



# **State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters**

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## Foreword by Michael Farris

This Compendium is written by the nation's foremost scholar on Article V, Professor Robert G. Natelson. It is designed to assist both legislators and legislative counsel with the legal issues most likely to arise in the process of calling for a Convention of the States under Article V.

Mark Levin's book, *The Liberty Amendments*, has focused a great deal of attention on the possibility of using Article V to rein in the growth of federal power. Many different proposals are being advanced by a variety of organizations. This Compendium should serve as a valuable tool to assist with the legal analysis of all of these different Article V proposals.

In general terms, supporters of Article V advocate three basic approaches. Some proposals call for a single amendment (e.g., a Balanced Budget Amendment). Some proposals call for an unlimited convention. We propose a convention for a single topic, rather than a single amendment.

The approach being advanced by Citizens for Self-Governance is essentially identical to the one advanced by Mark Levin. We seek a Convention of States that is limited to restraining the power and jurisdiction of the federal government and imposing fiscal restraints on Washington, D.C. Our proposal would also permit consideration of term limits on members of Congress, the judiciary, and other federal officials.

When state applications approach the same general subject, but differ in the operative language, it opens up the prospect of legal challenges when trying to determine whether thirty-four applications have been passed on the same subject. The Convention of States Project seeks to ensure that thirty-four states enact the exact same language in the operative sections. Language in preambles and introductory paragraphs can vary, but we are in the best possible legal situation when the formal resolution stating the purpose for the convention is uniform in all states.

The Bill of Rights was a package of amendments designed to preserve the rights of the people. Our Convention of States Project will allow the states to

propose a package of amendments designed to limit the growth and curb the fiscal irresponsibility of the federal government. Other solutions have good attributes. But our solution is the only approach that offers a solution that is as big as the problem. We need a comprehensive solution to the mess in Washington, D.C.

We invite your careful consideration to the Convention of States model. But, again, this Compendium should be of value in assessing all Article V proposals.

Thank you for your service to your state and our nation.

Michael P. Farris

October 31, 2014



## Executive Summary

Article V of the United States Constitution prescribes methods of amending the instrument. It tells us that all amendments must be ratified by legislatures or conventions in three-fourths of the states—but that before they can be ratified, they must be duly proposed.

The Constitution provides for two modes of proposal: by Congress and by a “Convention for proposing Amendments.” A convention must be called by Congress on “application” of two-thirds of the states.

Because a convention for proposing amendments has never been held, some commentators believe little is known about it or about the procedures leading to it. As a matter of fact, quite the contrary is true: we know a great deal about those subjects.

Our sources include convention practice both before and after the Constitution was adopted; numerous observations by leading Founders; hundreds of applications from state legislatures; two centuries of public discussion, resolutions, and legislation; and, finally, a string of court cases stretching from 1798 into the twenty-first century in which the judiciary has elucidated the principles and rules of Article V with satisfying clarity and consistency.

This Compendium is designed for lawyers involved in activities preparatory to the calling of a convention for proposing amendments. It contains textual exegesis, relevant legal authorities, and sample forms.

This book is divided into five Parts. Part I, which discusses bibliography, lists the major writings on Article V and classifies them into three groups or “waves,” according to chronology and accuracy. It is designed to alert the reader *at the outset* as to which writings are generally reliable and which suffer from misunderstandings that were almost universal during the 1960s and 1970s.

Part II is a Table of Cases. Part III contains exegesis on the procedure, including extensive footnoting, in the manner of a legal treatise. Part IV is a collection of forms, and Part V reproduces some of the most recent scholarly treatments of the subject.

This fourth edition includes cases and other sources that are either newly discovered or, like the Supreme Court's *Arizona State Legislature* case, decided since publication of the first edition. It also includes additional discussion of points that readers suggested be amplified.

I hope you find this material interesting and useful.

Robert G. Natelson

April 30, 2016

## Table of Contents

<b>Foreword by Michael Farris</b> .....	<b>i</b>
<b>Executive Summary</b> .....	<b>iii</b>
<b>Part I. Sources, “Science Fiction,” and Article V Bibliography</b> .....	<b>1</b>
§ 1.1. <i>Sources</i> .....	1
§ 1.2. <i>“Science Fiction”</i> .....	4
§ 1.3. <i>The Three Waves of Modern Article V Bibliography</i> .....	5
§ 1.4. <i>Major Publications</i> .....	8
<b>Part II. Table of Cases</b> .....	<b>12</b>
<b>Part III. Explanatory Text with Footnotes</b> .....	<b>14</b>
§ 3.1. <i>Historical Background</i> .....	14
§ 3.2. <i>Types of Conventions</i> .....	17
§ 3.2.1. <i>In-State and Multi-State Conventions</i> .....	17
§ 3.2.2. <i>Proposing and Ratifying Conventions</i> .....	18
§ 3.2.3. <i>Plenipotentiary and Limited Conventions</i> .....	19
§ 3.2.4. <i>Categorizing the Constitutional Convention and the                     Convention for Proposing Amendments</i> .....	19
§ 3.3. <i>Why the Founders Adopted the Proposal Convention in Article V.</i> ..	21
§ 3.4. <i>Analyzing the Text of Article V</i> .....	23
§ 3.5. <i>Applicable Legal Principles: Interpretation, Incidental Powers,             and Fiduciary Obligations</i> .....	25
§ 3.6. <i>Assemblies Acting under Article V Do So Solely by Virtue of             Powers Granted by Article V.</i> .....	28
§ 3.7. <i>Under Article V, a State “Legislature” Means the State’s             Representative Assembly, without Participation by the Governor             or by Any Reserved Power of Initiative or Referendum</i> .....	31
§ 3.8. <i>The State Legislatures’ Applications</i> .....	34
§ 3.8.1. <i>Background</i> .....	34
§ 3.8.2. <i>What Is an Application and How Is It Adopted?</i> .....	34

§ 3.8.3.	<i>State Legislatures May Limit Their Applications to a Single Subject.....</i>	36
§ 3.8.4.	<i>Application Format, Conditions, and Subject Matter .....</i>	38
§ 3.8.5.	<i>State Legislatures May Rescind Applications.....</i>	39
§ 3.8.6.	<i>Unrescinded Applications Do Not Grow “Stale” with the Passage of Time.....</i>	40
§ 3.9.	<i>The Congressional Role in Calling the Convention .....</i>	42
§ 3.9.1.	<i>The Meaning of “Call” .....</i>	42
§ 3.9.2.	<i>Contents of the Call.....</i>	43
§ 3.9.3.	<i>Congressional Powers Incidental to the Call .....</i>	46
§ 3.9.4.	<i>The Necessary and Proper Clause Does Not Authorize Congress to Structure the Convention. ....</i>	48
§ 3.9.5.	<i>If Thirty-Four Applications on the Same Subject Are Received, the Call Is Mandatory.....</i>	52
§ 3.9.6.	<i>Counting Applications .....</i>	54
§ 3.9.7.	<i>Historic Examples of Multi-State Convention Calls .....</i>	60
§ 3.10.	<i>Selecting Commissioners .....</i>	63
§ 3.11.	<i>Empowering Commissioners.....</i>	64
§ 3.12.	<i>Instructing and Supervising Commissioners.....</i>	65
§ 3.13.	<i>“No Runaway” Acts and Similar Laws .....</i>	65
§ 3.14.	<i>Convention Rules.....</i>	66
§ 3.14.1.	<i>The Legal Environment .....</i>	66
§ 3.14.2.	<i>Historical Resources.....</i>	69
§ 3.14.3.	<i>Formalities before Adoption of Rules .....</i>	71
§ 3.14.4.	<i>Recommended Rules Not Pertaining to Debate or Decorum.....</i>	77
§ 3.14.5.	<i>Rules of Debate and Decorum.....</i>	85
<b>Part IV:</b>	<b>Forms .....</b>	<b>92</b>
§ 4.1.	<i>Citizens for Self-Governance Form Application.....</i>	92
§ 4.2.	<i>Sample Form Electing Commissioners .....</i>	93

§ 4.3. <i>Sample Commissions</i> .....	94
§ 4.4. <i>Sample Instructions</i> .....	96
§ 4.5. “No Runaway” Acts .....	100
§ 4.5.1. <i>Uniform Interstate Convention Act</i> .....	101
§ 4.5.2. <i>Indiana Acts Limiting Commissioners</i> .....	107
<b>Part V: Full-Text Source Materials</b> .....	<b>116</b>
§ 5.1. <i>Robert Natelson, Founding-Era Conventions</i> .....	116
§ 5.2. <i>Robert Natelson, Rules Governing the Process</i> .....	213
§ 5.3. <i>Michael Rappaport, The Constitutionality of a Limited Convention</i> .....	272
§ 5.4. <i>Michael Stern, Toward a Safeguarded Article V Convention</i> .....	330

## Part I. Sources, “Science Fiction,” and Article V Bibliography

### § 1.1. *Sources*

Many sources offer insight into the meaning of Article V. The first resort is, of course, the constitutional text. However, as is true on other questions of constitutional law, the meaning of the text of Article V is not always self-evident. In such instances, the courts typically rely on Founding-Era or other historical evidence of meaning.<sup>1</sup>

Historical evidence of the meaning of Article V is largely of the same kind used for other parts of the Constitution. It includes usages in eighteenth century dictionaries and other contemporaneous sources, the records left by the Constitution’s drafters, the ratification debates in the state conventions and in public venues (such as newspapers), material from the first session of the First Congress, including the first two state applications for an amendments convention, and eighteenth century law and legal documents. In the case of Article V, another important source of information consists of extant records from approximately thirty conventions held among the colonies and states in the century before the Constitution was written.<sup>2</sup>

Additional light is shed by a mass of material illuminating how the Article V convention—then usually called a “convention of the states”—was understood in the century *subsequent* to the Founding—that is, from the 1790s through the end of the nineteenth century. Three Supreme Court decisions cast light on the procedure.<sup>3</sup> State legislatures issued applications and also issued resolutions responding to

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<sup>1</sup> See *infra* § 3.5.

<sup>2</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013), *reprinted infra* § 5.1.

<sup>3</sup> *Dodge v. Woolsey*, 59 U.S. 331 (1855) (noting that the electorate has no direct role in the amending process); *Smith v. Union Bank*, 30 U.S. 518 (1831) (referring to a convention for proposing amendments as a “convention of the states”); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (holding that the President has no role in the amending process, and relying on the procedures used in proposing the first ten amendments).

other states' applications.

During the century after the Founding, there were several further multi-state conventions.<sup>4</sup> Regional meetings were held in Hartford, Connecticut in 1814 and in Nashville, Tennessee in 1850. Several Southern states met in Montgomery, Alabama in early 1861, and most of the remaining states held a general convention in Washington, D.C., around the same time in an effort to ward off the Civil War. These conclaves did not qualify as Article V conventions for proposing amendments, but they were close relatives. Indeed, the Washington gathering was a fraternal twin: although called by Virginia rather than by Congress to propose an amendment to Congress rather than to the states, in every other particular it mimicked an Article V convention. It followed long-standard convention rules, and produced a proposed amendment. Although Congress remained deadlocked, the Washington gathering itself was a successful dress rehearsal for an amendments convention under Article V.

The twentieth century witnessed at least one multi-state convention—a seven-state “commission” held in 1922, primarily at Santa Fe, New Mexico, to negotiate the Colorado River Compact. In addition, much of the twentieth century was marked by intense Article V activity. State legislatures produced scores of applications.<sup>5</sup> At least twenty-nine were issued for a convention to propose an amendment providing for direct election of Senators.<sup>6</sup> Congress rendered further proceedings unnecessary by proposing the Seventeenth Amendment in 1912, which three-fourths of the states had ratified by the following year. During the 1940s, five

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<sup>4</sup> See *infra* § 3.1.

<sup>5</sup> Applications are collected at *The Article V Library*, <http://article5library.org/> (last visited Apr. 29, 2016), and one may undertake subject searches there. Another site collecting applications, *Friends of the Article V Convention*, <http://www.foavc.org/> (last visited Apr. 29, 2016), is less reliable and must be used cautiously.

<sup>6</sup> *Article V Convention Application Analysis*, THE ARTICLE V LIBRARY, <http://article5library.org/analyze.php> (filter by “Direct election of Senators”) (last visited Apr. 29, 2016).

states applied for a convention for proposing an amendment limiting the President to two terms.<sup>7</sup> Congress responded by proposing the Twenty-Second Amendment in 1947.

Congress proved less responsive to later twentieth century application campaigns, particularly those to limit its own power or the power of federal judges. For example, Congress stonewalled when, during the 1960s, thirty-three states applied for a convention to partially reverse Supreme Court decisions requiring all state legislative chambers to be apportioned solely by population.<sup>8</sup> Congress was similarly unmoved when state legislatures repeatedly applied for an amendment requiring a balanced federal budget.<sup>9</sup>

The twentieth century also brought with it the first-ever ratification of a constitutional amendment (the Twenty-First) by state ratifying conventions rather than by state legislatures. Congress opted for that “mode of ratification” despite some doubts about the procedure; as matters turned out, it worked reasonably well. Moreover, nearly fifty reported court cases construing Article V were issued during the twentieth century, including some key decisions from the U.S. Supreme Court,

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<sup>7</sup> *Id.* (screen by “Limit Presidential Tenure”).

<sup>8</sup> This campaign died out partly as a result of the passing of its leader, Senator Everett Dirksen (R-IL) and partly because liberal opponents widely disseminated fears that an Article V convention was a “con-con” that might “run away.” Although similar claims arose early in the twentieth century, this seems to have been the first application campaign in which those claims had a significant political impact. See ROBERT G. NATELSON, THE LIBERAL ESTABLISHMENT’S DISINFORMATION CAMPAIGN AGAINST ARTICLE V (2015), available at <https://www.i2i.org/wp-content/uploads/2015/01/Campaign-v.-Article-V-final.pdf>.

The applications differed in wording sufficiently that it might have been impossible to aggregate all thirty-three. See *Article V Convention Application Analysis*, THE ARTICLE V LIBRARY, <http://article5library.org/analyze.php> (filter by “Apportionment”) (last visited April 29, 2016). The same cannot be said of the applications for direct election of Senators. See *id.* (filter by “Direct election of Senators”).

<sup>9</sup> Thirty-two of the necessary thirty-four states were at one time on record for a balanced budget convention. See *Article V Convention Application Analysis*, THE ARTICLE V LIBRARY, <http://article5library.org/analyze.php> (filter by “Balanced budget”) (last visited April 29, 2016).



and numerous other cases with clear implications for the interpretation of Article V.<sup>10</sup>

In the early years of the twenty-first century, we have seen still more court cases, a fair number of legislative applications, and a resurgence of related scholarship. Clearly, there is no lack of material for guidance on Article V procedures.

