

# POLICY *brief*

*Goldwater Institute*

*No. 10-06 | November 4, 2010*

## Learning from Experience: How the States Used Article V Applications in America's First Century (Part 2 in a 3 Part Series)

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### EXECUTIVE SUMMARY

By Nick Dranias, the Goldwater Institute Clarence J. and Katherine P. Duncan chair for constitutional government and the director of the Institute's Dorothy D. and Joseph A. Moller Center for Constitutional Government.

In the face of growing federal power and mounting deficits, some want states to call for a convention for proposing amendments to the U.S. Constitution that would rein in the federal government. Article V of the Constitution authorizes states to initiate amendments with a convention. Critics claim no one really knows how the process works and calling a convention would open the door to mischief by Congress, the courts, and convention delegates. But states frequently applied for an amendments convention between 1789 and 1913. A study of that history reveals much about how states can - and cannot - use the Article V process today.

This report, the second in a three-part series, compares milestones such as the failed efforts of the southern states to rely on Article V to support nullification of federal law and the indirectly successful efforts of the progressive movement to elect U.S. senators by popular vote.

Goldwater Institute Senior Fellow Robert Natelson's research confirms that, for the most part, Americans stayed close to the original understanding of Article V and the important ground rules governing the process. Historically, there has been a sharp distinction between an Article V convention and a general constitutional convention. Likewise, a majority of state Article V applications were limited to particular subjects. Most people agreed the amendments convention would be a creature of the state legislatures that controlled the convention agenda, while convention delegates would have discretion over an amendment's actual language.

Although the state-initiated Article V process has not yet led directly to adoption of a constitutional amendment, its history from 1789 until 1913 shows a remarkable continuity in its use and a consensus on the process involved. This consensus lays a solid foundation for current efforts and allays critics' fears that the process could run amok.

## ***Learning from Experience: How the States Used Article V Applications in America's First Century (Part 2 in a 3 Part Series)***

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### **Introduction<sup>1</sup>**

America is in crisis: The last few decades have shown that the constitutional system of checks and balances is failing to keep government within its proper bounds. No matter who is elected, the federal government remains unable to balance its budget, to perform basic tasks efficiently, or to respect constitutional limits. In response, a movement is rising to amend the Constitution to clarify the scope of federal power and impose additional restrictions upon its exercise. An ultimate goal is to revive the Founders' view of the federal government as a fiscally responsible entity that protects human freedom.

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Amending the Constitution to promote Founding-era principles is well precedented. Most of the 27 amendments adopted thus far served this purpose. The first 11 amendments were designed largely to enforce on the federal government the terms of the Constitution as its advocates represented them during the ratification debates of 1787-1790. The 21st Amendment restored the control of alcoholic beverages to the states. The 22nd Amendment restored the two-term presidential tradition established by George Washington. The 27th Amendment, limiting congressional pay raises, had been drafted by James Madison and approved by the first session of the First Congress (1789). In addition, several other amendments that changed the Founders' political settlement did so to advance Founding principles. An example is the 13th Amendment to abolish slavery.

Under Article V of the Constitution, amendments may be proposed to the states either by Congress or by what the document calls a "convention for proposing amendments."<sup>2</sup> This assembly also has been called a *convention of the states*, an *Article V convention*, and an *amendments convention*. All those usages are correct; as explained later, however, referring to it as a "constitutional convention" is clearly incorrect.

Congress must call a convention for proposing amendments when two-thirds of the states send "applications" directing Congress to do so. Whether proposed by Congress or by convention, an amendment must be approved by three-fourths of the states before it becomes effective.

The Founders included the state-application-and-convention process because they recognized that Congress might become irresponsible or corrupt and refuse

to propose needed changes - particularly if those changes might restrain the power of Congress.<sup>3</sup> Increasingly, Americans are recognizing that the current situation is *precisely* the kind of situation for which the state application process was designed.

## Previous Findings

This is the second report in a three-part series. The first, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, was published by the Goldwater Institute on September 16, 2010. It relied on a very wide range of Founding-era sources to explain how the Founders expected the state-application-and-convention process to work, and what the rules governing the procedure would be. Key findings were as follows:

- Although today people tend to identify the term “convention” with the famous 1787 meeting that produced the Constitution, the founding generation made extensive use of conventions during the period from 1774 through 1787.
- Some of the Founding-era conventions were held within individual states; others, such as the Providence, Hartford, New Haven, and Annapolis conventions and the 1780 Philadelphia convention, were interstate or “federal.” Some, such as the conventions that set up state governments during the Revolution, exercised broad powers; most, however, were directed at a particular purpose, such as state conventions to propose state constitutional amendments or federal conventions called to recommend measures of economic regulation and price stability.
- Conventions to propose amendments were to be interstate or “federal,” and to serve the limited purpose of drafting and proposing amendments to the states for ratification or rejection. Conventions to propose amendments, like other federal conventions, are agents of the state legislatures.
- A state legislature’s “application” is its request to Congress to call a convention. State governors have no role in the application process.
- When calling a convention, Congress resumes its pre-constitutional status as an agent for the applying states. If two-thirds of the states ask for an Article V convention addressing the same subject matter, Congress is required to call one. Congress sets the initial time and place of the convention, but otherwise has no authority over procedures or composition.<sup>4</sup> The president has no role in this or any other part of the process.

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- As in all previous federal conventions, each state determines how its delegates are selected, how many it will send, and how to compensate them. At the convention, each state initially receives one vote. The convention may modify this rule. The convention also adopts its other rules.<sup>5</sup>
- Applying states may limit the subject matter that the convention may consider. However, the Constitution limits the states' control over the convention in one respect: The states may not dictate the precise wording of an amendment or require the convention to propose it. Rather, the convention decides whether to propose amendments and prepares their language.
- If the convention proposes one or more amendments, Congress must decide whether each proposal is to be submitted for ratification to state conventions or to state legislatures. This is the only part of the process in which Congress acts in its usual role as an agent of the people rather than as an agent of the states.
- If the convention makes a recommendation outside the state-imposed agenda, it is only a recommendation of the sort any agent is entitled to make. It may be persuasive, but is without legal force. In other words, it is not a "proposed" amendment. Congress may not designate a mode of ratification for them, nor may the states ratify them.<sup>6</sup> In the extremely unlikely event that Congress selected a mode of ratification for a mere recommendation and three quarters of the states purported to ratify it, then the courts (and all governmental agencies) could treat it as void.<sup>7</sup>
- As is true of any other proposed amendments, the convention's proposals are ineffective unless "ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress." The three-fourths requirement virtually guarantees that no amendment can be adopted without the support of a majority (and more likely a supermajority) of the American people.<sup>8</sup>

Readers interested in how the Founding-era sources support those conclusions are referred to the first report.

## **Scope of This Second Report**

This report outlines the history of the state-application-and-convention process from 1789 through adoption of the 17th Amendment (direct election of

U.S. senators) in 1913. Although no Article V convention was called during this period, states resorted repeatedly to the application process in times of crisis. State applications helped to convince Congress to adopt the Bill of Rights. During the Nullification Crisis, the intervention of the elderly James Madison led states to apply for an Article V convention as a way to resolve constitutional deadlock. Prior to the Civil War, leaders attempted to use the process to resolve deadlock, although their campaign proved too little, too late. At the turn of the century, advocates of direct election of senators employed the process to win a major constitutional victory.

The events of 1789, when ratification in North Carolina and Rhode Island was still in doubt, tend to cast further light on the Founders' design. Subsequent events come too late to be strong evidence of the Founders' views, but they do show a great deal of consistency with those views. Throughout the period this report covers, most political leaders still understood the state-application-and-convention process as one in which state legislatures, without executive participation, could act under constitutional rules to empower a convention in which states would meet as semi-sovereigns to address problems identified in state applications, and propose solutions for general ratification.

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## **Post-Founding Developments in the 18th Century**

### **The First Applications for an Article V Convention**

The requisite nine states ratified the Constitution in 1788, and the new government got under way in the spring of 1789. From that time until the end of the 18th century, events (1) confirmed the Founding-era understanding that an Article V convention is not a directly popular body, but a "convention of the states"; (2) confirmed that states may apply either for a general or a limited-subject convention; and (3) confirmed that neither the federal nor state executives have a role in the process.