### § 1.2. “*Science Fiction*”

If an American Founder such as John Dickinson or Alexander Hamilton were to visit us today, he no doubt would be astonished at how little most Americans—even those working in constitutional law—know about the convention procedure of Article V. To the Founders, interstate convention protocols were familiar and well-understood, and they fully expected the application and convention process to be employed.

The loss of knowledge appears to have occurred sometime after the early twentieth century. Sadly, that knowledge was replaced with a great deal of *misinformation* promulgated by authors, most of whom opposed the idea of states meeting together to propose amendments. Their statements and writings were characterized by little investigation and much speculation.<sup>11</sup>

Of course, speculation in the absence of facts is always risky, and sometimes

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> See ROBERT G. NATELSON, THE LIBERAL ESTABLISHMENT’S DISINFORMATION CAMPAIGN AGAINST ARTICLE V (2015), available at <https://www.i2i.org/wp-content/uploads/2015/01/Campaign-v.-Article-V-final.pdf>. Particularly influential articles in the disinformation campaign were Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963), Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972), and William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1 (1963–1964). Professor Swindler argued expressly that only Congress should be allowed to initiate amendments and that state efforts to do so should be ignored, *despite the language of the Constitution!* *Id.* at 23, 33. He justified this, in part, by saying that then-pending state-based initiatives were “alarmingly regressive.” *Id.* at 38.

produces comical results. Before scientists were able to penetrate the clouds covering the planet Venus, science fiction authors posited a land of jungle and swamps—a vision obviously unconnected to the truth.<sup>12</sup> In like manner, twentieth century writers portrayed an amendments convention as a congressionally-sponsored mob of placard-wavers. One writer has compared it to the Republican and Democratic National Conventions in which hordes of passionate delegates, untethered to any agenda, become flushed with the power to remake the country.<sup>13</sup> This “science fiction” version of Article V largely dominated the writings of the 1960s and 1970s. In the last few years, however, we have been able to recapture the traditional knowledge.

### § 1.3. *The Three Waves of Modern Article V Bibliography*

We can trace our recovery of Article V information by classifying modern bibliography on the subject into three phases or “waves”:

- *First Wave* publications date mostly from the 1960s and 1970s. These were authored predominantly by liberal academics who opposed conservative efforts to trigger a convention and who therefore emphasized uncertainties.
- *Second Wave* publications were issued between 1979 and 2000. The Second Wave was a transitional body of work relying on additional sources.
- *Third Wave* publications are those written since 2010. In the aggregate, they fully reconstruct convention procedures and law from all the

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<sup>12</sup> See *The Greenhouse in the Sky?*, CHEMISTRY WORLD, <http://www.rsc.org/chemistryworld/Issues/2006/April/GreenhouseSky.asp> (last visited Apr. 13, 2016) (contrasting prior science-fiction speculation with the actual surface of Venus).

<sup>13</sup> E.g., Phyllis Schlafly, *Is Article V in Our Future?*, TOWN HALL MAG., Aug. 27, 2013, available at <http://townhall.com/columnists/phyllisschlafly/2013/08/27/is-article-v-in-our-future-n1673875/page/full>. (“Now imagine Democratic and Republican conventions meeting in the same hall and trying to agree on constitutional changes.”).

historical and legal sources.

First Wave publications tended to be agenda-driven. Even when they were not, they were sparse on research: First Wave authors seldom ventured beyond snippets of *The Federalist* and a few excerpts from the proceedings of the 1787 Constitutional Convention. Virtually all those authors seemed unaware of any precedents other than the 1787 Constitutional Convention.

In the absence of reliable facts, First Wave authors created a largely speculative version of Article V. Without models other than the 1787 gathering, they assumed that a convention for proposing amendments would be a “constitutional convention.” They further assumed that the congressional power to “call” the convention gave Congress wide authority over the process and that the courts would have little role. Some envisioned a mob scene of hundreds or thousands of delegates popularly elected, without state legislative involvement. Most (but not all) First Wave authors claimed that this “constitutional convention” could not be limited to a single subject, and could venture anywhere it chose.

First Wave authors based their speculations on some interesting techniques. For example, some asserted that because some Founders had referred to an amendments convention as a “general convention,” they must have meant that the gathering was necessarily unlimited as to subject. In fact, however, the Founders’ term “general” refers to the number of states that participate in the assembly, not the scope of the agenda.<sup>14</sup>

Dissatisfaction with such raw speculation encouraged a new breed of writers to revisit the issue. The Second Wave began in 1979 when John Harmon, a Justice

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<sup>14</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 629 (2013), *reprinted infra* § 5.1. For examples of this misunderstanding, see Charles L. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972) (describing an unlimited convention as a “general” one), and Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1632 n.47 (1978–1979) (assuming that because Madison referred to a “general” convention he meant an unlimited one).

Department lawyer, produced a legal opinion for the Department that, unlike First Wave publications, considered a range of materials drawn from the debates over the Constitution's ratification.<sup>15</sup> The most elaborate Second Wave publication was Russell Caplan's book, *Constitutional Brinksmanship*, released in 1988 by Oxford University Press. Caplan utilized ratification materials and court opinions in his study, and even made brief reference to earlier interstate conventions.

Access to this wider range of sources led most Second Wave authors to understand that an Article V gathering could be limited as to subject. But their unfamiliarity with other aspects of the record induced them to persevere in other First Wave errors. For example, several continued to refer to an Article V conclave as a "constitutional convention," and some assumed that Congress had authority to prescribe the method of delegate selection. Some even committed new mistakes.<sup>16</sup>

The Third Wave of publications began around 2010. Third Wave findings enlist not only the records of the Constitution's drafting and ratification, but also the pre-existing convention tradition and contemporaneous law. These materials are supplemented by case law and actual practice over the two centuries since the Founding. As a result, Third Wave writings have relegated earlier commentaries to merely historical interest.

Following are the principal conclusions of Third Wave scholarship:

- A convention for proposing amendments is a diplomatic meeting among delegations representing the state legislatures—truly a convention of states.
- It is a limited purpose gathering, not a "constitutional convention."

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<sup>15</sup> John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 OP. O.L.C. 390 (1979).

<sup>16</sup> Thus, in Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLINE L. REV. 1, 28–29 (1990–1991), the authors argued that because Article V used of the word "amendments" (in the plural), it necessarily prevented limiting a convention to a single subject. This conclusion flies in the face of history.

- It was modeled after a long tradition of limited-purpose multi-state assemblies that followed established protocols and procedures.
- Not only can the convention be limited as to subject, but Founders expected all or most amendments conventions to be so limited.
- Congressional power over the convention process is limited to counting and classifying applications and setting a time and place for meeting.
- Article V questions can, and often have been, adjudicated by the courts.

### § 1.4. *Major Publications*

#### *Third Wave Publications (after 2010)*

MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* (2013)

Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013), *reprinted infra* § 5.1.

———, *James Madison and the Constitution’s “Convention for Proposing Amendments,”* in *UNION AND STATES’ RIGHTS: A HISTORY AND INTERPRETATION OF INTERPOSITION, NULLIFICATION, AND SECESSION 150 YEARS AFTER SUMTER* (Neil H. Cogan ed., 2013)

———, *THE ALEC ARTICLE V HANDBOOK* (Am. Legislative Exch. Council, 2d ed. 2013), *available at* <http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf>

———, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011), *reprinted infra* § 5.2.

———, *AMENDING THE CONSTITUTION BY CONVENTION: PRACTICAL GUIDANCE FOR CITIZENS AND POLICYMAKERS* (Independence Inst., 2012) (updated and amended version of an earlier paper published by the Goldwater Institute)

———, *AMENDING THE CONSTITUTION BY CONVENTION: LESSONS FOR TODAY FROM THE CONSTITUTION’S FIRST CENTURY* (Independence Inst., 2011) (updated and amended version of an earlier paper published by the Goldwater Institute)

———, AMENDING THE CONSTITUTION BY CONVENTION: A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN (Independence Inst., 2010) (updated and amended version of an earlier paper published by the Goldwater Institute)

Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53 (2012), *reprinted infra* § 5.3.

Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011), *reprinted infra* § 5.4.

———, *A Brief Reply to Professor Penrose*, 78 TENN. L. REV. 807 (2011)

### ***Second Wave Publications (1979–2000) (superseded, but still often useful)***

RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988) (the leading Second Wave publication and an important starting point for Third Wave scholarship)

Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983–1984) (correcting the view that the courts have no role in Article V)

Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 STATE OF AM. FEDERALISM 113 (1980)

John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 OP. O.L.C. 390 (1979) (an unusually thorough piece of work for its time, and the transition to Second Wave writings)

Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996)

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

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

Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227 (1996–1997)

U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL POLICY, LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION (1987)

Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLINE L. REV. 1 (1990–1991)

***First Wave Publications (generally before 1980) (no longer useful)***

AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1973) (the best researched of the First Wave publications)

Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963)

———, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972)

Arthur E. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME L. REV. 659 (1964)

———, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1967–1968)

Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call a Constitutional Convention?*, 22 ARIZ. L. REV. 1011 (1980)

Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623 (1978–1979)

Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1967)

Bill Gaugush, *Principles Governing the Interpretation and Exercise of Article V Powers*, 35 WESTERN POL. Q. 212 (1982) (despite its date, this is essentially a First Wave publication)

Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979)

Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66

MICH. L. REV. 903 (1967–1968)

Philip L. Martin, *The Application Clause of Article V*, 85 POL. SCI. Q. 616 (1970)

John T. Noonan, Jr., *The Convention Method of Constitutional Amendment: Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641 (1979)

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

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

William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1 (1963–1964)

Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979) (a list of questions about conventions, but without research to resolve them)

William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (an unusual First Wave article in that it concludes that conventions may be limited)



## Part II. Table of Cases

- AFL-CIO v. Eu, 686 P.2d 609 (Cal. 1984)
- Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015)
- Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998)
- Barlotti v. Lyons, 189 P. 282 (Cal. 1920)
- Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999)
- Burroughs v. United States, 290 U.S. 534 (1934)
- Coleman v. Miller, 307 U.S. 438 (1939)
- Davis v. Hildebrant, 241 U.S. 565 (1916)
- Decher v. Secretary of State, 177 N.W. 288 (Mich. 1920)
- Dillon v. Gloss, 256 U.S. 368 (1921).
- Dodge v. Woolsey, 59 U.S. 331 (1855)
- Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996)
- Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975)
- Field v. Clark, 143 U.S. 649 (1892)
- Fitzgerald v. Greene, 134 U.S. 377 (1890)
- Goldwater v. Carter, 444 U.S. 996 (1979)
- Gralike v. Cooke, 191 F.3d 911 (8th Cir. 1999), *aff'd on other grounds*, 531 U.S. 510 (2001)
- Hawke v. Smith (“Hawke I”), 253 U.S. 221 (1920)
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- In re* Initiative Petition 364, 930 P.2d 186 (Okla. 1996)
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- League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997)
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Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999)  
 Morrissey v. State, 951 P.2d 911 (Colo. 1998)  
 Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977)  
 Opinion of the Justices, 172 S.E. 474 (N.C. 1933)  
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 Opinion of the Justices, 167 A. 176 (Me. 1933)  
 Opinion of the Justices, 107 A. 673 (Me. 1919)  
 Opinion of the Justices, 148 So. 107 (Ala. 1933)  
 Powell v. McCormick, 395 U.S. 486 (1969)  
 Prior v. Norland, 188 P. 727 (Colo. 1920)  
 Ray v. Blair, 343 U.S. 214 (1952)  
 Rhode Island v. Palmer (“National Prohibition Cases”), 253 U.S. 350 (1920)  
 Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997)  
 Smiley v. Holm, 285 U.S. 355 (1932)  
 Smith v. Union Bank, 30 U.S. 518 (1831)  
 Spriggs v. Clark, 14 P.2d 667 (Wyo. 1932)  
 State *ex rel.* Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933)  
 State *ex rel.* Donnelly v. Myers, 186 N.E. 918 (Ohio 1933)  
 State *ex rel.* Erkenbrecher v. Cox, 257 F. 334 (D.C. Ohio 1919)  
 State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984)  
 State v. Hatch, 526 P.2d 1369 (Mont. 1974)  
 Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973)  
 U.S. Term Limits v. Thornton, 514 U.S. 779 (1995)  
 United States v. Chambers, 291 U.S. 217 (1934)  
 United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954)  
 United States v. Sprague, 282 U.S. 716 (1931)  
 United States v. Thibault, 47 F.2d 169 (2d Cir. 1931)  
 United States *ex rel.* Widenmann v. Colby, 265 F. 998 (D.C. Cir. 1920), *aff’d*,  
 253 U.S. 350 (1921)  
 White v. Hart, 80 U.S. 646 (1871)

### Part III. Explanatory Text with Footnotes

#### § 3.1. *Historical Background*<sup>17</sup>

In seventeenth and eighteenth century Anglo-American practice, a “convention” was an assembly, other than a legislature, convened to address ad hoc political problems.<sup>18</sup> In England, conventions re-enthroned the Stuart royal line in 1660<sup>19</sup> and granted the throne to William and Mary in 1689.<sup>20</sup> The latter convention promulgated the English Declaration of Rights.

Americans also began to meet in convention during the late seventeenth century. Many conventions were bodies that convened only within a particular colony or state. Others were diplomatic assemblies of governments, which sometimes were called “congresses” as well as “conventions.” (The two terms were interchangeable.) We have records of about twenty conventions among colonies before Independence in 1776 and of eleven additional ones among states through 1787.<sup>21</sup> Among the latter were meetings in Springfield, Massachusetts and York Town, Pennsylvania in 1777, New Haven, Connecticut in 1778, Philadelphia in 1780, Annapolis in 1786, and of course the Constitutional Convention in 1787.

Multi-colony and multi-state conventions developed standard protocols.<sup>22</sup> The

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<sup>17</sup> On this history, see generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013) [hereinafter Natelson, *Conventions*], reprinted *infra* § 5.1.

<sup>18</sup> Natelson, *Conventions*, at 624; Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 706 (2011) [hereinafter Natelson, *Rules*], reprinted *infra* § 5.2; cf. Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (“The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes.”).

<sup>19</sup> See 8 HOUSE OF COMMONS JOURNAL 16–18 (1802), available at <http://www.british-history.ac.uk/search/series/commons-jrnl>.