By the time Congress met in the spring of 1789, 11 of the original 13 states had ratified (North Carolina and Rhode Island had not yet done so). However, several states were still unhappy with the Constitution as written and wanted early action on proposed amendments - most important a Bill of Rights. Two of those states, Virginia and New York, accordingly applied for a convention for proposing amendments. The Virginia application was dated November 14, 1788. It demanded:

that a convention be immediately called, of deputies from the several States, with full power to take into their consideration the defects of

this 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.<sup>9</sup>

The New York application, dated February 5, 1789, contained wording somewhat similar, but not identical:

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.<sup>10</sup>

*The wording of the New York application contemplated a convention free to propose any amendments. But the Virginia language suggests a subject matter that, while broad, was limited. Virginia's succeeding language has been interpreted as authorizing an open convention; but the preamble's limiting words reveal an intent for the convention to address only those "defects suggested by the State Conventions." Thus, the Virginia application at least arguably reflects the prevailing view that state applications could limit the scope of the convention.*

Although these early applications were not successful in the sense that a convention was not called, they did help spur Congress to propose its own Bill of Rights.

The content of each of these applications is instructive evidence of how the Founders expected the process to work. Although the New York constitution vested a qualified veto in a "council of revision" that included the governor, neither the council nor the governor signed the application. This is consistent with the finding in the first report that "legislature" in Article V meant the representative assembly alone, and did not include any executive participation.

Both legislatures referred in their applications to an amendments convention as a gathering of "deputies [agents] from the several States," as federal conventions always had been, rather than as a gathering of direct representatives of the people, as conventions were within individual states. Notably, when the Pennsylvania legislature refused to join Virginia and New York, it also referred to the proposed meeting as "a convention of the states."<sup>11</sup>

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## Submission of the First 11 Amendments

Congress adopted its proposed Bill of Rights in the fall of 1789. Although the Constitution's Presentment Clause requires that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President" for signature or veto,<sup>12</sup> the amendment was not submitted to President Washington. Nor did Washington criticize the omission. This was consistent with the understanding that federal and state executives were not part of the process.

Five years later, Congress submitted the 11th Amendment to the states, also without submission to the President, and also without complaint. In *Hollingsworth v. Virginia*,<sup>13</sup> decided in 1798, the Supreme Court upheld this procedure. Although one party argued that the 11th Amendment was ineffective because it lacked presidential approval, the Court held such approval to be unnecessary. The Court did not explain why, but a likely reason was that the Founders had crafted the presentment rule for legislation and its substitutes, not for congressional resolutions under Article V.

At first glance, this seems to conflict with the text.<sup>14</sup> However, under the then-prevailing doctrine of *equitable construction*, a court could disregard the literal meaning of the text when it clearly conflicted with the "intent of the makers."<sup>15</sup>

The doctrine of equitable construction was applied only very rarely, but it may have been applied in *Hollingsworth*. There was a fair amount of evidence that the Presentment Clause was broader than intended, and that in Article V the words "Congress" and "Legislatures" meant representative assemblies only. For example, during the ratification debates, the highly influential Federalist writer, Tench Coxe, had represented publicly that the president had no role in the state-application-and-convention process.<sup>16</sup> The New York 1789 application had not been signed by that state's council of revision. Congress had sent the Bill of Rights to the states without either presidential approval or presidential protest. Moreover, elsewhere outside the lawmaking arena, the constitutional text clearly contemplates "legislature" as including only a representative assembly rather than the entire lawmaking apparatus.<sup>17</sup> The Guarantee Clause distinguishes legislative from executive roles in cases of insurrection or invasion,<sup>18</sup> and before the 17th Amendment, the Constitution lodged election of U.S. senators in the state legislatures alone, not including their executives.<sup>19</sup>

## Lessons from 18th-Century Practice

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## The “Nullification” Crisis

### State Applications during the Crisis

The first major constitutional crisis of the 19th century arose from opposition to the War of 1812 in the New England states, but no applications for amendments seem to have arisen during that period. The second constitutional crisis, however, did generate Article V activity. That activity shows a continued understanding of an amendments convention as a vehicle by which state legislatures may identify specific problems to be addressed by their delegations in a federal assembly. This era also confirmed the Founding-era understanding that although the applying states could limit the subject matter of the convention, they could not dictate specific words of amendment. In addition, the crisis induced many to think of an Article V convention as a way to resolve constitutional deadlock.

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In the late 1820s, several Southern states, notably South Carolina, were angered by a federal protective tariff. South Carolina politicians promoted the doctrine of *interposition* – popularly called “nullification” – by which state legislatures or conventions could declare invalid within state limits any federal law they saw as violating the federal “compact.” Upon such a declaration, the federal government would have to yield, resort to force, or submit the matter to arbitration by a “convention of the states.”<sup>20</sup> For support, South Carolinians pointed to the famous Virginia and Kentucky resolutions of 1798, authored respectively by James Madison and Thomas Jefferson.<sup>21</sup>

In a letter to a newspaper editor published in 1830, Madison denied forcefully ever sanctioning nullification. Instead, he adhered to a view Jefferson had expressed in 1821:<sup>22</sup> The state-application-and-convention procedure was the better way to resolve disputes about the balance of state and federal powers.<sup>23</sup>

In the wake of Madison’s letter, South Carolina refined its nullification theory to make clear that the ultimate arbiter of the dispute should be a “Convention of the States” called under Article V.<sup>24</sup> The state legislature sent the following application to Congress late in 1832:

*Resolved,* That it is expedient that a Convention of the States be called as early as practicable, to consider and determine such questions of disputed power as have arisen between the States of this confederacy and the General Government.<sup>25</sup>

Note that the application was for a gathering limited to subject matter (to consider “questions of disputed power” arising between the states and the federal government)<sup>26</sup> and did not seek to dictate particular language to the convention.

Although this probably was intended as an Article V application,<sup>27</sup> its wording led some to believe that South Carolina was seeking a plenipotentiary (“constitutional”) convention, since it asked for an assembly “to consider *and determine* ... questions of disputed power.” In his 1833 response to South Carolina’s nullification resolution, President Jackson adopted Madison’s position about the role of an Article V “convention of all the states,” but did not take notice of the South Carolina application.<sup>28</sup>

At about the same time, Georgia applied for an Article V convention. The resolution as adopted by the state house listed a range of areas in which the house believed the Constitution needed amendment. That version appears in the U.S. House Journal.<sup>29</sup> In fact, the final application, approved in December 1832, referred only to amendments on the subject of tariffs and taxation.<sup>30</sup> Yet the operative words appear to contemplate a convention unlimited as to subject matter:

for the call of a Convention of the people to amend the constitution aforesaid in the particulars herein enumerated, and in such others as the people of the other States may deem needful of amendment.<sup>31</sup>

On the other hand, in early 1833, the Alabama legislature adopted and transmitted to Congress the following application with clearly limited subject matter:

This Assembly further recommends to the Congress of the United States, as she has already done to her co-States, the call of a Federal Convention for proposing such amendments to our Federal Constitution as may seem necessary and proper to restrain the Congress of the United States *from exerting the taxing power for the substantive protection of domestic manufactures*.<sup>32</sup>

Like all other applications to date, the Alabama application did not seek to dictate particular wording to the convention. (Two decades later, in *Dodge v. Woolsey*,<sup>33</sup> the Supreme Court obliquely affirmed this procedure.)

Most state legislatures took the South Carolina, Georgia, and Alabama calls under active consideration, but rejected them, either explicitly or tacitly, usually on the ground that a convention at that time would be “inexpedient.”<sup>34</sup> A few states rejected the suggestion that a convention for proposing amendments was

the proper forum for arbitrating such questions, preferring to rely on the courts instead.<sup>35</sup> Some state officials saw the applications as too broad. The governor of New Jersey in particular argued that the applications should have more narrowly defined the subject matter for the convention.<sup>36</sup>

In addition to confirming the Founding-era view that an Article V convention could be (and usually would be) limited to subject matter, the South Carolina and Alabama petitions confirmed the idea that the assembly would be a creature of the states. Hence, the South Carolina application referred to the gathering as a “convention of the states,” the Alabama application called it a “Federal Convention,” and President Jackson’s 1833 proclamation approved similar language. The Georgia application, to be sure, characterized it as a “Convention of the people,” and in Illinois there was an unsuccessful effort in the legislature to insist that any such assembly would be a “convention of the people” rather than of the states.<sup>37</sup> In the other states considering the issue, however, the most common characterization was as a “convention of the states.”<sup>38</sup>

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The Supreme Court took the same view. In 1831, the Court decided *Smith v. Union Bank of Georgetown*,<sup>39</sup> which presented the issue of whether to apply to a decedent’s estate the law of Virginia or the law of Maryland. The Court held that by reason of pre-existing law and the nature of the federal union, the law of Maryland should be applied. It acknowledged, however, that result could be changed by amendment “by a convention of the states, under constitutional sanction....”<sup>40</sup>

### **Lessons from the Crisis**

Despite occasional confusion - for example, the imprecise wording of the South Carolina application - prevailing practice during this period generally was consistent with the Founders’ views. Leaders usually understood the Article V convention as an assembly of the states rather than a directly popular body. State applications usually focused on particular subject areas, but no state legislature purported to dictate specific language.<sup>41</sup> Madison performed an important service in drawing attention to the convention’s potential as a mechanism for adjudicating power disputes through amendments to alter or clarify jurisdictional boundaries.

## **Before and during the Civil War**

### **State Applications to Avert Civil War**

More Article V activity took place in the period immediately before and during the Civil War. This activity shows that most politicians still understood that a convention for proposing amendments was an agent of the state legislatures

and that applications could limit the convention to a single subject. The history also reveals some appreciation for the state-application-and-convention process as a way for the states to gather to resolve constitutional crises. Unfortunately, it does not show enough of that appreciation - for rather than move quickly and confidently for an Article V convention, the states tarried unduly. Their delays contributed to the tragedy of the Civil War.

As Southern states began to consider secession in the wake of Abraham Lincoln's 1860 election, political leaders undertook to craft a compromise that would save the Union and stave off war. The compromise formulae frequently included one or more constitutional amendments. Typical was the plan of Senator John J. Crittenden of Kentucky<sup>42</sup> - then the senior member of the Senate and a highly respected moderate. To modern readers who view it outside historical perspective, the Crittenden plan seems harsh, for it would have protected slavery where it existed, enforced the fugitive slave laws, and admitted slavery into western territories south of the old Missouri Compromise line (36 degrees, 30 minutes north latitude). Seen in a historical perspective, however, it seems more attractive. The Crittenden plan would have reversed the Supreme Court's notorious *Dred Scott*<sup>43</sup> decision, which had ruled that slavery was forever legal in all the territories. California was already in the Union as a free state, so the plan would have extended slavery to New Mexico and Arizona only - territories for which the institution was widely viewed as impractical. In effect, therefore, the compromise would have isolated slavery in a region of diminishing relative economic and political importance, probably dooming it in the long term. The immediate benefit would have been preservation of the Union while avoiding a war that cost 600,000 lives, 500,000 wounded, and incalculable suffering.

Senator Crittenden's plan received a good deal of public support. But the composition of Congress was such that no single plan could win even a majority of the votes - much less the two-thirds required to propose constitutional amendments. Accordingly, advocates of reconciliation began to consider the state-application-and-convention method as a way to bypass Congress.

At a cabinet meeting on November 9, 1860, President Buchanan supported an Article V convention to propose an "explanatory amendment" on the subject of slavery.<sup>44</sup> In the ensuing months, several members of Congress - including Representatives Charles Larrabee of Wisconsin, John C. Burch of California, and Reuben Fenton of New York - all offered congressional resolutions encouraging the states to apply under Article V.<sup>45</sup> George E. Pugh of Ohio and James W. Grimes of Iowa did the same in the Senate.<sup>46</sup> On March 4, President Lincoln, now newly inaugurated, said that while he had no specific amendments to recommend, he had no objection to amendments generally, and that he preferred proposal by a convention to proposal by Congress.<sup>47</sup>

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Meanwhile, the Commonwealth of Virginia - which had not yet seceded - called for a less formal interstate convention. The Commonwealth commissioned former President John Tyler as its envoy to Washington. Congress took no action, but throughout most of February 1861, 133 commissioners from 21 of the 34 states met in what came to be known as the Washington Peace Conference or Peace Convention. Tyler served as chairman.

At the Peace Conference, Virginia recommended a settlement based on the Crittenden plan,<sup>48</sup> and the ultimate recommendation of the conference was a variation of that proposal. Unlike an Article V convention, however, the Peace Conference had no constitutional standing to propose amendments directly to the states. Instead of promoting an Article V convention, the Peace Conference decided to submit its proposal to Congress.<sup>49</sup> The Senate rejected the recommendation of the Peace Conference, and the House refused even to consider it.<sup>50</sup>

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Several states decided to attempt to break the deadlock by filing Article V applications. We do not know how many valid applications there were because all do not appear in the congressional records. This may be because they were not transmitted,<sup>51</sup> but it is more likely that Congress, which had no established way of handling such documents, simply failed to record them. For example, the Illinois application does not appear in the congressional records, but those records do state that on February 28, 1861, New York Senator William Seward announced that Kentucky, New Jersey, and Illinois already had applied; two days later, Illinois Senator Lyman Trumbell said the same thing.<sup>52</sup>

Kentucky applied first (January 24, 1861), suggesting as a basis for settlement the compromise offered by that state's favorite son, Senator Crittenden. The application's operative wording was for a general convention rather than one limited by subject matter: "Resolved ... That application to Congress to call a convention for proposing amendments to the Constitution of the United States, pursuant to the fifth article, thereof, be, and the same is hereby now made."<sup>53</sup> The very next day, New Jersey applied, stating in part:

4. *And be it resolved,* That the resolutions and propositions submitted to the Senate of the United States by Hon. JOHN J. CRITTENDEN, of Kentucky, for the compromise of the questions in dispute between the people of the northern and of the southern States, or any other constitutional method of settling the slave question permanently, will be acceptable to the people of the State of New Jersey, and the Senators and Representatives in Congress from New Jersey be requested, and earnestly urged, to support these resolutions and propositions.

5. *And be it resolved,* That as the Union of these States is in

imminent danger 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 to said Constitution.<sup>54</sup>

The Illinois legislature adopted its application on February 12,<sup>55</sup> and on March 18, still another arrived in Congress - from Indiana. In his capacity as President of the Senate, Vice President John Breckinridge:

laid before the Senate a letter of the governor of the State of Indiana, communicating a copy of a joint resolution passed by the legislature of that State on the 11th instant, requesting Congress to call a convention of the States to take into consideration the propriety of amending the Constitution, so that its meaning may be definitely understood in all sections of the Union....<sup>56</sup>

Two days later, the Ohio legislature also applied.<sup>57</sup>

This brought the tally to five states.<sup>58</sup> Unfortunately, no others took action,<sup>59</sup> and in any event the movement had not begun in time. When Ohio submitted its application, seven Southern states already had seceded.<sup>60</sup>

### **Applications during the Civil War**

There were three applications transmitted after the Civil War had begun. One was a reaffirmation from Kentucky, adopted in 1863.<sup>61</sup> In March 1864, North Carolina, although still in rebellion, applied for an Article V convention to resolve the war,<sup>62</sup> and in September 1864, Oregon submitted a single-subject-matter application for an amendment abolishing slavery:

*Whereas*, article five, section one of the Constitution of the United States provides for its own amendment ... and whereas in the process of the rebellion, it has become apparent that African slavery has been the cause thereof, and that there can be no permanent peace with slavery as a political element in the government, or with any of the attendant laws in force in States thereof, and believing that the Constitution ought to be so amended as to forever prohibit involuntary servitude, except for crimes within the United States and the territories thereof, therefore,

*Resolved* That application is hereby made to the Congress of the United States for calling a convention for proposing amendments to the Constitution of the United States.<sup>63</sup>

## **Lessons from the Antebellum and Civil War Period**

The lessons from the state application process during the Civil War and the years leading up to the war reinforce certain conclusions reached earlier. The Founding-era view was that an Article V convention was the creature of the *state legislatures*, and not of the people directly, and this certainly was confirmed: During this period, the assembly was referred to repeatedly by the phrase “convention of the states” and certain variants. This was true not only in the South, but in border states (i.e., slave states that had not seceded) and in the North as well.<sup>64</sup> Others called it by its constitutional name - a “convention for proposing amendments.”<sup>65</sup> It is notable that few, if any, mistook it for a constitutional convention.

Most state applications during this era asked for a general, rather than limited-subject, convention, because the crisis required a comprehensive solution. Yet Oregon’s application for an amendment abolishing slavery showed that the constitutional option of a limited-subject convention had not been forgotten.