<sup>20</sup> See RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 6–40 (1988) [hereinafter CONSTITUTIONAL BRINKSMANSHIP].

<sup>21</sup> Natelson, *Conventions*, at 620; Natelson, *Rules*, at 707–08.

<sup>22</sup> These are discussed generally in Natelson, *Conventions*.

procedure would begin when a colony or state (or, less commonly, the Continental Congress or a prior convention) issued an invitation to other governments to meet at a prescribed place and time to discuss one or more subjects. The subjects might include Indian affairs, common defense, war supply, inflation, trade, or other topics. This invitation was the *call* or sometimes the *application*.<sup>23</sup> During the eighteenth century, an “application” was merely an address or petition, and in the convention context it could also refer to a request to Congress to issue a call.<sup>24</sup> The proposed meeting might be *partial*—that is, limited to the governments in a certain region of the country—or *general*: including all or most of the colonies or states. The procedures for partial and general conventions were identical.

Because these were meetings among governments, the procedures were based on those prevailing in international law for meetings among sovereigns.<sup>25</sup> Each colony or state sent a *committee* (delegation) of *commissioners* (delegates) empowered by documents called *commissions*. The call and the commissions defined the outer scope of the commissioners’ powers. At the conclave each government received one vote, irrespective of the size of its committee. The convention elected its own officers and established its own rules.

Many of the Constitution’s Framers and leading ratifiers had served as commissioners to multi-government conventions. Those who had not were familiar with the process from their experience in government service. Article V’s “Convention for proposing Amendments” was modeled after these meetings.<sup>26</sup> Indeed, the phrase “convention of the states”<sup>27</sup> and similar expressions<sup>28</sup> remained

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<sup>23</sup> On terminology, see Natelson, *Conventions*, at 629–32. For an example of the term “application” being used as a synonym for “call,” see *id.* at 642 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention). For additional terminology, see Natelson, *Rules*, at 698–99, 708.

<sup>24</sup> Natelson, *Conventions*, at 667.

<sup>25</sup> CONSTITUTIONAL BRINKSMANSHIP, at 95–96 (1988).

<sup>26</sup> Natelson, *Conventions*, at 680–85.

<sup>27</sup> *E.g.*, *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

<sup>28</sup> Natelson, *Conventions*, at 684–85 (reproducing language of early state applications and a

the usual way of referring to an Article V amendments convention for many decades after the Constitution was ratified.

During the century following ratification, states continued to meet in conventions. The 1814 Hartford Convention was a “partial” (regional) gathering of delegates from the New England states designed to coordinate the response among those states to the unpopular War of 1812. It endorsed a series of amendments to the Constitution.<sup>29</sup> Because, however, it met outside the sanction of Article V it could not issue ratifiable proposals. Another regional convention was the gathering of nine states at Nashville, Tennessee in 1850. It sought to coordinate Southern response to federal policy.<sup>30</sup> Still another was the seven-state Montgomery, Alabama convention of 1861, which met to coordinate Southern secession and to draft a new confederate constitution. Finally, at least one regional convention met during the twentieth century. This was the seven-state “Colorado River Commission,” a gathering that assembled, primarily in Santa Fe, New Mexico, to negotiate the Colorado River Compact.

The 1861 Washington Conference Convention—the largest multi-state convention ever held—was “general” in nature, with most of the non-seceding states in attendance. Its purpose was to propose a constitutional amendment to stave off the Civil War.<sup>31</sup> Because it, too, met outside Article V, it could not issue its proposal

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responsive resolution).

<sup>29</sup> *Amendments to the Constitution Proposed by the Hartford Convention: 1814*, YALE LAW SCHOOL, [http://avalon.law.yale.edu/19th\\_century/hartconv.asp](http://avalon.law.yale.edu/19th_century/hartconv.asp) (last visited Apr. 4, 2014). The journal is also available in *A SHORT ACCOUNT OF THE HARTFORD CONVENTION* (Theodore Lyman ed., 1823).

<sup>30</sup> See THELMA JENNINGS, *THE NASHVILLE CONVENTION: SOUTHERN MOVEMENT FOR UNITY, 1848–1850* (1980). This gathering, called by the State of Mississippi, also was known as the Southern Convention.

<sup>31</sup> The official name of the gathering was the Washington Conference Convention, but it is also commonly referred to as the “Washington Peace Conference.” It was called by Virginia, and attended by twenty-one states after several already had seceded. Former President John Tyler served as convention president.

The proceedings are collected in *A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET*

to the states directly, so it sought action from Congress—which was not forthcoming.

What is notable is that all five gatherings followed the convention protocols established during the seventeenth and eighteenth centuries.<sup>32</sup> The Washington, D.C., meeting acted as an Article V Convention in almost every particular.

### **§ 3.2. *Types of Conventions***

For constitutional purposes, one can classify conventions sponsored by American governments in several different ways: in-state and multi-state; conventions to propose, conventions to ratify, and conventions with power to do both; and those plenipotentiary and limited in their powers.

#### **§ 3.2.1. *In-State and Multi-State Conventions***

An *in-state convention* is a meeting of delegates from a single state. An example is a state constitutional convention or a state ratifying convention of the kind that approved the Twenty-First Amendment. In such gatherings, delegates usually are popularly elected by, and represent, the people—although during the Founding Era there were some in-state conventions composed of delegations from towns or other local governments. The Constitution authorizes two kinds of in-state conventions: those authorized to ratify the Constitution and those authorized to ratify amendments.<sup>33</sup>

By contrast, a *multi-state, interstate, or federal convention* is a gathering of representatives of the states or state legislatures.

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SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES (L.E. Chittenden ed., 1861). For a modern treatment, see ROBERT GRAY GUNDERSON, OLD GENTLEMEN'S CONVENTION: THE WASHINGTON PEACE CONFERENCE OF 1861 (1961). (The name of the book comes from a derogatory comment by abolitionist Horace Greeley.)

<sup>32</sup> The Hartford journal does not reveal how votes were tabulated (by commissioner or by state), but otherwise its proceedings are consistent.

<sup>33</sup> U.S. CONST. arts. V, VII.

### § 3.2.2. *Proposing and Ratifying Conventions*

A *proposing convention* is charged only with proposing solutions to prescribed problems. As its name suggests, the convention for proposing amendments is of this kind. Other illustrations include the 1787 Constitutional Convention and the 1861 Washington Conference Convention.

A *ratifying convention* is charged only with ratifying or rejecting specific proposals. Examples of ratifying conventions are the in-state assemblies that approved the Constitution<sup>34</sup> and those that approved the Twenty-First Amendment (repealing Prohibition).<sup>35</sup>

Some conventions possess power to propose and approve.<sup>36</sup> During the Revolutionary War, some in-state conventions enjoyed both proposing and ratifying power, particularly if the state's legislature was not functioning. By contrast, most multi-state conventions were authorized to propose only. However, the 1780 Philadelphia Price Convention was empowered to both propose and decide,<sup>37</sup> and an early draft of the Constitution would have granted an amendments convention authority to both propose and decide. The Framers ultimately rejected that approach.<sup>38</sup>

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<sup>34</sup> U.S. CONST., art. VII.

<sup>35</sup> On the latter, see RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS (Everett Somerville Brown ed., 1938). For a shorter treatment, see Everett Somerville Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005 (1935).

<sup>36</sup> The division between proposal and decision was elucidated by the seventeenth century political author James Harrington in his *Commonwealth of Oceana*—a work hugely popular among the Founders. Harrington compared it to the common domestic situation in which one girl cuts a cake while the other gets to choose which piece is hers. He therefore referred to it as “dividing” and “choosing.”

<sup>37</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 656 (2013), *reprinted infra* § 5.1.

<sup>38</sup> *Id.* at 621–22.

### **§ 3.2.3. *Plenipotentiary and Limited Conventions***

A *plenipotentiary* convention is one with an unlimited mandate, or at least a mandate that is very broad. The term comes from international diplomatic practice. During the Founding Era, the in-state conventions that managed their governments in absence of the legislature enjoyed plenipotentiary authority. The Constitution does not authorize any plenipotentiary conventions.

A *limited* convention is restricted to one or more topics. The most extreme example of a limited convention is a ratifying convention, whose only power is to approve or reject a preset proposal.

Historically, multi-state proposing conventions have been authorized to deliberate, debate, draft, and recommend (or in a few cases, to mandate) solutions to prescribed problems. Sometimes the agenda given them has been very broad, as in the case of the First Continental Congress (1774). Sometimes the agenda has been very narrow, as in the case of the 1781 Providence Convention: It was confined to New England military supply issues for a single year. But in no case has a proposal convention been limited to approving or disapproving prescribed language. That would inhibit the deliberative purpose of a proposal convention, and would ill-suit the dignity of an assembly of semi-sovereigns.

### **§ 3.2.4. *Categorizing the Constitutional Convention and the Convention for Proposing Amendments***

#### ***The Constitutional Convention***

There is an oft-repeated claim that Congress called the 1787 Constitutional Convention and restricted it to amending the Articles. That claim is erroneous.<sup>39</sup>

What actually happened was that the 1786 Annapolis Convention issued a resolution somewhat analogous to an Article V application, but addressed to its

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<sup>39</sup> After most of the states already had accepted the invitation to participate, Congress passed a weak resolution expressing the “opinion” that the convention be limited to amending the Articles. All but two states disregarded this “opinion,” but many writers have confused it with the convention call. *Id.*, at 674–79.



participating states rather than to Congress. The resolution recommended another, wider convention. Accordingly, two of the participating states, Virginia and New Jersey, called another federal convention for May of 1787. Neither the Annapolis resolution, nor the state calls, nor the convention itself proceeded under the Articles of Confederation. Rather, they were exercises of the states' reserved powers. Nor was the convention restricted to proposing amendments to the Articles. The call and the commissions issued by ten states empowered the convention to recommend any and all expedient changes to the "foederal constitution"<sup>40</sup>—a phrase that in the language of the time referred to the entire political system.

The 1787 gathering in Philadelphia was obviously a *multi-state* or *federal* convention rather than one limited to a single state. Just as obviously, it was a proposing rather than a ratifying body. Although technically limited, the breadth of its charge caused it to lean toward the *plenipotentiary* side.

### ***The Convention for Proposing Amendments***

This also is a *multi-state* gathering or "convention of states."<sup>41</sup> Unlike the

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<sup>40</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559–86 (Max Farrand ed., 1939).

<sup>41</sup> Some writers have depicted a convention for proposing amendments, as least potentially, as a popularly-elected gathering directly representing the people. However, the Supreme Court refers to it not as a "convention of the people" but as a "convention of the states," *Smith v. Union Bank*, 30 U.S. 518, 528 (1831). The Court's characterization is confirmed by a large body of uncontradicted Founding-Era evidence. This evidence includes, *inter alia*, contemporaneous convention practice and discussions of the procedure during the Constitutional Convention and during the ratification debates. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 715–32 (2011), *reprinted infra* § 5.2. See generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013), *reprinted infra* § 5.1.

In addition, the Founding Generation often referred to an amendments convention as a "convention of the states." This usage appears in contemporaneous legislative resolutions on the subject. See, for example:

Constitutional Convention, which states called in their sovereign capacity, a convention for proposing amendments is called pursuant to the Constitution. It draws its authority from the Constitution and only to the extent permitted by the applications and calls. Its authority is therefore limited to the scope of those documents, and is consequently narrower than the authority of a constitutional convention. On the other hand, the fact that it is a *proposing* body suggests that its discretion cannot be confined to approving or rejecting prescribed language, as in the case of ratifying convention.

### **§ 3.3. *Why the Founders Adopted the Proposal Convention in Article V.***

An early draft of the Constitution permitted amendments to be proposed and adopted only by a multi-state convention.<sup>42</sup> Then the Framers added provisions allowing Congress to propose amendments and requiring state ratification.<sup>43</sup> Congress received the power to propose because the Framers believed that Congress's position would enable it readily to see defects in the system.

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- The first application for an Article V convention. 1 ANNALS OF CONGRESS 28–29 (1789) (Joseph Gales ed., 1834) (reproducing Virginia application of Nov. 14, 1788, calling an amendments convention “a convention of the states”).
  - The Pennsylvania legislature’s resolution disapproving that application. MINUTES OF THE THIRTEENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA IN THEIR SECOND SESSION 124–25 (Mar. 5, 1789) (calling an amendments convention “a convention of the states”).
  - A letter from the Virginia legislature to the Governor of New York successfully urging New York to adopt its own application. JOURNAL OF THE HOUSE OF ASSEMBLY OF THE STATE OF NEW-YORK 25 (Dec. 27, 1788) (calling an amendments convention “a Convention of the States”).
  - A Rhode Island legislative resolution on the same subject. 10 RECORDS OF THE STATE OF RHODE ISLAND 309–10 (John Russell Bartlett ed., 1865) (General Assembly resolution of Oct. 27, 1788) (calling an amendments convention a “general convention of the states”).

<sup>42</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 159 (Max Farrand ed., 1939).

<sup>43</sup> *Id.* at 578.

However, some delegates—notably George Mason of Virginia—pointed out that Congress might become abusive or exceed its powers.<sup>44</sup> It might refuse to adopt a necessary or desirable amendment, particularly one designed to curb its own authority. Accordingly, the Framers added the convention for proposing amendments as a way for the states to present corrective amendments for ratification without substantive congressional participation.<sup>45</sup>

The purpose of the convention as a “congressional bypass” was much discussed during the debates over the ratification of the Constitution. Illustrative was the comment of Samuel Rose, a New York state legislator who supported the Constitution at his state’s ratifying convention:

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 government, if upon trial it should be found that they had given too much.<sup>46</sup>

James Madison stated it more succinctly in *The Federalist No. 43: The Constitution*

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<sup>44</sup> *Id.* at 649.

<sup>45</sup> On the framing process, see Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 621–24 (2013), reprinted *infra* § 5.1; Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 699–702 (2011), reprinted *infra* § 5.2; Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765, 767–70 (2011), reprinted *infra* § 5.4; see also *Idaho v. Freeman*, 529 F. Supp. 1107, 1132 (D. Idaho 1981), *judgment vacated as moot sub nom. Carmen v. Idaho*, 459 U.S. 809 (1982) (“[T]he drafters of the Constitution found it appropriate to grant the same power to propose amendments to both the local [state] and national governments . . .”).

<sup>46</sup> 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2520–22 (Merrill Jensen, John P. Kaminsky, & Gaspare J. Saladino eds., 2009).