No one can say definitively that a convention for proposing amendments could have averted Civil War. Certainly some of the most respected political leaders of the day - including Presidents Buchanan and Lincoln, and a number of U.S. senators - thought that it might. If their assessment was correct, then the events of the time show us that there can be far greater risks in failing to call a convention than in calling one.

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## **Campaign for Direct Election of Senators**

People sometimes disagree on the issue of whether elections for U.S. Senate should have been moved from state legislatures to the voters at large. This report does not address the merits of that change but instead discusses the brilliant way in which state applications for a “convention of the states” dedicated to a single subject were employed to enact a popular amendment over staunch congressional opposition.

After the Civil War, members of Congress occasionally suggested that states apply for a convention for proposing amendments,<sup>66</sup> but there was little campaigning for one. However, that was to change dramatically at the end of the century.

The original Constitution had specified that members of the House of Representatives were to be elected for two-year terms by those voters in each state who had “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>67</sup> Because in nearly all states voting qualifications for the lower legislative chamber were fairly minimal (and were to be eased further), this rendered the House a very democratic institution.

To balance that democratic influence with seasoning and stability and to give the states a role in federal governance, the Framers prescribed that two Senators be elected by each state legislature for six-year terms.<sup>68</sup> This method of election has been credited widely with producing, at least during the first half of the 19th century, a Senate of good quality and some Senators of outstanding quality.<sup>69</sup> There were, however, at least three drawbacks to the system. First, smaller electorates (e.g., state lawmakers) are easier to corrupt than larger electorates (e.g., the entire people). Although cases where candidates purchased Senate seats from state lawmakers were few during the early years, they multiplied after 1850.<sup>70</sup>

Furthermore, the system was prone to deadlock. State legislatures sometimes had to ballot for months on end while their state remained underrepresented in Congress. A deadlock delayed the selection of New York's senators in the First Congress, and the phenomenon became more and more common as time wore on.<sup>71</sup> Between 1891 and 1905, there were 45 deadlocked senatorial elections in 20 different states.<sup>72</sup> Deadlock often was broken by "stampeding" - last-minute election of a dark horse who no one previously had thought to be of senatorial timber.<sup>73</sup> In addition, because people "voted" for a Senate candidate by voting for state legislature, federal and state issues became bundled, with state issues often entirely submerged, both among the voters<sup>74</sup> (the Lincoln-Douglas senatorial race of 1858 is the most famous example) and among state lawmakers.<sup>75</sup>

Allegedly to cure all of these ills, the progressives sought to move election of U.S. senators from the legislatures to the people of the several<sup>76</sup> states. American historians, who tend to sympathize with the progressives, sometimes imply that direct election was the only possible corrective, and they sometimes depict the campaign as opposing idealistic progressive reformers to the "greedy corporations" that controlled a "Millionaires' Club" of "plutocratic" senators.<sup>77</sup> As is often the case in history, the truth is more complicated.

There were available remedies short of constitutional amendment. Article I, Section 4, Clause 1 of the Constitution provides as follows:

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.<sup>78</sup>

So although each state initially set its own election rules for both House and Senate, Congress was permitted to override those rules to a considerable extent. Thus, Congress could alter the "Manner of holding Elections" for senators within the state legislatures to specify procedures less subject to deadlock. For example, Congress could require that elections be conducted by joint votes of both

legislative chambers. It could mandate that a winner need only a plurality rather than a majority of votes. It also could select between secret ballot and *viva voce* voting, and otherwise regulate election mechanics.<sup>79</sup> (However, this constitutional provision did not empower Congress to govern campaigns and campaign finance, as is widely assumed today.<sup>80</sup>) In addition, the Senate had the power - exercised on several occasions - to expel members for corruption.<sup>81</sup> It would not have required a constitutional amendment to strengthen the relevant law or Senate rules pertaining to such matters.

Indeed, the leading historian of the controversy and a strong advocate of direct election, George H. Haynes, acknowledged that “some of the worst abuses might have been corrected without taking the election from the legislatures.”<sup>82</sup>

Congress enacted regulatory legislation in 1866, but the legislation was poorly crafted and probably aggravated rather than relieved the deadlock problem.<sup>83</sup> Still, reformers could have crusaded for improvements in the law rather than for changes in the Constitution. A congressional regulation adopting a plurality-winner rule may have virtually eliminated deadlock. A plurality-winner rule had been suggested for inclusion in the 1866 statute, but Congress rejected it.<sup>84</sup> The neglect of these and other alternative avenues to reform - even though far more attainable than a constitutional amendment - strongly suggests that progressives had more on their minds than corruption, deadlock and issue bundling.

What else, then, were they thinking of? Part of the answer comes from statistical research by historian John D. Buenker, which shows that the contest was not really between “idealists” and “plutocrats” - not entirely, anyway. Buenker concludes that a key component in the coalition for direct election consisted of the big-city political machines, mostly (but not exclusively) Democrat. The urban bosses saw in direct election a greater share of power for themselves and for the ethnic groups they represented.<sup>85</sup> In some states, the goal was more purely partisan: to weaken Republican senatorial candidates while benefitting Democrats and Populists. Illustrative was Rhode Island, where “the contest was clearly one between the urban-based Democrats, aided by a few Progressives and Republicans from similar constituencies, and the rural and small-town based Republican organization.”<sup>86</sup> Finally, the progressives strongly favored augmenting federal power. Direct election would end state participation in Congress, and thereby facilitate federal incursion into areas of policy traditionally under state control.

### **Use of Article V in the Campaign**

We begin with four critical facts: First, the cause of direct election enjoyed very high levels of popular support - perhaps even higher than the modern popularity of a balanced-budget requirement. Direct election seemed a viable way

*The cause of direct election [of senators] enjoyed very high levels of popular support – perhaps even higher than the modern popularity of a balanced-budget requirement. Direct election seemed a viable way of attacking corruption and state legislative deadlock, just as a balanced-budget requirement is seen as a way of imposing more fiscal restraint.*

of attacking corruption and state legislative deadlock, just as a balanced-budget requirement is seen as a way of imposing more fiscal restraint. Second, the cause was one that state lawmakers - the people who are empowered to make Article V applications - could appreciate. Even though transferring senatorial elections to the voters would reduce the power of state lawmakers, most of those lawmakers had become thoroughly disgusted with deadlock, long periods without senatorial representation, and the overshadowing of state issues in state legislative elections.

Third, efforts to induce Congress to propose an amendment had proved fruitless. When the state application campaign began in 1899, the House of Representatives already had voted three times for such an amendment, only to see it die in the Senate.<sup>87</sup> The same thing happened again in 1900 and 1902.<sup>88</sup> Most senators simply had no interest in altering the method of election that had elected them. A cause with overwhelming public support seemed blocked permanently in Congress, just as more recent causes with overwhelming public support, such as proposals for a balanced budget amendment and term limits, have been blocked in Congress.

Fourth, advocates of direct election understood that Americans often have amended their Constitution not so much to change the fundamentals of the system as to restore or reinforce those fundamentals. Those advocates therefore cast their amendment in those terms. As the 1911 Senate Judiciary Committee report said in recommending the 17th Amendment, social change required altering the mode of election, “not for the purpose of changing the fundamental principles of our Government, but for the purposes of maintaining the very principles which the fathers sought to establish.”<sup>89</sup>

*Advocates of direct election understood that Americans often have amended their Constitution not so much to change the fundamentals of the system as to restore or reinforce those fundamentals.*

Finally, Americans at the time of the direct election movement seem to have remembered most of their constitutional history. They understood that when applications from two-thirds of the states are received, Congress has no choice in the matter - it *must* call a convention.<sup>90</sup> They also understood that state applications can limit the subject matter, but that the convention, not the states, actually drafts the amendment.<sup>91</sup> States targeted their applications toward direct elections, while not purporting to dictate the amendment’s precise language. On the other hand, there was enough constitutional amnesia that opponents were able to argue that a convention for proposing amendments would be “constitutional convention,” and prove a runaway.<sup>92</sup> While there had been scattered claims to that effect earlier in our history,<sup>93</sup> this appears to be the first time they were widespread. Indeed, some proponents played into their adversaries’ hands by referring to the assembly as a “constitutional convention.”<sup>94</sup> As events demonstrated, however, the claim was not believed widely enough to derail the movement.

The campaign began with various efforts to induce Congress to report an amendment of its own. For example, on January 13, 1893, a unanimous Nebraska

House of Representatives formally asked Congress “to submit an amendment to the Constitution of the United States providing for the election of United States Senators by a direct vote of the people.”<sup>95</sup>

It may have been interest in direct election that induced the Texas legislature to apply for a convention on June 5, 1899 - apparently the first application since the Civil War.<sup>96</sup> This was a general application, not limited to any subject or subjects. In it, the legislature directed the Texas secretary of state to “send a copy of this resolution to the Congressmen from Texas, and to the governor of each State at once, and to the legislatures of the several States as they convene, with a request of them to concur with us in this resolution.”<sup>97</sup>

Texas’s decision to send its resolution to other states represented a desire to coordinate with other states in a common plan. According to George Haynes, that same year the Pennsylvania legislature:

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created something of a sensation by not only indorsing [sic] the demand for popular elections of senators, but also by providing for the appointment of a joint committee of five to confer with the legislatures of other States regarding the election of United States senators by popular vote. To the next legislature, this committee reported that as a result of their investigations they were of the opinion that the Senate would not take favorable action in relation to the election of senators by popular vote until resolutions were passed by the legislatures of two-thirds of the States making application to Congress for a convention to propose an amendment to the Constitution. The committee, therefore, recommended that the States apply to Congress to call such a convention, and that copies of a resolution appended to their report be sent to the secretary of state of each State, to the president of the United States Senate, and to the speaker of the House. This action was taken. At the next meeting of the legislature, provision was made for continuing the work of the committee and an appropriation was made for its expenses.<sup>98</sup>

The Pennsylvania committee was charged with coordinating the direct-election campaign with other states, and to continue that work even when the Pennsylvania legislature was not in session.<sup>99</sup> It was, in other words, organized in the tradition of the Revolutionary-era “committees of correspondence” set up in the American colonies, and contemplated by James Madison as a future remedy for federal abuse.<sup>100</sup> On December 19, 1900, the Georgia legislature established a similar committee,<sup>101</sup> as did Arkansas in 1901<sup>102</sup> and Oklahoma in 1907.<sup>103</sup>

The Pennsylvania committee adopted an application form, which it sent on to other states. The form was reflected in Pennsylvania's own application, as follows:

*Whereas*, A large number of State Legislatures have at various times adopted Memorials and Resolutions in favor of election of United States Senators by popular vote;

*And Whereas*, The National House of Representatives has on four separate occasions, within recent years, adopted resolutions in favor of this proposed change in the method of electing United States Senators, which was not adopted by the Senate;

*And Whereas*, Article V of the Constitution of the United States provides that Congress, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, and believing there is a general desire upon the part of the citizens of the State of Pennsylvania that the United States Senators should be elected by a direct vote of the people

*Therefore*, be it resolved ...

That the Legislature of the State of Pennsylvania favors the adoption of an amendment to the Constitution which shall provide for the election of United States Senators by popular vote, and joins with other States of the Union in respectfully requesting that a convention be called for the purpose of proposing an amendment to the Constitution of the United States, as provided for in Article V of the said Constitution, which amendment shall provide for a change in the present method of electing United States Senators, so that they can be chosen in each State by a direct vote of the people.

*Resolved*, That a copy of this concurred Resolution, and application to Congress for the calling of a convention, be sent to the Secretary of State of each of the United States, and that a similar copy be sent to the President of the United States Senate, and the Speaker of the House of Representatives.<sup>104</sup>

*This carefully crafted [application] form clarified that the legislature was applying formally for an Article V convention, and not merely requesting Congress to act. This decision was not only consistent with the Founders' expectations, but it reassured others that the applying state did not seek to rewrite the entire Constitution.*

This carefully drafted form clarified that the legislature was applying formally for an Article V convention, and not merely requesting Congress to act, as Nebraska had done in 1893. The form avoided the "open convention" approach of Texas and provided instead that the convention would consider only the particular subject matter (i.e., direct election of senators). This decision was not only consistent with the Founders' expectations,<sup>105</sup> but it reassured others that the applying state did not seek to rewrite the entire Constitution. The approach of limiting the convention to a single issue also was a familiar to state lawmakers, since a single-subject rule commonly was (and still is) applied to state bills. The form properly named the assembly sought as a "convention ... for the purpose of proposing an amendment," rather than a "constitutional convention."

The application did not to attempt to dictate precise language to the convention, but left amendment writing to that body - also consistent with the Founders' understanding.<sup>106</sup> Furthermore, the promulgation of a standard form reduced the risk that Congress might refuse to call a convention for proposing amendments because the applications of the two-thirds of the states applying differed as to the precise language of the amendment sought. The form also included a common list of recipients for all applications, partly to ensure that all applications were catalogued in the same place. Previous applications had been lost or failed to appear in the Congressional Record or its predecessor publications, or had appeared only in summary versions.<sup>107</sup>

The next direct-election application was adopted by the Minnesota legislature on February 9, 1901. It followed the same basic principles as the Pennsylvania application, but did so in tighter wording:

*Be it enacted by the legislature of the State of Minnesota:*

SECTION 1. The legislature of the State of Minnesota hereby makes application to the Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention to propose an amendment to the Constitution of the United States making United States Senators elective in the several States by direct vote of the people.

SEC. 2. The secretary of state is hereby directed to transmit copies of this application to the Senate, House of Representatives of the Congress and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislatures now in session in the several States, requesting their cooperation.<sup>108</sup>

*The promulgation of a standard form reduced the risk that Congress might refuse to call a convention to propose amendments because the application of the two-thirds of the states applying differed as to the precise language of the amendment sought.*

From that time, applications began to appear in Congress with regularity and in considerable numbers. Some, such as Montana's application of February 21, 1901, generally followed the language adopted in Pennsylvania.<sup>109</sup> The applications of such other states as Tennessee (1901),<sup>110</sup> Nevada (1903),<sup>111</sup> and Iowa (1904)<sup>112</sup> also followed Pennsylvania. Oregon applied just a few days after Minnesota, following the Minnesota form.<sup>113</sup> Michigan adopted the same form for its application later the same year.<sup>114</sup>

On the whole, the applying legislatures showed a good deal of discipline, but, politicians being who they are, some could not resist adding imprints of their own. South Dakota's resolution of 1907, for example, included a preamble reciting that "election of United States Senators by the legislatures of the several States frequently interfere [sic] with important legislative duties, and has in many States resulted in charges of bribery and corruption."<sup>115</sup> Occasionally, a state would pursue

a riskier course. Washington State applied for an unlimited convention (1903).<sup>116</sup> Oklahoma also applied for an unlimited convention, although the application contained the text of a direct-election amendment “the State of Oklahoma will propose.”<sup>117</sup> The Louisiana legislature indicated in its preamble a direct-election motive, but - either deliberately or inadvertently - used operative language that applied an unlimited “constitutional convention.”<sup>118</sup>

But this kind of deviation from the basic formula was not common. Indeed, during the same period, states employed the same formula to apply for amendments on other subjects. Perhaps the leading issue, other than direct election of Senators, was the continued *de facto* existence of polygamy in Utah, which many states sought to stamp out via constitutional amendment.<sup>119</sup>

No issue, however, garnered as many applications as direct election of Senators. By the end of 1905, perhaps 20 states had applied to Congress.<sup>120</sup> By 1912, 31 states had - only one shy of the required two-thirds of 48.<sup>121</sup>

The campaign for an Article V convention was complemented by numerous other methods of persuasion. Members of Congress repeatedly introduced resolutions of their own - at least 287 by 1912.<sup>122</sup> Private groups petitioned for direct election. Political parties included the issue in their platforms. State legislatures issued petitions urging Congress itself to propose an amendment. They also scheduled popular referenda on the question,<sup>123</sup> which revealed strong public support. State legislatures also adopted legal devices designed to make the process of legislative election mimic popular election. These devices included nomination by direct primary, advisory elections, and ballot language indicating whether a legislative candidate had pledged to vote for the people’s choice.<sup>124</sup> By December 1910, nearly half the senators who were to take office in the following year already had been designated by popular vote.<sup>125</sup> The effect on the personnel making up the Senate weakened opposition to direct election in that chamber.<sup>126</sup> In 1912, the Senate finally yielded and approved the measure that became the 17th Amendment.