“equally enables the General, and the State Governments, to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other.”<sup>47</sup>

### **§ 3.4. *Analyzing the Text of Article V***

Article V of the Constitution can be divided into four distinct parts, designated below by different type faces:

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.

The underlined language is the procedure by which amendments are formally proposed. Formal proposal is a condition precedent to the remaining steps, so it occurs first in the amendment process.

The **bolded** language, although placed third, occurs second in the amendment process, when Congress designates a “Mode of Ratification” for formal proposals. Obviously, Congress has no authority to designate a mode of ratification unless the potential amendment has been properly proposed.

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<sup>47</sup> Despite the reference to “states,” it is actually the state legislatures acting alone, not state governments, that apply for amendments. *See infra* § 3.7.

The *italicized* language outlines the ratification process, which occurs only after proposal and congressional selection of the mode of ratification.

The final proviso, set forth in ordinary roman type, prohibits certain kinds of amendments. It is a reminder that the Article V procedure is carried out subject to what Madison called “the forms of the Constitution.”<sup>48</sup> One cannot use Article V to obtain unconstitutional results. For example, neither Congress nor a convention for proposing amendments has power to alter the ratification procedure, as alarmists sometimes suggest. Any effort by the convention to do would be ignored by other agencies of government, including the courts.

Now, let us focus on the proposal and ratification portions of Article V:

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 . . . .

Observe that Article V provides two methods of proposal and two methods of ratification. Both methods of ratification have been employed: state conventions ratified the Twenty-First Amendment and state legislatures ratified all the rest. The congressional method of proposal has been used to completion, but the state application and convention method has not. Let us focus on the language that governs the latter: “[O]n the Application of the Legislatures of two-thirds of the several States, [Congress] shall call a Convention for proposing Amendments . . . .”

The following is clear from the language:

- If two-thirds of the states make “Application” to Congress for a

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<sup>48</sup> Letter from James Madison to George Turberville (Nov. 2, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 297, 299 (Gaillard Hunt ed., 1904); *Cf.* Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 92–93 (2012), *reprinted infra* § 5.3.

convention,

- Congress “shall” (must) “call” one, and
- The power granted to the convention is “proposing Amendments.”

The text has taken us far, but has left some questions. They include:

- (1) When the state legislatures act, do they act pursuant to powers delegated by Article V, or by virtue of the powers reserved by the Tenth Amendment?
- (2) What is a state “Legislature”? Does the term refer to the entire legislative body of the state, including any participation by the governor and the people’s initiative and referendum power? Or does it refer only to a state’s representative assembly?
- (3) What is an application?
- (4) What is a call?
- (5) What, in this context, is a “convention” and how is it constituted?

Fortunately, the answers to all of those questions are recoverable, and are provided in the next section.

### **§ 3.5. *Applicable Legal Principles: Interpretation, Incidental Powers, and Fiduciary Obligations***

Contrary to some suggestions,<sup>49</sup> Article V questions are freely justiciable.<sup>50</sup>

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<sup>49</sup> Some writers cite stray Supreme Court dicta or concurrences suggesting that congressional control over the amendment process is unreviewable. The language cited appears in *White v. Hart*, 80 U.S. 649 (1871), and *Coleman v. Miller*, 307 U.S. 438, 456 (1939) (Black, J., concurring).

Black’s *Coleman* concurrence has had a disproportionate effect on public perceptions, considering (1) the patent implausibility of its core claim (it asserted, in the teeth of the constitutional language, that *Congress* has absolute control of the amendment process), see *Idaho v. Freeman*, 529 F. Supp. 1107, 1135–36 (D. Idaho 1981), judgment vacated as moot sub nom. *Carmen v. Idaho*, 459 U.S. 809 (1982), (2) that it was not the opinion of the Court, (3) that it has never been followed and (4) that the courts have universally repudiated it!

<sup>50</sup> Opinion of the Justices, 172 S.E. 474 (N.C. 1933) (stating that whether an amendment is ratified

Indeed, “the judiciary . . . has . . . dealt with virtually all the significant portions of that article,”<sup>51</sup> and the courts apply similar rules of interpretation to Article V as to other parts of the Constitution. If there is a difference between judicial interpretations of Article V and those of other parts of the Constitution, it is that interpretation of Article V is more traditional than the sometimes freewheeling approach the Supreme Court adopts when construing the Commerce Power or the Due Process Clauses.

When Article V’s language is indisputably clear—such as the grant of discretion to Congress to select a mode of ratification<sup>52</sup>—the clear language is enforced.<sup>53</sup> When the meaning is less obvious, courts consult Founding-Era evidence of meaning and, on occasion, evidence of subsequent usage.<sup>54</sup>

The Supreme Court observed in one Article V case that “with the Constitution or other written instrument, what is reasonably implied is as much a

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ultimately is determined by the Supreme Court); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.); *Freeman*, 529 F. Supp. 1107. See also the Article V cases cited throughout this book. *See supra* Part II.

<sup>51</sup> *Freeman*, 529 F. Supp. at 1126.

<sup>52</sup> *United States v. Sprague*, 282 U.S. 716 (1931). The language in *Sprague* was arguably, broader—that all of Article V precluded interpretation—but other parts of Article V were not at issue. *See Coleman*, 307 U.S. 438 (referring to the “familiar principle, what was there said must be read in the light of the point decided”). As the footnotes in this work demonstrate, the courts, including the Supreme Court, have freely interpreted the less-obvious portions of the Article.

<sup>53</sup> *Hawke v. Smith* (“Hawke I”), 253 U.S. 221 (1920).

<sup>54</sup> *Leser v. Garnett*, 258 U.S. 130 (1922) (relying on history to affirm validity of the procedure adopted for the Fifteenth, and therefore the Nineteenth, Amendment); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 381 (1798) (following practice pertaining to first ten amendments); *Dyer*, 390 F. Supp. at 1306–07 (applying historical evidence in determining how conventions determine voting rules); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954) (citing history of judicial reliance on the Fourteenth Amendment as evidence that it had been validly adopted); *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920) (citing Founding-Era evidence in defining the Article V word “legislature”); *Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (determining the mode of election for a state ratifying convention by consulting historical practice).

part of it as what is expressed.”<sup>55</sup> Just as the Constitution’s other express grants carry with them incidental powers,<sup>56</sup> so do the grants in Article V.<sup>57</sup> In other words, a grant of power to an assembly operating under Article V carries with it subordinate powers that, at the time the Constitution was adopted, customarily accompanied such a grant, or are otherwise reasonably necessary to carrying out the grant.<sup>58</sup>

The Article V process includes some agency relationships. Congress serves as an agent for the states in counting applications and calling the convention. Commissioners at the convention serve as agents for their respective state legislatures. Traditional convention practice tells us that normal rules of fiduciary conduct apply in these relationships.<sup>59</sup> These include (1) an obligation by Congress to treat all of its principals (the state legislatures) impartially (2) obligations by commissioners to remain within the scope of their powers and otherwise obey

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<sup>55</sup> *Dillon v. Gloss*, 256 U.S. 368, 373 (1921) (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification).

<sup>56</sup> Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 704–06 (2011), *reprinted infra* § 5.2. The Founding-Era law of principals and incidents and its implication for constitutional interpretation are discussed in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52, 60–68 (2010). The basic concepts outlined there were adopted by Chief Justice Roberts in his discussion of the Clause in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2591 (2012).

<sup>57</sup> *Dillon*, 256 U.S. at 373 (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933) (holding that Article V gives state legislatures power to provide for ratifying conventions); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933) (stating that the calling of a convention is an incidental duty of the state legislature when Congress chooses that mode of ratification).

<sup>58</sup> *Myers*, 186 N.E. 918 (stating that the calling of a convention is an duty of the state legislature when Congress chooses that mode of ratification because it is “necessary and incidental” to ratification); *see also Sevier*, 62 S.W.2d 895 (holding that Article V gives state legislatures power to provide for ratifying conventions).

<sup>59</sup> Natelson, *Rules*, at 703–04.



instructions, and (3) the power of state legislatures to recall commissioners.

**§ 3.6. *Assemblies Acting under Article V Do So Solely by Virtue of Powers Granted by Article V.***

Like some other parts of the Constitution, Article V grants a list of enumerated powers. The grants are made to designated legislatures and conventions.<sup>60</sup> A legislature or convention exercising authority under Article V may be called an *Article V assembly*.

The grants under Article V, together with their incidental powers, are the sole source of authority for amending the Constitution.<sup>61</sup> Thus, Congress holds no amending authority by virtue of other grants in the Constitution. Because the amending power was created by the Constitution and did not antedate it,<sup>62</sup> the state legislatures hold none by virtue of powers reserved under the Tenth Amendment.<sup>63</sup> The law governing the amendment process is federal, not state, law.<sup>64</sup>

The principles set forth in the prior paragraph are worth emphasizing because some Article V activists have assumed erroneously that states can exercise Tenth Amendment “reserved” power over the amendment process. Some have urged state legislatures and electorates to adopt state constitutional provisions, legislation, and interstate compacts to govern it. However, there is a very long line of cases holding that amendment powers derive solely from the Constitution, that

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<sup>60</sup> *Hawke v. Smith* (“Hawke I”), 253 U.S. 221 (1920); *see also* *Hawke v. Smith* (“Hawke II”), 253 U.S. 231 (1920).

<sup>61</sup> *Prior v. Norland*, 188 P. 729 (Colo. 1920).

<sup>62</sup> *Cf. U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

<sup>63</sup> *United States v. Sprague*, 282 U.S. 716, 733 (1931) (holding the Tenth Amendment irrelevant because, “The fifth article does not purport to delegate any governmental power to the United States . . . . On the contrary . . . the article is a grant of authority by the people to Congress, and not to the United States.”); *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931) (holding that Tenth Amendment is not relevant in the ratification process); *Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.); *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977).

<sup>64</sup> *Coleman v. Miller*, 307 U.S. 438 (1939).

Article V law is exclusively federal law, and that state ordinary state legislation cannot manipulate the process. Virtually without exception, the courts have invalidated efforts to use state law in that way.<sup>65</sup> These cases make it clear, moreover that the application, ratification, proposal, and “Mode of Ratification” procedures all are governed by the same principles.<sup>66</sup>

Assemblies acting under Article V are not departments of the federal government, but they do exercise a “federal function.”<sup>67</sup> In that capacity, Congress and state legislatures act as proposing or assenting bodies on behalf of the people rather than as legislatures.<sup>68</sup>

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<sup>65</sup> In chronological order, see *Herbring v. Brown*, 180 P. 328 (Or. 1919), *Barlotti v. Lyons*, 189 P.282 (Cal. 1920) (similar holding), *Opinion of the Justices*, 107 A. 673 (Me. 1919), *Prior*, 188 P. 727, *Hawke I*, 253 U.S. 221, *Hawke II*, 253 U.S. 231, *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (Brandeis, J.), *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895 (1933), cert. denied, 290 U.S. 679 (1933), *Coleman*, 307 U.S. 438, *State v. Hatch*, 526 P.2d 1369 (Mont. 1974), *Dyer*, 390 F. Supp. 1291, *Opinion of the Justices to the Senate*, 366 N.E.2d at 1228, *AFL-CIO v. Eu*, 86 P.2d 609, 620 (Cal. 1984), stay denied sub nom. *Uhler v. AFL-CIO*, 468 U.S. 1310 (1984), *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984), stay denied 469 U.S. 1301 (1984), *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996), cert. denied 519 U.S. 1147 (1997), *In re Initiative Petition No. 264*, 930 P.2d 186 (Okla. 1996), *League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997), *Morrissey v. State*, 951 P.2d 911 (Colo. 1998), *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1093 (D.S.D. 1998), *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999), *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).

For a detailed examination of the constitutionality of one effort to control the amendment process through state law, see ROBERT G. NATELSON, IS THE “COMPACT FOR AMERICA” PLAN TO AMEND THE CONSTITUTION CONSTITUTIONAL? (Article V Information Center 2016), available at <https://www.i2i.org/wp-content/uploads/2015/01/CFA-Report-final2.pdf>.

<sup>66</sup> See *supra* note 65; see also *Spriggs v. Clark*, 14 P.2d 667 (Wyo. 1932) (assuming that same rules apply to application as to ratification process).

<sup>67</sup> *Leser*, 258 U.S. at 137; *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); *Sevier*, 62 S.W.2d 895.

<sup>68</sup> *Hawke I*, 253 U.S. 221; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 381 (1798); *Prior*, 188 P. 729; see also *Hawke II*, 253 U.S. 231; *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) (stating that people assent to amendments through representative assemblies); *Sevier*, 62 S.W.2d 895.

The Article V grants of power are as follows:<sup>69</sup>

- Authority to two-thirds of each house of Congress to “propose” amendments.
- Authority to two-thirds of the state legislatures to make “Application” for a convention for proposing amendments.
- Authority to Congress to “call” that convention.
- Authority to the convention “for proposing” amendments.
- Authority to Congress to decide whether ratification shall be by state legislatures or state conventions.
- If Congress selects the former method, authority to state legislatures to ratify or reject.
- If Congress selects the latter method, implied authority and a mandate to each state legislature to call a ratifying convention.
- Authority to three-fourths of those conventions to ratify.
- Authority incidental to the foregoing, such as the authority of all Article V assemblies to establish their own rules,<sup>70</sup> and the power of state legislatures to define the scope of their applications, to determine the mode for selecting commissioners (delegates), and to fix how state ratifying conventions are selected.

Additional information on both principal and incidental powers is found in later sections of this part.<sup>71</sup>

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<sup>69</sup> For a slightly different formulation, see Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 702–03 (2011), reprinted *infra* § 5.2.

<sup>70</sup> *Dyer*, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules); Opinion of the Justices, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members).

<sup>71</sup> *Infra* § 3.9.3.

**§ 3.7. Under Article V, a State “Legislature” Means the State’s Representative Assembly, without Participation by the Governor or by Any Reserved Power of Initiative or Referendum.**

Article V grants authority to assemblies as such, not to branches of the federal or state governments. A state “Legislature,” as Article V uses the term means the state’s law-making representative body, not the entire legislative power of the states.<sup>72</sup> The Supreme Court recently reaffirmed this while distinguishing the grants in Article V from those in the Constitution’s Elections Clause, which does grant power to the general legislative power of the states.<sup>73</sup>

Thus, the President need not sign, and may not veto, congressional amendment proposals.<sup>74</sup> Similarly, state legislatures have authority to apply and ratify without gubernatorial intervention.<sup>75</sup> On the other hand, a gubernatorial

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<sup>72</sup> *Hawke I*, 253 U.S. 221; *Opinion of the Justices*, 107 A. 673; *Prior*, 188 P. 729; *Decher v. Sec’y of State*, 177 N.W. 288 (Mich. 1920); *see also Hawke II*, 253 U.S. 231; *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *judgment vacated as moot sub nom. Carmen v. Idaho*, 459 U.S. 809 (1982); *Dyer*, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules). *See also* cases cited *supra* note 65.