### **Lessons from the Campaign**

Despite some confusion sowed by the opposition, for the most part the organizers of the direct election application campaign remembered constitutional rules laid down by the Founders: (1) single-subject applications were permitted and expected, (2) applications could not actually draft the amendment, and (3) the procedure was designed to make reforms that Congress would not undertake itself. It was still widely understood that an amendments convention was a gathering of delegates of states, as the wording of the Oklahoma application of 1907 demonstrated.<sup>127</sup>

*Despite some confusion sowed by the opposition, the organizers of the direct election application remembered constitutional rules laid down by the Founders, including: 1) single-subject applications were permitted and expected, 2) applications could not actually draft the amendment, and 3) the procedure was designed to make reforms that Congress could not undertake itself.*

The experience also provides some practical lessons. The issue selected was overwhelmingly popular and appealing to state lawmakers. The advocates supplemented the application campaign with other tactics and understood the need for courage in the face of real and claimed uncertainty. They also emphasized that, even though they were altering the Constitution, they were doing so in furtherance of founding principles.

## Conclusions

As shown in the first report of this three-part series,<sup>128</sup> the historical record reveals that the Founding generation had a fairly clear understanding of how the state-application-and-convention method of amendment was suppose to work, and what the rules governing it were to be. This second report has shown that during the first 125 years under the Constitution, procedures followed usually were consistent with the Founders' understandings.

*The Founders expected that most applications would be limited to particular subjects. They viewed the call at the behest of two-thirds of the states as mandatory of Congress and saw the conventions to propose amendments as a creature of the state legislature that neither the president or state executives had a role in. The Founders also assumed that while the states could control the convention agenda, the convention had discretion over an amendment's language.*

The Founders expected that most applications would be limited to particular subjects, and a majority of them were - arguably Virginia's 1789 application, certainly the South Carolina and Alabama applications on nullification, Oregon's petition on slavery, and dozens of applications on issues such as direct election and polygamy. The Founders viewed the call at the behest of two-thirds of the states as mandatory on Congress. During the century and a quarter after the Founding, this was generally accepted. The Founders saw the convention for proposing amendments as a creature of the state legislatures; during the era surveyed here, the Supreme Court, President Andrew Jackson, and most others agreed. The Founders believed that the president and state executives had no role in the process, and both the Supreme Court's decision in *Hollingsworth v. Virginia* and general practice tended to confirm this. Leading Founders, particularly James Madison, had drawn a sharp distinction between an Article V convention and a true constitutional convention, and only toward the end of the period covered in this report was there significant dissent on that point - dissent ultimately disregarded. The Founders assumed that while the states could control the convention agenda, the convention had discretion over an amendment's language. During the 19th century, the Supreme Court agreed, and throughout that century to the early 20th century, applying states universally acted on the same assumption.

The third report in this series will list specific recommendations based on the history outlined in the first two reports and on the law as laid down by the courts. Based on practice and interpretation through 1913, however, those using the state-application-and-convention process must remember the following:

- An Article V convention is a gathering of delegates designated by the state legislatures – not a directly popular assembly. Congress has no role in choosing delegates or setting convention rules, including rules of voting. Congress has an affirmative fiduciary duty to treat all states equally in this process.
- Assent of the American people is assured by the constitutional rules requiring state super-majorities at both the application and ratification stages, and the congressional prerogative of requiring ratification by popular conventions.
- Because the state-application-and-convention process is driven by state legislatures, congressional duties (except for choosing between the two modes of ratification) are ministerial only, and state and federal executives have no role in the process.
- Although the state legislatures may not write amendments for the convention, that assembly is otherwise an agent of the state legislatures and bound by restrictions those legislatures impose on the scope of the convention.

### **About The Author**

Robert G. Natelson, the author of “The Original Constitution: What It Actually Said and Meant,” is a constitutional historian. He is a senior fellow at the Goldwater Institute in Phoenix, Ariz., and a senior fellow in constitutional jurisprudence at the Independence Institute in Golden, Colo. He served as professor of law at the University of Montana for 25 years. He is best known for his studies of the Constitution’s original understanding, and for bringing formerly neglected sources of evidence to the attention of constitutional scholars. His works are listed at <http://www.umt.edu/law/faculty/natelson.htm> (last accessed October 4, 2010).

NOTES

1. *Bibliographical note:* This footnote collects alphabetically the secondary sources cited more than once in this article. The sources and short-form citations used are as follows:

John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305 (1969) [hereinafter Buenker].

Russell L. Caplan, *CONSTITUTIONAL BRINKMANSHIP: AMENDMENT THE CONSTITUTION BY NATIONAL CONVENTION 52-56* (Oxford Univ. Press, 1988) [hereinafter Caplan].

Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 THE STATE OF AM. FEDERALISM (1980) [hereinafter Diamond].

George H. Haynes, *THE ELECTION OF SENATORS* (Henry Holt & Co., New York, 1912) [hereinafter Haynes, *ELECTION*].

George H. Haynes, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* (The Houghton Mifflin Company, Boston, 1938) [2 vols.; only vol. 1 is cited herein, as Haynes, *SENATE*].

Philip L. Martin, *The Application Clause of Article Five*, 85 POL. SCI. Q. 616 (1970) [hereinafter Martin].

Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan* (Goldwater Institute, 2010) [hereinafter Natelson, *Amending*].

Robert G. Natelson, *THE ORIGINAL CONSTITUTION: WHAT IT REALLY SAID AND MEANT* (The Tenth Amendment Center, 2010) [hereinafter Natelson, *ORIGINAL CONSTITUTION*].

Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. \_\_\_\_ (forthcoming 2010) [hereinafter Natelson, *Elections*].

William Russell Pullen, *THE APPLICATION CLAUSE OF THE AMENDING PROVISION OF THE CONSTITUTION* (Univ. of North Carolina, 1951 (Ph.D. thesis)) [hereinafter Pullen].

2. Article V reads 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 Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect

the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

3. Natelson, *Amending*, *supra* note 1.

4. Similarly, Congress has no power to set a ratification deadline; that is the convention's prerogative. Caplan, *supra* note 1, at 148.

5. This author does not come across a single example during the Founding era where convention rules, including voting rules, were established by any agency but the convention itself.

6. *Accord*: Caplan, *supra* note 1, at 147 (“Congress has the power to check *ultra vires* amendments by refusing to select” a ratification mode for them). *See also id.* at 150 (states cannot ratify a recommendation not properly proposed).

7. *Accord*: *Id.* This author will discuss judicial review of constitutional amendments in the third report in this series.

Some have claimed that the convention could invent an alternative mode of ratification. Legally, the assembly has no such power, and all branches of the federal government, as well as all state and federal courts, would be free to treat such an “amendment” as void.

8. *In theory*, it is now possible for an amendment to be ratified by three-fourths of the states representing only a minority of the American population. As explained in Natelson, *Amending*, *supra* note 1, it is impossible as a matter of fact, however, because more and less populous states differ so much in their political preferences.

9. 1 HOUSE J. 28-29.

10. 1 HOUSE J. 29-30.

11. *Quoted in* Pullen, *supra* note 1, at 23 (“the calling of a convention of the states for amending the foederal [sic] constitution”). By contrast, a convention *within* a state was referred to as a “Convention of the people.” *Id.* at 26 (quoting a South Carolina report recommending against applying for an Article V convention).

12. U.S. CONST. art. I, § 7.

13. 3 U.S. (3 Dall.) 378 (1798).

14. U.S. CONST. art. I, § 7.

15. For a discussion of the doctrine of equitable construction, see Natelson, ORIGINAL CONSTITUTION, *supra* note 1, at 36-37.

16. *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY 277, 283.

17. At the time of the Founding, several states involved the executive branch in lawmaking. *See* Natelson, *Amending*, *supra* note 1.

18. U.S. CONST. art. IV, § 4 (“on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)”).

19. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be

composed of two Senators from each State, chosen by the Legislature thereof”). See also art. I, § 3, cl. 2 (“if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State”). By contrast, when the Constitution refers to the “legislature” or “Congress” in a lawmaking capacity, it includes the executive to the extent the executive otherwise must approve laws. *Smiley v. Holm*, 285 U.S. 355 (1932).

A contrary argument is that the amendment process is more like lawmaking than it is like the one-time votes referred to above. On the other hand, while it is *possible* that the Constitution’s framers wanted the President to be able to veto measures that necessarily had received more than the proportion required for override, it is not *probable*.