<sup>73</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015) (“[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.” Thus “the Legislature” comprises the referendum and the Governor’s veto in the context of regulating congressional elections. . . . In the context of ratifying constitutional amendments, in contrast, “the Legislature” has a different identity, one that excludes the referendum and the Governor’s veto.”) (internal citations omitted).

<sup>74</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 381 (1798); *Opinion of the Justices*, 107 A. 673.

<sup>75</sup> Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 710–12 (2011), *reprinted infra* § 5.2; *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977); *see also Opinion of the Justices*, 673 A.2d 693 (Me. 1996) (stating that a governor has no delegated power under Article V).

signature should not invalidate the application.

Other methods, including initiative and referendum, may not displace the methods outlined in Article V, either directly or indirectly.<sup>76</sup> A referendum may not ratify in lieu of the state legislature<sup>77</sup> or state convention,<sup>78</sup> nor may initiatives, referenda, or state constitutional or legal provisions be employed to coerce the state legislature or other Article V assemblies.<sup>79</sup> An Article V assembly is a deliberative assembly at the ratification stage,<sup>80</sup> at the application stage,<sup>81</sup> and at the proposal

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<sup>76</sup> *Hawke I*, 253 U.S. 221; *Prior*, 188 P. 729; see *Hawke II*, 253 U.S. 231; *Sevier*, 62 S.W.2d 895; see also cases cited *supra* note 65. This is so, although references to the state legislature in other parts of the Constitution may include the referendum power. *Smiley v. Holm*, 285 U.S. 355 (1932) (stating that the constitutional meaning of “legislature” depends on the function, and that it can refer to a lawmaking, ratifying, electing, or consenting body; of course, it may also mean an applying body); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (construing the Times, Places and Manner Clause); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (dicta).

The prohibition of initiatives and referenda is not changed by the holding in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2668 (2015). In that case, the Supreme Court upheld the use of voter initiative for an exercise of power delegated to state “Legislatures” by the Constitution’s Elections Clause. This is because, as the Court makes clear, the Elections Clause delegation is to the states’ general legislative authority. The Court also makes it clear that Article V’s delegations to state “Legislatures,” by contrast, are to those legislatures acting as independent assemblies. 135 S. Ct. at 2668.

<sup>77</sup> *Hawke I*, 253 U.S. 221; see also *Hawke II*, 253 U.S. 231; *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); *State v. Hatch*, 526 P.2d 1369 (Mont. 1974).

<sup>78</sup> *Opinion of the Justices*, 167 A. 176 (Me. 1933)

<sup>79</sup> *Gralike v. Cooke*, 191 F.3d 911 (8th Cir. 1999), *aff’d on other grounds*, 531 U.S. 510 (2001); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984); *Morrissey v. State*, 951 P.2d 911 (Colo. 1998); *Waltermire*, 691 P.2d 826 (dicta); *In re Initiative Petition 364*, 930 P.2d 186 (Okla. 1996). *But see* *Opinion of the Justices*, 148 So. 107 (Ala. 1933) (a state law may require convention delegates to vote in accordance with the results of a referendum). As the cases cited here demonstrate, the Alabama holding has been repudiated everywhere.

<sup>80</sup> *Opinion of the Justices*, 167 A. at 180.

<sup>81</sup> *Waltermire*, 691 P.2d 826 (rejecting attempt to use initiative process to force legislature to apply

stage.<sup>82</sup> In the words of Justice Brandeis, its function “transcends any limitations sought to be imposed by the people of a state.”<sup>83</sup> A court will not countenance “an unconstitutional attempt effectively to remove the Article V power from legislators and place it in the hands of the people, thus substituting popular will for the will of the independent ‘deliberative assemblage’ . . . envisioned by the Framers of the Constitution.”<sup>84</sup> However, the courts do permit advisory referenda on Article V questions.<sup>85</sup>

To be sure, in the one case in which state conventions ratified a constitutional amendment, those conventions—although not actually coerced—acted less as deliberative bodies than as registers of the popular will.<sup>86</sup> As ratification bodies, however, they were limited to a “yes” or “no” vote; a convention for proposing amendments is not.

Article V assemblies enjoy powers incidental to those expressly granted by Article V.<sup>87</sup> The rule barring coercion of an Article V assembly in the exercise of its express powers should also apply to an incidental power, such as establishing its own rules or electing its own officers. Those matters may not be dictated by a state’s constitution or by its law or by legislative procedures adopted for other

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for convention); In re *Initiative Petition No. 264*, 930 P.2d 186 (same).

<sup>82</sup> *Donovan*, 931 S.W.2d 119; see also *Gralike*, 191 F.3d 911; *Miller*, 169 F.3d 1119; *Barker*, 3 F. Supp. 2d 1088; *Gwadosky*, 966 F. Supp. 52; *Bramberg*, 978 P.2d 1240; *Morrissey*, 951 P.2d 911; Opinion of the Justices, 673 A.2d 693 (Me. 1996); *Waltermire*, 691 P.2d 826 (dicta); In re *Initiative Petition 364*, 930 P.2d 186.

<sup>83</sup> *Leser v. Garnett*, 258 U.S. 130, 137 (1922); see also *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973) (explaining that *Leser* struck down not just referenda but other state law efforts to control the Article V process, and holding that under *Leser* a state constitution may not impair a state legislature in its ratification function).

<sup>84</sup> *Miller*, 169 F.3d 1119.

<sup>85</sup> *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J.) (upholding advisory referendum); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997).

<sup>86</sup> Everett Somerville Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005, 1017 (1935).

<sup>87</sup> *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933).

circumstances. A court may, however, find that an Article V assembly has impliedly adopted such a pre-existing rule.<sup>88</sup>

### **§ 3.8. *The State Legislatures' Applications***

#### **§ 3.8.1. *Background***

In Founding-Era practice, a state legislature, a prior convention, or Congress could invite states to send commissioners to a federal convention. The invitation usually was labeled the *call*, but sometimes an *application*.<sup>89</sup>

The Framers standardized both vocabulary and usage. Article V denotes the actual invitation as the call, and provides that it may be issued only by Congress. Article V denotes the petition to Congress as an application and provides that it may be issued only by a state legislature. However, when two-thirds of the states have applied on the same topic, Congress must call the convention to deal with that topic; Congress has no discretion in that matter.<sup>90</sup>

#### **§ 3.8.2. *What Is an Application and How Is It Adopted?***

An application is a resolution of a state legislature formally requesting Congress to call a convention for proposing one or more amendments.<sup>91</sup> The resolution may include statements of purpose (preambles or “whereas” clauses), but need not do so.

Article V grants power to make application to the state legislatures alone.<sup>92</sup>

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<sup>88</sup> Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (holding a state legislative voting rule not binding on, but impliedly accepted by, the legislature operating under Article V).

<sup>89</sup> For an example of the term “application” being used as a synonym for “call,” see Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 642 (2013), *reprinted infra* § 5.1 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention).

<sup>90</sup> THE FEDERALIST No. 85 (Alexander Hamilton).

<sup>91</sup> Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 709–10 (2011) [hereinafter Natelson, *Rules*], *reprinted infra* § 5.2.

<sup>92</sup> *Supra* § 3.6.

Neither the state constitution, state laws, nor normal legislative procedures are binding on the legislature when it acts under Article V.<sup>93</sup> If, however, the legislature does follow those procedures, a court may rule that the legislature has assented impliedly to them.<sup>94</sup>

Generally, bicameral state legislatures have adopted applications by individual chambers successively voting for the same resolution. However, the legislature may decide to vote on applications in a joint session. Similarly, the legislature may require a supermajority vote to adopt an application. In the absence of a decision to do so, action is by a majority of those present and voting, assuming a quorum.<sup>95</sup>

Applications may be adopted only pursuant to the grant of power in Article V. That grant is to the state legislature as an Article V assembly, not to the state itself.<sup>96</sup> There is no formal role in the process for either the governor or for the people acting through initiative or referendum.<sup>97</sup> Purely advisory initiatives and referenda are permitted.<sup>98</sup>

Although it is wise to provide for certain formalities after adoption, such as transmission to other states, no formalities are required for the application to be valid other than that mentioned in the Constitution<sup>99</sup>—i.e., transmission to Congress. Generally, official state certification that an application has been passed precludes congressional and judicial investigation into the appropriateness of the

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<sup>93</sup> *Supra* § 3.7.

<sup>94</sup> *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

<sup>95</sup> *Ohio ex rel. Erkenbrecher v. Cox*, 257 F. 334 (S.D. Ohio 1919) (dicta); *cf. Rhode Island v. Palmer* (“National Prohibition Cases”), 253 U.S. 350 (1920) (the requirement that “two thirds” of each house of Congress propose amendments means two-thirds of the members present, assuming a quorum).

<sup>96</sup> *Supra* § 3.6.

<sup>97</sup> *Supra* § 3.7; *see also* Natelson, *Rules*, at 710–12.

<sup>98</sup> *Supra* § 3.7.

<sup>99</sup> *United States ex rel. Widenmann v. Colby*, 265 F. 998 (D.C. Cir. 1920), *aff’d*, 253 U.S. 350 (1921); *Cox*, 257 F. 334 (no requirement for validity of a ratification other than mentioned in Constitution).



process adopted.<sup>100</sup>

### **§ 3.8.3. *State Legislatures May Limit Their Applications to a Single Subject.***

The normal practice of political bodies suggests power to define the scope of their resolutions. There should be, therefore, a presumption that a state legislature may apply for a convention to consider only certain topics rather than be required to apply only for an unlimited convention.<sup>101</sup> Nevertheless, during the 1960s and 1970s various legal writers (predominantly those opposing a convention) argued that all conventions must be unlimited. Some even contended that limited applications were void by reason of their limits.

These contentions were made on very slender evidence, and subsequent research has discredited them.<sup>102</sup> Founding-Era practice, upon which the Constitution's amendment convention was based, was to limit in advance the topic and scope of multi-government conventions.<sup>103</sup> Discussions from the Founding Era

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<sup>100</sup> *Leser v. Garnett*, 258 U.S. 130 (1922) (holding that official notice by state legislatures that they had ratified bound the U.S. Secretary of State, whose certification was binding on the courts); *Field v. Clark*, 143 U.S. 649, 669–73 (1892) (holding that evidence that bill was signed by the Speaker of the House and President of the Senate and enrolled was conclusive that it was duly passed); *Idaho v. Freeman*, 529 F. Supp. 1107, 1150 (D. Idaho 1981), *judgment vacated as moot sub nom. Carmen v. Idaho*, 459 U.S. 809 (1982); *Colby*, 265 F. 998; *Cox*, 257 F. 334.

<sup>101</sup> *Cf. Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977) (holding that a single-subject application is valid, although not dealing with the issue as to whether the limitation is enforceable).

<sup>102</sup> *See, e.g., Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53 (2012) [hereinafter Rappaport, *Limited Convention*], reprinted *infra* § 5.3.; Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011) [hereinafter Stern, *Reopening*], reprinted *infra* § 5.4.

<sup>103</sup> *See generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013) [hereinafter Natelson, *Conventions*], reprinted *infra* § 5.1.

reveal a universal assumption that applications would be made to promote amendments addressing prescribed problems.<sup>104</sup> The first application ever issued, that of Virginia in 1788,<sup>105</sup> was arguably limited as to subject, and hundreds of later applications have been limited as well.<sup>106</sup> Indeed, the central purpose of the state application and convention procedure—to grant state legislatures parity with Congress in the proposal process—would be largely defeated unless those legislatures had the same power Congress does to define an amendment’s scope in advance.

It also follows from historical practice, not to mention common sense, that Congress should aggregate together towards the two-thirds threshold only those applications that address the same general topic.<sup>107</sup>

The limits on the ability of the convention to “run away”—that is, exceed the scope of the applications and call—is not within the present scope of this work. Suffice to say that no prior American inter-governmental conventions have run away, and contrary to some claims, this is also true of the 1787 Constitutional Convention.<sup>108</sup> There are numerous and redundant legal checks on an Article V convention exceeding its authority.<sup>109</sup>

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<sup>104</sup> Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 723–31 (2011) [hereinafter Natelson, *Rules*], reprinted *infra* § 5.2; Rappaport, *Limited Convention*, at 83–89; Stern, *Reopening*, at 771.

<sup>105</sup> This application is substantially reproduced in Natelson, *Rules*, at 739, along with its unlimited New York counterpart.

<sup>106</sup> Natelson, *Rules*, at 731–32.

<sup>107</sup> *Infra* § 3.9.6.

<sup>108</sup> See generally Natelson, *Conventions*. On the Constitutional Convention, see *id.* at 674; Natelson, *Rules*, at 719–23.

<sup>109</sup> ROBERT G. NATELSON, PROPOSING CONSTITUTIONAL AMENDMENTS BY A CONVENTION OF THE STATES: A HANDBOOK FOR STATE LAWMAKERS 17–18 (Am. Legislative Exch. Council, 2d ed. 2013), available at <http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf>; see also Rappaport, *Limited Convention*, at 81–82; Stern, *Reopening*, at 781–87.

### § 3.8.4. *Application Format, Conditions, and Subject Matter*

An application should be addressed to Congress. It should assert specifically and unequivocally that it is an application to Congress for a convention pursuant to Article V. The resolution should not merely request that Congress propose a particular amendment, nor should it merely request that Congress call a convention. An example of effective language is as follows:

The legislature of the State of \_\_\_\_\_ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that [*here state general topic for convention*].

The application form proposed by Citizens for Self-Governance is set forth in the Forms section of this book.<sup>110</sup> This form includes a preamble in a set of “whereas” clauses.

Conditions on applications may or may not be valid, depending on the nature of the condition.<sup>111</sup> However, they are not recommended. Besides the fact that a court may declare a condition invalid, there is a risk that conflicting conditions among state applications otherwise covering the same subject may prevent Congress from aggregating them toward the two-thirds threshold. There is also the risk that conditions may be seen as coercing Congress or the convention in a manner not permitted by Article V.

As noted above, single subject applications are almost certainly valid and enforceable. The same cannot be said for applications that purport to dictate to the

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<sup>110</sup> *Infra* § 5.1.