20. Pullen, *supra* note 1, at 33.

21. Many relying today on these documents are unaware that most of the other states immediately adopted legislative resolutions formally repudiating them. The counter-resolutions by seven of the remaining 13 states (there were then 15 in all) are at [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm) (last accessed October 4, 2010). Of course, the Virginia and Kentucky resolutions were issued too late to be a good source of original understanding. On the terminal dates for various kinds of evidence, see Natelson, ORIGINAL CONSTITUTION, *supra* note 1, at 40.

22. Caplan, *supra* note 1, at 47.

23. James Madison to Edward Everett, Aug. 28, 1830:

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.

24. Pullen, *supra* note 1, at 37-38.

25. 26 HOUSE J. 219-20. The resolution was dated Dec. 13, 1832.

26. It could not, therefore, consider such issues as whether the President’s term of office should be changed.

27. Pullen, *supra* note 1, at 38-39.

28. Jackson wrote:

It is true that the governor of the State speaks of the submission of their grievances to a convention of all the States; which, he says, they “sincerely and anxiously seek and desire.” Yet this obvious and constitutional mode of obtaining the sense of the other States on the construction of the federal compact, and amending it, if necessary, has never been attempted by those who have urged the State on to this destructive measure. The State might have proposed a call for a general convention to the other States, and Congress, if a sufficient number of them concurred, must have called it.

PRESIDENT JACKSON’S PROCLAMATION OF THE 10<sup>TH</sup> OF DECEMBER, 1833,  
CONCERNING THE ORDINANCE OF SOUTH CAROLINA ON THE SUBJECT OF THE

TARIFF 584 & 592 (Nov. 24, 1832), 4 ELLIOT'S DEBATES, *supra* note 1, at 582, 592.

29. The application set forth at 26 HOUSE J. 270-71 reads in part:

And the experience of the past having clearly proved that the constitution of the United States needs amendment in the following particulars:

I. That the powers delegated to the General Government, and the rights reserved to the States or to the people, may be more distinctly defined.

II. That the power of coercion by the General Government over the States, and the right of a State to resist an unconstitutional act of Congress, may be determined.

III. That the principle involved in a tariff for the direct protection of domestic industry may be settled.

IV. That a system of federal taxation may be established, which shall be equal in its operation upon the whole people, and in all sections of the country.

V. That the jurisdiction and process of the Supreme Court may be clearly and unequivocally settled.

VI. That a tribunal of last resort may be organized to settle disputes between the General Government and the States.

VII. That the power of chartering a bank, and of granting incorporations, may be expressly given to, or withheld from Congress.

VIII. That the practice of appropriating money for works of internal improvement may be either sanctioned by an express delegation of power, or restrained by express inhibition.

IX. That it may be prescribed what disposition shall be made of the surplus revenue when such revenue is found to be on hand.

X. That the right to, and the mode of disposition of the public lands of the United States, may be settled.

XI. That the election of President and Vice President may be secured, in all cases, to the people.

XII. That their tenure of office may be limited to one term.

XIII. That the rights of the Indians may be definitely settled.

Only items III and IV survived the Georgia Senate. Pullen, *supra* note 1, at 43.

30. Pullen, *supra* note 1, at 43.

31. The application was approved by the governor on Dec. 22, 1832.

32. 26 HOUSE J. 361-62 (Jan. 12, 1833) (italics added).

Some have suggested this was not a valid Article V convention, since it merely “recommend[ed] to Congress ... the call of a Federal Convention.” Pullen, *supra* note 1, at 45; Martin, *supra* note 1, at 619 (both citing Herman Ames, a compiler of proposed amendments). But this suggestion seems hyper-technical. The Alabama resolution was rather clearly what an Article V application was supposed to be: a request that Congress “call a Federal Convention to propose ... amendments to our Federal Constitution.”

33. 59 U.S. 331 (1855). The court stated of the amendment process that

the 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 clear 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.

34. See Pullen, *supra* note 1, at 47-67 (containing a state-by-state summary).

35. *E.g.*, Massachusetts. *Id.* at 47.

36. *Id.* at 55-57. *See also id.* at 50 (quoting the governor of Connecticut as criticizing the Georgia and Alabama petitions as too broad).

37. *Id.* at 51.

38. *E.g.*, *id.* at 52-53 (Kentucky); 60 (Maine); 61-62 (North Carolina); 63-65 (Virginia).

39. 30 U.S. (5 Pet.) 518 (1831).

40. *Id.* at 528.

41. In 1855, the Supreme Court obliquely affirmed that the specific language was a prerogative of the convention. The Court stated of the amendment process that

the 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].

*Dodge v. Woolsey*. 59 U.S. 331, 348 (1855). 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.

42. Sen. Joseph Lane of Oregon also proposed a compromise, which is at CONG. GLOBE, 36<sup>th</sup> Cong. 112-14 (Dec. 18, 1860), and is followed by the text of the Crittenden compromise. The latter is discussed in Caplan, *supra* note 1, at 52-53.

43. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
44. Pullen, *supra* note 1, at 68-70.
45. Pullen, *supra* note 1, at 70-73.
46. CONG. GLOBE, 36<sup>th</sup> Cong. 183 (Dec. 24, 1860); PULLEN, *supra* note 1, at 73-74.
47. Caplan, *supra* note 1, at 55.
48. Caplan, *supra* note 1, at 52-54.
49. Caplan, *supra* note 1, at 54.
50. Caplan, *supra* note 1, at 54.
51. *See, e.g.*, Pullen, *supra* note 1, at 84 (discussing the Illinois application). Pullen argues that some of the applications may not have been valid because of formal defects. *Id.* at 103.
52. CONG. GLOBE, 36<sup>th</sup> Cong. 1270 (Feb. 28, 1861) (reproducing a resolution by Senator Seward that Illinois, Kentucky, and New Jersey all had applied for a convention for proposing amendments). *See also* CONG. GLOBE, 36<sup>th</sup> Cong. 1382 (March 2, 1861) (quoting Senator Trumbell as saying that applications have been received from Illinois, Kentucky, and New Jersey).
53. Pullen, *supra* note 1, at 79-80.
54. CONG. GLOBE, 36<sup>th</sup> Cong. 680 (Feb. 1, 1861); Pullen, at 80-81.
55. Pullen, *supra* note 1, at 83.
56. 52 SENATE J. 420-21 (Mar. 18, 1861). *See also* Pullen, *supra* note 1, at 84-85.
57. Pullen, *supra* note 1, at 81-82. This should not be confused with a separate “application” from the Ohio Democratic Party. 52 SENATE J. 205 (Feb. 9, 1861).
58. Some have listed Virginia as among the applying states. *See, e.g.*, Martin, *supra* note 1, at 620. However, the Virginia proposal was for the Peace Conference.
59. Pullen, *supra* note 1, at 86-93.
60. *See* eHistory archive, Ohio State University, “HistoryList - Succession of the Southern States,” at <http://ehistory.osu.edu/world/ListPreviewOnly.cfm?LID=56&PreviewOnly=yes&public=yes> (last accessed October 4, 2010) for dates on which each state seceded.
61. Pullen, *supra* note 1, at 98.
62. Pullen, *supra* note 1, at 102.
63. Pullen, *supra* note 1, at 100-01.
64. The New Jersey application was for “a convention (of the States) to propose amendments to said Constitution,” and that from Indiana for “convention of the States.” Pullen, *supra* note 1, at 80-81 & 85. For other examples of this usage, *see id.* at 86 (Arkansas proceedings); 87 (Missouri proceedings); 88 (Tennessee proceedings); 89-91 (North Carolina proceedings); 92 (New York proceedings); 93 (California proceedings); 94-95 (Iowa proceedings).
65. Thus, President Buchanan paraphrased the Kentucky application as

calling for “a convention for proposing amendments.” 57 HOUSE J. 276 (Feb. 6, 1861). The same language was employed in Kentucky and Oregon applications. Pullen, *supra* note 1, at 79 & 100-01.

66. *Id.* at 58-60.

67. U.S. CONST. art. I, § 2, cl. 1.

68. U.S. CONST. art. I, § 3, cl. 1.

69. *E.g.*, 2 Alexis De Tocqueville, DEMOCRACY IN AMERICA (Eduardo Nolle ed., 2009) 320-21. *See also* Haynes, SENATE 85 (“That the Senate attained its highest prestige while its members were thus chosen [by the state legislatures] indicates that the Constitution framers choice of method was not without strong elements of justification”).

70. Haynes, *supra* note 1, at 91 & 93.

71. Haynes, ELECTION, *supra* note 1, at 86.

72. *Id.*

73. *Id.* at 88-91.

74. Haynes, ELECTION, *supra* note 1, at 87.

75. *Id.* at 93-95.

76. This use of “several,” employed in the Constitution and in the early republic, is largely archaic today. It means “individual” or “separate.”

77. The quotations in this depiction are drawn from a popular history text for schools: 2 David M. Kennedy, Lizabeth Cohen & Thomas A. Bailey, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 709 (14th ed., Wadsworth Cengage Learning, 2010).

78. Since such regulations took the form of permanent laws, the “Legislature” referred to here included not just the legislature itself, but the governor, if the state constitution required his signature. *Cf.* Natelson, *Elections*, *supra* note 1 (forthcoming) and accompanying text.

79. Natelson, *Elections*, *supra* note 1 (forthcoming). *See also* Haynes, SENATE, *supra* note 1, at 83-85.

80. Natelson, *Elections*, *supra* note 1 (forthcoming).

81. U.S. CONST. art. I, § 5, cl. 2.

82. Haynes, SENATE, *supra* note 1, at 86.

83. Haynes, SENATE, *supra* note 1, at 83-84 & 86.

84. Haynes, SENATE, *supra* note 1, at 84.

85. Buenker, *supra* note 1.

86. Buenker, *supra* note 1, at 311.

87. Haynes, SENATE, *supra* note 1, at 97 n.1.

88. *Id.*

89. Haynes, SENATE, *supra* note 1, at 108.

90. On the understanding that the call was mandatory, see Haynes, SENATE, *supra* note 1, at 107.

91. On these points of constitutional law, see Natelson, *Amending*.

92. Some of the claims are reproduced in Pullen, *supra* note 1, at 111-12.

93. *E.g.*, Pullen, *supra* note 1, at 97 (describing the views of the minority of the New York delegation to the Washington Peace Conference - although apparently in reaction to applications for an *unlimited* convention).

94. Pullen, *supra* note 1, at 109 (quoting an Iowa resolution for a conference of state governors) & 183-84 (quoting a South Dakota application); 42 CONG. REC. 5902 (May 8, 1908) (reproducing Louisiana application of Nov. 25, 1907).

95. 24 CONG. REC. 1603 (1893).

96. The application read in part as follows:

Whereas the Constitution of the United States of America provided that Congress, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments to said Constitution:

Therefore, we, the senate of the State of Texas, the house of representatives of the State of Texas concurring, do hereby petition and request the Congress of the United States of America to call a convention for proposing amendments to said Constitution as soon as the legislatures of two-thirds of the several states of the United States of America shall concur in this resolution by applying to Congress to call said convention. 33 CONG. REC. 219 (1899).

97. *Id.*

98. Haynes, ELECTION, *supra* note 1, at 122-23; Haynes, SENATE, *supra* note 1, at 107; Pullen, *supra* note 1, at 107-08. For a report in Congress on the Pennsylvania action, see 33 CONG. REC. 930 (1900).

99. Pullen, *supra* note 1, at 108.

100. THE FEDERALIST NO. 46 (“Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted”).

101. Hayes, ELECTION, *supra* note 1, at 123.

102. Pullen, *supra* note 1, at 108.

103. Pullen, *supra* note 1, at 185-86.

104. Pullen, *supra* note 1, at 183.

105. Natelson, *Amending*, *supra* note 1.

106. Natelson, *Amending*, *supra* note 1.

107. Thus, there are references in the CONGRESSIONAL GLOBE to the Illinois application of 1860, but the application itself nowhere appears in the congressional records. *Supra* note 52.

108. 34 CONG. REC. 2560 (Feb. 18, 1901).

109. 35 CONG. REC. 208-09 (Dec. 9, 1901):

Whereas a large number of State legislatures have at various times adopted memorials and resolutions in favor of election of United States Senators by

popular vote; and

Whereas the national House of Representatives has on four separate occasions within recent years adopted resolutions in favor of this proposed change in the method of electing United States Senators, which were not adopted by the Senate; and

Whereas Article V of the Constitution of the United States provides that Congress, on the application of legislatures of two-thirds of the several States, shall call a convention for proposed amendments and believing there is a general desire upon the part of the citizens of the State of Montana that the United States Senators should be elected by a direct vote of the people: Therefore, be it

*Resolved ...* That the legislature of the State of Montana favors the adoption of an amendment to the Constitution which shall provide for the election of United States Senators by popular vote, and joins with other States of the Union in respectfully requesting that a convention be called for the purpose of proposing an amendment to the Constitution of the United States, as provided for in Article V of the said Constitution, which amendment shall provide for a change in the present method of electing United States Senators, so that they can be chosen in each State by direct vote of the people.

*Resolved,* That a copy of this joint resolution and application to Congress for the calling of a convention be sent to the secretary of state of each of the United States, and that a similar copy be sent to the President of the United States Senate and the Speaker of the House of Representatives.

110. 35 CONG. REC. 2344 (March 9, 1902) (reproducing resolution of March 27, 1901).

111. 37 CONG. REC. 24 (Mar. 10, 1903) (reproducing resolution of Feb. 25, 1903).

112. 38 CONG. REC. 3959 (Mar. 29, 1904) (reproducing resolution of Mar. 24, 1904).

113. 35 CONG. REC. 117 (Dec. 4, 1901) (reproducing application of Feb. 23, 1901).

114. *Id.* (reproducing application of April 9, 1901).

115. 41 CONG. REC. 2497 (Feb. 8, 1907) (reproducing resolution of Feb. 2, 1907).

116. Pullen, *supra* note 1, at 184.

117. Pullen, *supra* note 1, at 185-86.

118. 42 CONG. REC. 5902 (May 8, 1908) (reproducing resolution of Nov. 25, 1907):

Whereas we believe that Senators of the United States should be elected directly by the voters; and

Whereas to authorize such direct election an amendment to the Constitution of the United States is necessary; and

Whereas the failure of Congress to submit such amendment to the States has made it clear that the only practicable method of securing a submission of such amendment to the States is through a constitutional convention, to be called by Congress upon the application of the legislatures of two-thirds of all the States: Therefore be it

Resolved by the general assembly of the State of Louisiana:

SECTION 1. That the legislature of the State of Louisiana hereby makes application to the Congress of the United States, under Article V of the Constitution of the United States, to call a constitutional convention for proposing amendments to the Constitution of the United States....

119. *See, e.g.*, Delaware's 1907 application:

Joint resolution proposing an amendment to the Constitution of the United States, prohibiting polygamy and polygamous cohabitation within the United States.

Whereas it appears from Investigation recently made by the Senate of the United States, and otherwise, that polygamy still exists in certain places in the United States, notwithstanding prohibitory statutes enacted by the several States thereof; and

Whereas the practice of polygamy is generally condemned by the people of the United States, and there is a demand for more effectual prohibition thereof by placing the subject under Federal Jurisdiction and control at the same time reserving to each State the right to make and enforce its own laws relating to marriage and divorce:

Now, therefore, be It

*Resolved* by the senate and house of representatives of the State of Delaware in general assembly met That application be and is hereby made to Congress under the provisions of Article V of the Constitution of the United States, for the calling of a convention to propose an amendment to the Constitution of the United States whereby polygamy and polygamous cohabitation shall be

prohibited, and Congress shall be given power to enforce such prohibition by appropriate legislation.

*Resolved* That the legislatures of all other States of the United States now in session, or when next convened, be, and they are hereby, respectfully requested to join in this application by the adoption of this or equivalent resolution.

Resolved further, That the secretary of state be, and hereby is, directed to transmit copies of this application to the Senate and House of Representatives of the United States, and to the several members of said bodies representing this State therein; also to transmit copies hereof to the legislatures of all other States of the United States.

41 CONG. REC. 3011 (Feb. 15, 1907).

120. Haynes, ELECTION, *supra* note 1, at 125.

121. Caplan, *supra* note 1, at 63-64.

122. Haynes, SENATE, *supra* note 1, at 96 n. 2.

123. *Id.* at 97-98. *See, e.g.*, Pullen, *supra* note 1, at 186 (reproducing 1911 Texas resolution petitioning Congress to propose a direct-election amendment).

124. *Id.* at 99-104 (discussing these mechanisms).

125. *Id.* at 104.

126. *Id.* at 107.

127. Pullen, *supra* note 1, at 185 (“at said convention the State of Oklahoma will propose”).

128. Natelson, *Amending*, *supra* note 1.

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