<sup>111</sup> Conditional applications and calls were recognized during the Founding Era. *See, e.g.*, Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 639, 661–62 (2013), *reprinted infra* § 5.1; *cf.* Idaho v. Freeman, 529 F. Supp. 1107, 1154 (D. Idaho 1981), *judgment vacated as moot sub nom. Carmen v. Idaho*, 459 U.S. 809 (1982) (declining to rule on the issue while criticizing the claim that conditions are void or void an application).

convention specific amendment wording. The courts and Congress may, with some justification, see them as invalid because they are inconsistent with historical practice and interfere with the normal discretion afforded to a proposal convention.<sup>112</sup> To the extent that specific wording varies among applications, it also will impede congressional aggregation toward the two-thirds threshold. Although some scholars believe applications mandating specific wording are constitutionally valid, legal issues and potential aggregation problems place them in doubt.

### **§ 3.8.5. *State Legislatures May Rescind Applications.***

Some have argued that states cannot rescind applications, and that once adopted an application continues in effect forever, unless a convention is called. In part, this is based on judicial deference to congressional suggestions that a *ratification* cannot be rescinded.<sup>113</sup> However, the position that applications cannot be rescinded is contrary to the principles of agency the Founders incorporated into the process. An application is a deputation from the state legislature to Congress to call a convention. Just as one may withdraw authority from an agent before the interest of a third party vests, so may the state legislature withdraw authority from Congress before the two-thirds threshold is reached.<sup>114</sup>

This theoretical conclusion is consistent with traditional multi-government convention practice. The power of a state to rescind its resolutions, offers, and ratifications was well-established by the time Article V was adopted, ending only when the culmination of a joint process was reached. The historical record contains

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<sup>112</sup> See *supra* § 3.7 for the deliberative nature of Article V assemblies.

<sup>113</sup> *Coleman v. Miller*, 307 U.S. 438 (1939) (stating that congressional decisions against rescission will be respected); *Opinion of the Justices*, 107 A. 673 (Me. 1919). *But see Freeman*, 529 F. Supp. at 1141 (noting that Congress has not come to a definitive conclusion on rescission of ratifications).

<sup>114</sup> Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 712 (2011), *reprinted infra* § 5.2; *Freeman*, 529 F. Supp. 1107 (holding that ratifications can be rescinded until the three-fourths minimum is reached).

specific examples of rescission of convention applications and calls.<sup>115</sup>

**§ 3.8.6. *Unrescinded Applications Do Not Grow “Stale” with the Passage of Time.***<sup>116</sup>

Some have argued that applications automatically become “stale” after an unspecified period of time, and no longer count toward a two-thirds majority. However, there is no evidence from the Founding Era or from other American practice implying that applications become stale automatically or that Congress can declare them to be so. On the contrary, during the constitutional debates, participants frequently noted with approval the Constitution’s general lack of time requirements in the amendment process. Moreover, the ministerial nature of the congressional duty to call a convention and Congress’s role as the agent for those legislatures in this process, suggests the opposite. Time limits are for principals, not agents, to impose. Therefore, if a state legislature believes its application to be stale, that legislature may rescind it.

The argument that applications can become stale traditionally has been buttressed by a 1921 Supreme Court case, *Dillon v. Gloss*,<sup>117</sup> which suggested that *ratifications*, to be valid, must be issued within a reasonable time of each other. Of course a rule pertaining to ratifications does not necessarily pertain to applications, and this was certainly true of the rationale behind the *Dillon* court’s statement.<sup>118</sup> Moreover, subsequent events have removed the prop for that statement, even as to

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<sup>115</sup> E.g., Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 666 (2013), *reprinted infra* § 5.1.

<sup>116</sup> This section is based largely on Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 712–14 (2011), *reprinted infra* § 5.2, but also includes new information.

<sup>117</sup> 256 U.S. 368 (1921).

<sup>118</sup> The “staleness” discussion in *Dillon* was based partly on presumed congressional power to set ratification time limits as an incident of its power to choose one of two “Mode[s] of Ratification.” However, congressional authority to call a convention for proposing amendments is narrower than its authority over ratification: The latter is partly discretionary, the former is purely ministerial.

ratifications: The *Dillon* language was predicated upon the court's doubt that proposed amendments could survive a very long ratification period.<sup>119</sup> That doubt was dispelled, however, by the universally-recognized adoption of the Twenty-Seventh Amendment based on ratifications stretching over two centuries. In any event, the courts have edged away from the "staleness" rationale of *Dillon*.<sup>120</sup>

An additional factor against the "staleness" contention is that there is no appropriate umpire—other than the issuing state legislature—to judge the issue. It is not resolvable by the courts for lack of "judicially manageable standards,"<sup>121</sup> and for Congress to judge would be to invite abuse by interjecting that body into a process designed to bypass it. Thus, in the final analysis, the only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or ratification) to be outdated, the legislature may rescind it, as many have done.

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<sup>119</sup> *Dillon*, 256 U.S. at 375.

<sup>120</sup> *Dillon* upheld the limit in the Eighteenth Amendment as incidental to the power to fix the mode of ratification, but the text of the amendment indicates that the limit was part of the original proposal itself. See *United States v. Thibault*, 47 F.2d 169, 169 (2d Cir. 1931) (reproducing the amendment's text). Since *Dillon*, the courts have corrected the basis on which the congressionally imposed seven-year ratification limit was justified. Thus, in *Coleman v. Miller*, 307 U.S. 438, 454 (1939) the Court stated that "[w]e have held that the Congress *in proposing an amendment* may fix a reasonable time for ratification." (Emphasis added); see also *United States v. Gugel*, 119 F. Supp. 897, 900 (E.D. Ky. 1954) (stating that time for ratification is not important "unless a period of limitation is fixed by the Congress *in the act submitting the amendment to the states*"—that is, in the proposal). In *Idaho v. Freeman*, 529 F. Supp. 1107, 1153 (D. Idaho 1981), *judgment vacated as moot sub nom. Carmen v. Idaho*, 459 U.S. 809 (1982), the court reported the original *Dillon* rationale, but noted that the time period in the proposed amendment before it was part of the congressional proposal itself.

<sup>121</sup> *Coleman*, 307 U.S. 438 (holding that there are no judicial standards for determining what time is reasonable); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

### **§ 3.9. *The Congressional Role in Calling the Convention***

#### **§ 3.9.1. *The Meaning of “Call”***

Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments. . . .” This Section 3.9 and its subsections discuss what it means for Congress to “call” a convention, the content of a call, the powers Congress enjoys as incidental to calling, and when Congress must issue a call.

The courts tell us that the terms of Article V are defined by historical usage.<sup>122</sup> That usage enables us to determine what it means for Congress to “call” a convention of the states.<sup>123</sup>

Between 1689 and Independence in 1776, American colonies met in convention at least twenty times. From 1776 through 1787, the newly independent states met in convention eleven times, including general conventions<sup>124</sup> in Philadelphia in 1780 and 1787. Precipitating each gathering was an invitation to meet. Some invitations were issued by the Continental Congress or by prior conventions, but most came from individual states seeking to meet with other states. For example, the Constitutional Convention was not, as commonly believed, the product of a congressional resolution, but the result of invitations extended in November 1786 by Virginia and New Jersey.<sup>125</sup>

The usual word for such an invitation was “call,” although sometimes the word “application” served the same purpose. In fact, in the parlance of the time an application was merely a petition or address, so a call really was one kind of

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<sup>122</sup> *Supra* § 3.5.

<sup>123</sup> For the characterization, by the Founding Generation and by the Supreme Court, of an Article V convention as a “convention of the states,” see *supra* §§ 3.1, 3.2.4.

<sup>124</sup> *Supra* § 3.1 (distinguishing between partial and general conventions). This survey of historical practice draws on Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013) [hereinafter Natelson, *Conventions*], reprinted *infra* § 5.1.

<sup>125</sup> See Natelson, *Conventions*, at 674–80, for a general discussion of the origins and procedure of the Constitutional Convention.

application.

In 1785, Massachusetts unsuccessfully asked Congress to issue a call, and referred to its own request as an “application.”<sup>126</sup> In framing Article V the drafters tried to resolve issues that prior practice left unclear,<sup>127</sup> and in this instance they adopted the terminology and procedure employed in 1785 by Massachusetts. Thus, the triggering petitions were to be “applications,” the invitation was to be the “call,” the submission of applications from two-thirds of the states would render the call mandatory, and the calling entity was to be Congress.

### § 3.9.2. *Contents of the Call*

The courts tell us that Article V terminology is defined by historical usage.<sup>128</sup> By examining calls from Founding-Era multi-state conventions, we can determine the contents of an Article V call.<sup>129</sup>

Entirely typical is the 1777 call by the Continental Congress for two multi-state conventions to deal with the problem of inflation during the Revolutionary War. Congress asked that one convention take place in York Town, Pennsylvania and another occur in Charleston, South Carolina. The call for both was as follows:

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pennsylvania [sic], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pennsylvania, on the 3d Monday in March next, 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:

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<sup>126</sup> See *id.* at 666–67.

<sup>127</sup> *Id.* at 689–90.

<sup>128</sup> *Supra* § 3.5.

<sup>129</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013) [hereinafter Natelson, *Conventions*], reprinted *infra* § 5.1, contains more than a dozen Founding-Era calls.



That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown [*sic*], in South Carolina, on the first Monday in May next. . . .<sup>130</sup>

This call designated the states invited and fixed the time, place, and purpose of the meeting. Some other Founding-Era calls included provisions for notifying the invitees and, if the calling agency was a state, that state's designation of its own commissioners. (Illustrative of the latter practice is the November 23, 1786 Virginia legislation that called the Constitutional Convention.)<sup>131</sup> However, Founding-Era calls did not try to control the composition, rules, or conduct of the convention beyond designating time, place, and purpose. To reassure readers on this point, the text of several calls is reproduced below in Section 3.9.7.

Massachusetts made two efforts to go beyond the “time, place, and purpose” trilogy, but both were unsuccessful. The call to the 1765 Stamp Act Congress asked that state delegations be “Committees” from the *lower houses* of the various colonies. The reason was that most of the colonial upper houses were controlled, directly or indirectly, by the Crown. Several colonies failed to follow this prescription, and the convention seated each committee regardless of how selected.<sup>132</sup> Massachusetts' 1783 invitation for a tax convention at Hartford sought

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<sup>130</sup> *Id.* at 645.

<sup>131</sup> *See infra* § 3.9.7 (reproducing the Virginia call).

<sup>132</sup> C.A. WESLAGER, *THE STAMP ACT CONGRESS* (1976). The call itself is reproduced on pages 181–82. The New York commissioners were selected by the legislature's committee of correspondence, *id.* at 81, and the Delaware commissioners by a rump of former legislators. *Id.* at 93–99.

One might read the call of Connecticut for the 1780 Boston convention as seeking to prescribe how some of the other states appointed their commissioners. However, that language probably represents merely an understanding of which state legislatures were in session and which ones were in recess. In any event, the result was the same as it was for the Stamp Act Congress: states appointed commissioners as they pleased, and all were seated. The call for the 1780 Boston Convention is found

to dictate that the convention act, “by the majority of the delegates so to be convened” rather than by a majority of states. However, two of the four states invited refused to participate, and Massachusetts was forced to rescind.<sup>133</sup> Thus, by the time the Constitution was written, established custom held that a convention call could prescribe to the states and the convention no more than the “time, place, and purpose” trilogy.

One may contrast this trilogy with the “time, place, and manner” language common in Founding-Era election law, and appearing in the Constitution itself.<sup>134</sup> Both phrases share the terms “time” and “place,” but the *manner* of election differs from the *purpose* of a convention. When a Founding-Era legislature determined the “manner of election,” it described the means: the rules by which electors were to make their choices.<sup>135</sup> The “purpose,” on the other hand, described the goal of the process rather than the means. In multi-state convention practice, the means—the rules of decision—were left to the participants: the state legislatures and their respective representatives in convention assembled.

In 1861, Virginia called a general convention of the states to try to craft a compromise to avoid the Civil War. This Washington Conference Convention was essentially a fraternal twin of an amendments convention.<sup>136</sup> The operative language of the call was as follows:

Resolved, That on behalf of the commonweath [*sic*] of Virginia,  
an invitation is hereby extended to all such States, whether  
slaveholding or non-slaveholding, as are willing to unite with Virginia

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in PROCEEDINGS OF A CONVENTION OF DELEGATES FROM SEVERAL OF THE NEW-ENGLAND STATES, HELD AT BOSTON, AUGUST 3–9, 1780, at 53–55 (Franklin B. Hough ed., 1867), and discussed in Natelson, *Conventions*, at 659–60.

<sup>133</sup> Natelson, *Conventions*, at 666.

<sup>134</sup> U.S. CONST. art. I, § 4, cl. 4 (“Times, Places and Manner of holding Elections”).

<sup>135</sup> Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010).

<sup>136</sup> See *infra* § 3.14.2 for an explanation of the relative importance of the Washington Conference Convention.

in an earnest effort to *adjust the present unhappy controversies*, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slaveholding States adequate guarantees for the security of their rights, to appoint commissioners to meet on the *fourth day of February next*, in the *City of Washington*, similar commissioners [sic] appointed by Virginia, to consider, and if practicable, agree upon some suitable adjustment.<sup>137</sup>

As the italicized language indicates: time, place, and purpose.

### **§ 3.9.3. *Congressional Powers Incidental to the Call***

Unlike the Articles of Confederation, the Constitution conveyed powers incidental to those enumerated. The incidental power doctrine is discussed above in Section 3.5. Essentially, it holds that when construing enumerated powers one should include certain subordinate powers tied to the enumerated powers by custom or necessity. The doctrine is a way of fully effectuating the intent of those who adopted an instrument.

Because incidental powers are subordinate, they cannot be as important as their principals<sup>138</sup>—a point reinforced by Chief Justice John Roberts in a 2012 case.<sup>139</sup> Moreover, as Chief Justice John Marshall observed, authority incidental to a constitutional grant must be consistent with the “spirit” of the Constitution.<sup>140</sup> In other words, a power incident to an express grant cannot subvert the purpose of the grant.

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<sup>137</sup> A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 9 (L.E. Chittenden ed., 1861) (emphasis added).

<sup>138</sup> See *supra* § 3.5.

<sup>139</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591–92 (2012).

<sup>140</sup> McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (stating that means must “consist with the letter and spirit of the constitution”).

Article V grants enumerated powers to Congress, to potential amendments conventions, to state legislatures, and to potential state ratifying conventions. In accordance with the courts' direction that we look to historical practice,<sup>141</sup> certain historical incidents follow these grants. Thus, state legislatures enjoy incidental authority to define the subject of their applications and to appoint and instruct their commissioners. State legislatures enjoy the incidental power of arranging for ratifying conventions. Conventions may adopt their own rules.<sup>142</sup>

Historical practice tells us that setting the initial time and place of meeting and describing the subject matter is part of the prerogative to "call."<sup>143</sup> This empowers Congress, serving for this purpose as an agent of the state legislatures, to count the number of applications addressing any one topic or group of topics.<sup>144</sup> Congress certainly may provide a place to store applications and to keep related records, to define the convention's subjects in the way most faithful to the applications, to respond to state requests for relevant information, and to notify the appropriate state officials of the call.<sup>145</sup>

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<sup>141</sup> See *supra* § 3.5.

<sup>142</sup> See *supra* § 3.5; *infra* § 3.14.

<sup>143</sup> See *supra* § 3.9.2.

<sup>144</sup> See *infra* § 3.9.6 (discussing how Congress counts applications).

<sup>145</sup> In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court seemed to take a more expansive view of Congress's incidental powers under Article V by upholding its time limit for ratification in the Eighteenth Amendment as incidental to the power to fix the mode of ratification. However, the text of the amendment indicates that the limit was part of the original proposal itself. See *United States v. Thibault*, 47 F.2d 169, 169 (2d Cir. 1931) (reproducing the amendment's text). Since *Dillon*, the courts have corrected the basis on which the congressionally imposed seven-year ratification limit was justified. Thus, in *Coleman v. Miller*, 307 U.S. 438, 454 (1939) the Court stated that "[w]e have held that the Congress *in proposing an amendment* may fix a reasonable time for ratification." (Emphasis added); see also *United States v. Gugel*, 119 F. Supp. 897, 900 (E.D. Ky. 1954) (stating that the time of ratification is not important "unless a period of limitation is fixed by the Congress *in the act submitting the amendment to the states*"—that is, in the proposal) (emphasis added). In *Idaho v. Freeman*, 529 F. Supp. 1107, 1153 (D. Idaho 1981), judgment vacated as moot sub nom. *Carmen v. Idaho*, 459 U.S. 809 (1982), the court reported the original *Dillon* rationale, but noted that the time

On the other hand, Congress's authority incidental to the call is quite restricted. There are at least three reasons for so concluding. First, historically a call's prescriptions for a convention were limited to time, place, and purpose.<sup>146</sup> Second, incidental powers may not subvert the purpose of a grant. The overriding purpose of the state application and convention procedure is to bypass Congress.<sup>147</sup> If Congress could structure the convention, this would largely defeat its overriding purpose. Third, other actors in the process enjoy incidental authority as well, so Congress may not do anything to intrude upon that authority. If Congress were to dictate to state legislatures how select commissioners, then Congress would invade the incidental authority of state legislatures. If Congress were to set rules for the convention, it would intrude on the convention's incidental authority to adopt its own rules.

**§ 3.9.4. *The Necessary and Proper Clause Does Not Authorize Congress to Structure the Convention.***

The Necessary and Proper Clause appears in Article I, Section 8 at the end of an (incomplete) list of congressional powers. It reads:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>148</sup>

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period in the proposed amendment was part of the congressional proposal itself.

In any event, the scope of powers incidental to selecting the mode of ratification does not determine the scope of powers incidental to calling a convention, particularly since the purpose of the convention is to bypass Congress.

<sup>146</sup> See *supra* § 3.9.2.

<sup>147</sup> See *supra* § 3.3.

<sup>148</sup> U.S. CONST. art. I, § 8, cl. 18.

In 1963, Yale University law professor Charles Black wrote an article fiercely opposing the application-and-convention procedure.<sup>149</sup> Without doing much research on the matter, Black argued that upon receipt of sufficient applications Congress could employ the Necessary and Proper Clause to structure the convention as it pleased.<sup>150</sup> In 1967 and twice thereafter, Senator Sam Ervin (D–N.C.), who professed himself a friend to the process, introduced legislation by which Congress would have fixed the method by which states adopt applications, prescribed how long they would last, dictated the procedure for selecting delegates, apportioned those delegates among the states, and imposed rules upon the convention, including the margin of votes necessary for making decisions.<sup>151</sup> From time to time, members of Congress have introduced similar bills. None has passed.<sup>152</sup>

Reliance on the Necessary and Proper Clause to justify bills of this kind assumes a certain stupidity on the part of the Constitution’s Framers: that is, it assumes that the Framers drafted the Necessary and Proper Clause broadly enough to enable Congress to control a process designed to circumvent itself. In fact, the Framers did no such thing. Such bills are unconstitutional for at least three reasons.

First, the Necessary and Proper Clause does not apply to Article V. By its terms, it applies only to powers listed in Article I, Section 8 (which are not pertinent to Article V) and to powers vested (1) in the “Government of the United States” and (2) in “Departments” and “Officers” of that government.

As pointed out earlier, when Congress, state legislatures, and conventions act

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<sup>149</sup> Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).

<sup>150</sup> Professor Black may have been encouraged by the Supreme Court’s use of the Clause in expanding the Commerce Power. However, the Court generally has not applied the Clause that way in other contexts.

<sup>151</sup> Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1967).

<sup>152</sup> See THOMAS H. NEALE, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS (Cong. Research Serv., Mar. 7, 2014) (discussing these efforts).

in the amendment process, they do so not as “Department[s]” of government, but as ad hoc assemblies.<sup>153</sup> Indeed, Article V is only one of several provisions in the Constitution that delegates tasks to persons or entities that do not act as agents of the U.S. Government. For example, Article I, Section 2 confers authority on state governors to issue writs of election to fill vacancies in the House of Representatives. Article I, Section 4 grants to the state legislative authorities the power to regulate congressional elections.<sup>154</sup> Before the Seventeenth Amendment, Article I, Section 3 empowered state legislatures to elect U.S. Senators. Article II, Section 1, coupled with the Twelfth Amendment, empowers the Electoral College to select the President. By its wording, the Necessary and Proper Clause does not extend to such independent actors.

To be sure, all of these persons and entities receive their authority from the Constitution and therefore are said to exercise “federal functions.”<sup>155</sup> But exercise of a federal function does not render an independent actor part of, or an agent of, the U.S. Government.<sup>156</sup>

For this reason the Necessary and Proper Clause does not encompass the independent assemblies empowered by Article V, even if, like Congress, they serve as part of government when acting in other capacities.<sup>157</sup>

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<sup>153</sup> *Supra* §§ 3.6, 3.7.

<sup>154</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015) (so noting, and distinguishing this power from the grant under Article V to state legislatures acting alone).

<sup>155</sup> *Supra* § 3.6; *see also* *Ray v. Blair*, 343 U.S. 214 (1952).

<sup>156</sup> *Ray*, 343 U.S. at 224–25 (“The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution.”).

<sup>157</sup> The non-applicability of the Necessary and Proper Clause help explains why the Times, Places and Manner Clause (also called the Elections Clause) includes a specific term permitting Congress to act in the area. U.S. Const., art. I, § 4, cl. 1.

Another grant of power to Congress to act in an independent capacity—that is, outside its normal role as the legislature of the U.S. Government—is the Twelfth Amendment, which provides for the

Second, even if the Necessary and Proper Clause did encompass those assemblies, the Clause would not be broad enough to enable Congress to structure the convention. The Necessary and Proper Clause does not actually bestow any authority: it is a rule of interpretation designed to tell the reader that, unlike the Articles of Confederation, the Constitution conveys incidental powers to Congress.<sup>158</sup> Yet powers incidental to the call are quite limited.<sup>159</sup> Indeed, it could hardly be otherwise. The Ervin bills would have changed a state-driven process into one in which Congress intruded at the application stage and completely muscled out the state legislatures at the convention stage. No power may be incidental to an express provision that contradicts the basic purpose of its principal.<sup>160</sup>

Third, a line of twentieth century cases holds that government legislation cannot control the amendment process.<sup>161</sup>

Such considerations strongly suggest that the courts would not permit Congress to interfere in the way contemplated by the Ervin bills. However, history suggests that litigation on the subject is unlikely. When Congress designated state conventions as the ratifying mechanism for the Twenty-First Amendment, some people suggested that Congress structure the ratifying conventions. Amid widespread objection that this was outside congressional authority or at least impractical, Congress left the task to the states, which managed the chore

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Senate and House of Representatives to serve as witnesses to the count of electoral votes in presidential elections.

<sup>158</sup> See generally Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 84, 97–101 (2010) (discussing the adoption and meaning of the Clause); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (quoting James Madison for the proposition that “the Clause is ‘merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.’”) (alteration in original).

<sup>159</sup> *Supra* § 3.9.3.

<sup>160</sup> *Supra* § 3.9.3.

<sup>161</sup> *Supra* notes 65 and 70.



themselves.<sup>162</sup> This precedent, coupled with Congress’s repeated failure over several decades to adopt the Ervin bills or comparable measures, suggests that the states will be left free to constitute an amendments convention as they choose.

**§ 3.9.5. *If Thirty-Four Applications on the Same Subject Are Received, the Call Is Mandatory.***

The Constitution provides that Congress “shall call” an amendments convention on application by two-thirds of the states (currently thirty-four). The language is obviously mandatory, and several leading Founders specifically represented it as such.<sup>163</sup> Historical usage informs us, however, that an application or call can limit the subject matter of the proposed gathering: virtually all applications and calls, before and during the Founding Era, had done so. Applications or calls for a convention dealing with one topic have never been treated together with applications or calls for a convention on another topic. For example, in 1786 there were simultaneous calls for a commercial convention and a navigation convention, but no one thought of aggregating them.<sup>164</sup> This background indicates that before Congress is obliged to call a convention, there must be thirty-four applications that overlap as to subject. The kind of overlap required is examined below in Section 3.9.6.

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<sup>162</sup> Everett Somerville Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005 (1935).

<sup>163</sup> Quotations are collected in Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 734–35 & nn.275–80 (2011), reprinted *infra* § 5.2.

<sup>164</sup> The Navigation Convention was to be a meeting of Pennsylvania, Delaware, and Maryland to discuss a canal and improvements in the waterways leading to Philadelphia and Baltimore. It never met. The Annapolis Commercial Convention met in 1786, and issued a sort of application recommending to the governments of the states represented at the convention that they call the Constitutional Convention. On the Navigation Convention, see Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 668–70 (2013), reprinted *infra* § 5.1.

We normally think of Congress and state legislatures as discharging legislative functions, the President as discharging executive functions, and the courts as discharging judicial functions. As every lawyer knows, the Constitution's separation of powers is not always so neat. The President's veto is an exercise of legislative power. The Senate's review of his nominations is executive. Congressional impeachment proceedings are judicial. The powers exercised under Article V are *sui generis*.

The structure of the Constitution implies—and the courts tell us directly—that when Congress, other legislatures, and conventions operate under Article V they discharge functions different from their usual roles, and that they serve as ad hoc agencies rather than as branches or departments of their respective governments.<sup>165</sup> Thus, when Congress proposes amendments or chooses a mode of ratification, it acts as an agent of the people rather than of the federal government,<sup>166</sup> just as a state legislature ratifying an amendment serves as an agent of the people rather than as a branch of state government.

The Framers selected Congress to issue the call because it was a convenient central entity. The mandatory duty to call is clearly not a legislative function, but an executive one. It is not exercised on behalf of the federal government, but on behalf of the applying state legislatures. It is, moreover, ministerial in nature, and therefore should be enforceable judicially.<sup>167</sup> In other words, if Congress refuses to undertake its constitutional obligation, judicial relief—such as mandamus, a declaratory judgment, or an injunction—can compel it to do so.<sup>168</sup>

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<sup>165</sup> *Supra* § 3.6.

<sup>166</sup> *United States v. Sprague*, 282 U.S. 716, 733 (1931).

<sup>167</sup> Ministerial duties and constitutional rules, even on Congress, are enforceable by the courts. *Cf.* *Powell v. McCormick*, 395 U.S. 486 (1969) (issuing a declaratory judgment for reinstatement of a member of Congress denied his seat); *Roberts v. United States*, 176 U.S. 222 (1900) (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

<sup>168</sup> Absolute refusal by both Congress and the courts to issue, or require issue, of the mandated call would, of course, be unconstitutional behavior, and presumably would require an extra-constitutional response. For example, the states might call a plenipotentiary convention outside

### § 3.9.6. *Counting Applications*

Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.” As Section 3.9.5 pointed out, Founding-Era evidence demonstrates that when “two thirds of the several States” apply, the duty to call arises only when they apply on the same general subjects.

To be sure, state applications are seldom identical. Congress will need to judge which applications should be aggregated. This is not inconsistent with the ministerial, mandatory nature of the congressional task, since even ministerial duties may call for exercise of discretion.<sup>169</sup> But because the duty to call is mandatory and because the application and convention process is designed to bypass Congress, in this case the exercise of discretion should be subject to heightened judicial scrutiny. This conclusion is strengthened by the fact that a refusal increases congressional authority, thereby creating a conflict of interest.

So long as thirty-four applications, however worded, agree that the convention is to consider a particular subject and do not include language fundamentally inconsistent with each other, the count may be easy. Aggregation may be facilitated by a recent trend by which an applying legislature provides explicitly that its own applications should be aggregated with designated applications from other states.

In this area, history argues that flexibility is appropriate and that hyper-technical readings are not. Founding-Era resolutions calling conventions and empowering commissioners almost never matched identically—but many conventions were held.<sup>170</sup>

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Article V. Extra-constitutional responses are not within the scope of this treatise.

<sup>169</sup> *Roberts*, 176 U.S. 222 (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

<sup>170</sup> See generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013), reprinted *infra* § 5.1.

Thus, an application calling for an amendment limiting “outlays” to expected revenue surely should be counted with an application for an amendment limiting “appropriations” to expected revenue. These, in turn should be aggregated with applications calling merely for a convention to consider a “balanced budget amendment.”

More difficult problems arise in four separate situations:

- (1) All applications seem to address the same subject, but some are inherently inconsistent with others.
- (2) Some applications prescribe a convention addressing Subject A while others prescribe a convention addressing both Subject A and unrelated Subject B.
- (3) Some applications prescribe a convention addressing Subject A (e.g., “a balanced budget amendment”) while others demand one addressing Subject X, where Subject X encompasses Subject A (e.g., “fiscal restraints on the federal government”).
- (4) Some applications prescribe a convention addressing Subject A and others call for a convention unlimited as to topic.

There is no direct judicial authority interpreting the Constitution on these points, and little, if any, reliable scholarly analysis of them. We do know, however, that the Founders expected the document to be interpreted in the larger common law context, and that in interpreting the document themselves they freely resorted to analogies from both private and public law.<sup>171</sup>

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<sup>171</sup> For example, during the ratification process, James Iredell, a leading North Carolina attorney and subsequently associate justice of the Supreme Court, likened the Constitution’s scheme of enumerated powers to a “great power of attorney,” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 148–49, (Jonathan Elliot ed., 2d ed. 1827) [hereinafter ELLIOT’S DEBATES], while Edmund Pendleton explained the Constitution’s delegation of powers by referring to (a) conveyance of a term of years, (b) conveyance of a fee tail or life estate, (c) conveyance of a fee simple, and (d) agency. Letter from Edmund Pendleton to Richard

In this instance, the closest analogue may be the law of contracts. Nearly all the Founders were social contractarians, and they frequently referred to the Constitution as a “compact.”<sup>172</sup> The application process itself is closely akin to the kind of group offer and acceptance that leads to such legal relationships as partnerships and joint ventures. Like offers, applications may be rescinded. Like offers, they become binding on the parties when the conditions for acceptance are satisfied. Contract principles provide some guidance for all four of the situations outlined above.<sup>173</sup>

The first situation arises when all applications seem to address the same subject, but some are inherently inconsistent with others. For example, the thirty-three applications issued in the 1960s for a convention to partially overturn the Supreme Court’s reapportionment decisions were divided between those authorizing any amendment on the subject and those authorizing *only* an amendment applying to one house of each state legislature. Similarly, many twentieth century balanced budget applications attempted to restrict the convention to verbatim text, but the text prescribed by different applications varied.<sup>174</sup> A 2010 Florida application (superseded by a broader one in 2014) applied for a balanced budget amendment but required that it comply with a long list of conditions not appearing in other applications.

Both contract principles and common sense dictate that applications with

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Henry Lee (Jun. 14, 1788), *reprinted in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1625–26 (Merrill Jensen et al. eds., 1976).

<sup>172</sup> The examples are many. *See, e.g.*, 3 ELLIOT’S DEBATES, at 384, 445, 591 (quoting Patrick Henry, an anti-federalist, at the Virginia ratifying convention); *id.* at 467 (quoting Edmund Randolph, a federalist, at the same convention).

<sup>173</sup> The contract analogy occurred to me in part because I did extensive work in contracts while in law practice and occasionally taught the subject as a law professor. More importantly, in writing this I have had the advantage of guidance by Scott Burnham, the Frederick N. & Barbara T. Curley Professor of Law at Gonzaga University, who is one of the nation’s premier scholars on the law of contracts.

<sup>174</sup> Aside from aggregation issues, such applications may not be valid. *See supra* § 3.8.4.

fundamentally inconsistent terms should not be aggregated together: According to the classical “mirror image” rule, the offer and the acceptance must match in order to form a contract.<sup>175</sup>

The second situation arises when some applications ask for a convention addressing Subject A while others ask for a convention addressing both Subject A and unrelated Subject B. At one time I believed those applications could be aggregated as to Subject A, but that result is inconsistent with contract principles. In this case, as in the first situation, the applications seek quite different conventions. If the convention were to address only Subject A, then the expectations of one group of applicants would not be met; but if a convention were empowered to address both subjects, it would fail to meet the expectations of the other group. Put another way, the “offer” is materially different from the purported “acceptance.”<sup>176</sup>

This non-aggregation conclusion is supported by correspondence between states negotiating the 1776–1777 Providence Convention. When Massachusetts called a convention to consider paper money and public credit, Connecticut (after an initial rejection) sought to accept on the basis of paper money, public credit, and military affairs. The response from Massachusetts president James Bowdoin indicated that an additional subject would be welcome, but stopped short of committing himself until he had seen Connecticut’s proposal in writing.<sup>177</sup>

Of course, just as an offeror is the master of his offer, a state is the master of its application. Certainly a state is free, when applying for a convention on two unrelated subjects, to specify that its application should be aggregated with others limited to either subject.

In the third situation, one set of applications contemplates a convention addressing Subject A while another set contemplates a convention addressing

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<sup>175</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 58 (1981).

<sup>176</sup> If, however, the wording of an “A plus B” application was such that the addition of B was a mere inquiry or suggestion, then presumably it could be aggregated with those applications addressing only Subject A. *Cf. id.* § 39.

<sup>177</sup> Natelson, *Conventions*, at 640–42.

Subject X, which encompasses Subject A. For example, the first group may seek a balanced budget convention while the second seeks fiscal restraints on the federal government. In this case, contract principles argue for aggregation on Subject A.<sup>178</sup>

Admittedly, the states applying for “fiscal restraints” might have preferred alternatives other than a balanced budget amendment. However, they employed language broad enough to comprehend a balanced budget amendment. They could have defined the subject as “fiscal restraints on the federal government, *excluding* a balanced budget amendment.” But they did not.

The conclusion of aggregability in the third situation is strengthened by a prudential factor: Any state that, faced with the choice between a balanced budget amendment and no restraints at all, would prefer no restraints at all, still retains multiple remedies. It may:

- Rescind or amend its application before the thirty-four state threshold is reached;
- Join at the convention with the non-applying states in voting against a balanced budget proposal; and
- Join with non-applying states in refusing to ratify.

In the fourth situation, some applications address Subject A and others petition for an “open” or unlimited convention. In this case, the question of aggregation has no *a priori* answer.

On one side, an advocate for aggregation might contend that this fourth scenario is really a version of the third, and that therefore a convention should be held on Subject A. An advocate for aggregation might assert that when a legislature passes an application for a convention to consider any and all topics, the legislature is chargeable with recognizing that the convention may do so. If the legislature objects to the content of other applications, it may resort to the same remedies

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<sup>178</sup> As Professor Burnham points out: in the absence of qualifying language “if the offeror said, for example, ‘I offer you any of my household furniture,’ and the offeree responded, ‘I’ll buy the couch,’ there is no doubt a contract was formed with respect to the couch.”

available to a dissenting state in the third situation: rescission, amendment, action at the convention, and refusal to ratify.

An opponent of aggregation might respond that in this situation, unlike the last, there is no subject-matter nexus between the two groups of applications. Everyone understands that “fiscal restraints” may include a balanced budget amendment; indeed, at the state level a balanced budget rule is a common kind of fiscal restraint. But a legislature adopting an unlimited application may have had completely different issues on its collective mind, or it may have contemplated reform only in the context of a wider constitutional examination.

Although there is no *a priori* answer to the aggregation issue in this instance, the wording of the applications themselves may offer guidance.<sup>179</sup> For example, in March, 1861, the Illinois legislature adopted an unlimited application that appears still to be valid. Its gist was that if dissatisfaction is sufficiently widespread to induce enough other states, when counted with Illinois, to apply for a convention, then for the sake of unity Illinois will meet with them.<sup>180</sup> This statement evinces a

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<sup>179</sup> Professor Burnham notes, “As a matter of interpretation, we must again determine what the offeror [i.e., an applying state legislature] intended. The offeror could be saying in effect, ‘I am open to discuss any topic,’ leaving the offeree to choose the topic; alternatively, the offeror could be saying in effect, ‘I am open to discuss only all topics,’ barring the offeree from narrowing the chosen topics.”

<sup>180</sup> The application provides in part:

WHEREAS, although the people of the State of Illinois do not desire any change in our Federal constitution, yet as several of our sister States have indicated that they deem it necessary that some amendment should be made thereto; and whereas, in and by the fifth article of the constitution of the United States, provision is made for proposing amendments to that instrument, either by congress or by a convention; and whereas a desire has been expressed, in various parts of the United States, for a convention to propose amendments to the constitution; therefore,

*Be it resolved by the General Assembly of the State of Illinois, That if an application shall be made to Congress, by any of the States deeming themselves aggrieved, to call a convention, in accordance with the constitutional provision aforesaid, to propose amendments to the constitution of the United States, that the Legislature of the State of Illinois will and does hereby concur in making such application.*



willingness to convene with other states, whatever they wish to discuss.

As the date indicates, Illinois' application was a response to suggestions that the states use Article V to avoid the Civil War. But the application's language is not limited to that situation and its general principle extends well beyond any one crisis. The application seems aggregable with all others.

### **§ 3.9.7. *Historic Examples of Multi-State Convention Calls***<sup>181</sup>

#### ***Congressional Call to York Town & Charleston Price Conventions (1777)***<sup>182</sup>

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pennsylvania [sic], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pennsylvania, on the 3d Monday in March next, 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:

That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown [sic], in South Carolina, on the first Monday in May next. . . .<sup>183</sup>

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1861 Ill. Laws 495.

<sup>181</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615, 668–70 (2013) [hereinafter Natelson, *Conventions*], reprinted *infra* § 5.1, includes details from the calls for numerous other conventions as well.

<sup>182</sup> For more information on the abortive York Town and Charleston Price Conventions, see Natelson, *Conventions*, at 644–47.

<sup>183</sup> 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 124 (Worthington Chauncey Ford et al. eds., 1907)

***Massachusetts' Call to Springfield Convention (1777)***<sup>184</sup>

The General Assembly of this state, taking into their consideration the state of the bills of credit emitted by this and the neighboring governments, and finding the measures that have already been adopted . . . have not effectually answered the purpose of supporting the credit of said bills . . . have chosen a committee to meet such committees, as may be appointed by the states of New Hampshire, Rhode Island, Connecticut and New York, on the 30<sup>th</sup> day of July next, at the town of Springfield, in the county of Hampshire, within this state, to confer together upon this interesting subject, and consider what steps can be taken effectually to support the credit of the public currencies, and prevent their being counterfeited; and to confer upon such other matters as are particularly mentioned in the resolve enclosed. . . .<sup>185</sup>

***Virginia's Combined Call and Authorization of Commissioners for the Constitutional Convention (1787)***<sup>186</sup>

Whereas the Commissioners who assembled at Annapolis on the fourteenth day of September last for the purpose of devising and reporting the means of enabling Congress to provide effectually for the

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<sup>184</sup> For more information on the Springfield Convention of 1787, see Natelson, *Conventions*, at 647–49.

<sup>185</sup> 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 599 (Charles J. Hoodly ed., 1894) (reproducing Massachusetts resolution).

<sup>186</sup> Virginia issued the call for the Constitutional Convention on November 23, 1786 in response to the recommendation of the Annapolis Convention. For more information about the call for the Constitutional Convention, see Natelson, *Conventions*, at 674–80. To view the credentials issued by the states to their delegates for the Constitutional Convention, see 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559–86 (Max Farrand ed., 1939) [hereinafter FARRAND'S RECORDS].

Commercial Interests of the United States have represented the necessity of extending the revision of the foederal System to all it's defects and have recommended that Deputies for that purpose be appointed by the several Legislatures to meet in Convention in the City of Philadelphia on the second day of May next a provision which was preferable to a discussion of the subject in Congress . . .

Be It Therefore Enacted by the General Assembly of the Commonwealth of Virginia that seven Commissioners be appointed by joint Ballot of both Houses of Assembly who or any three of them are hereby authorized as Deputies from this Commonwealth to meet such Deputies as may be appointed and authorized by other States to assemble in Convention at Philadelphia as above recommended and to join with them in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress as when agreed to by them and duly confirmed by the several States will effectually provide for the same. And Be It Further Enacted that in case of the death of any of the said Deputies or of their declining their appointments the Executive are hereby authorized to supply such Vacancies. And the Governor is requested to transmit forthwith a Copy of this Act to the United States in Congress and to the Executives of each of the States in the Union.<sup>187</sup>

***Virginia's Call to Washington Conference Convention (1861)***<sup>188</sup>

Resolved, That on behalf of the commonweath [*sic*] of Virginia, an invitation is hereby extended to all such States, whether

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<sup>187</sup> 3 FARRAND'S RECORDS 559–63.

<sup>188</sup> For more information on the Washington Conference Convention, see *supra* note 31 and accompanying text, and *infra* § 3.14.2–.5.

slaveholding or non-slaveholding, as are willing to unite with Virginia in an earnest effort to adjust the present unhappy controversies, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slaveholding States adequate guarantees for the security of their rights, to appoint commissioners to meet on the fourth day of February next, in the City of Washington, similar commissioners [sic] appointed by Virginia, to consider, and if practicable, agree upon some suitable adjustment.<sup>189</sup>

### **§ 3.10. *Selecting Commissioners***

At the convention, each participating state is represented by a “committee” (delegation) of commissioners (delegates). When Article V was adopted, the nearly-universal procedure was for the state legislatures to determine the method for selecting commissioners. (Exceptions were limited to instances when the selection had to be made during the legislative recess.) This practice continued for subsequent conventions as well. Article V indirectly confirms that the method of delegate selection is a prerogative of the state legislature by granting application power to state legislatures, in their capacity not as branches of state government but as Article V assemblies.

During the Founding Era, the legislature usually opted to select the commissioners itself.<sup>190</sup> Among the fifty-five commissioners at the 1787 Constitutional Convention, for example, fifty-four were legislative selections. The sole exception was James McClurg of Virginia. Governor Edmund Randolph

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<sup>189</sup> A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 9 (L.E. Chittenden ed., 1861).

<sup>190</sup> See generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 668–70 (2013), *reprinted infra* § 5.1.

designated Dr. McClurg, a noted physician, pursuant to legislative authorization after the legislature's original choice, Patrick Henry, refused to serve.<sup>191</sup>

A bicameral legislature may choose to elect commissioners by joint vote of both houses, or by seriatim votes. As the McClurg example suggests, however, the legislature may choose a different selection method. During the Founding Era, state legislatures occasionally delegated the choice to the executive or to a legislative committee. A number of states attending the 1861 Washington Conference Convention permitted the governor to nominate commissioners, subject to state senate approval, and commissioners to the 1922 Santa Fe convention all were selected by state governors pursuant to legislative authorization.

In theory, a state legislature could devolve election of commissioners upon the people, voting at large or in districts. This would be unprecedented, however, and probably unwise. The commissioner's job is primarily filled with diplomatic and drafting duties, with basic policy decisions left in the commissioning legislature. The text, history, and applicable case law strongly suggest that the commissioner is also subject to legislative rather than popular instruction. Direct election could create conflicts of interest in that regard. It is even conceivable that, based on Article V case precedent, the courts might not permit direct election.<sup>192</sup>

### **§ 3.11. *Empowering Commissioners***

As their name indicates, commissioners are empowered by a document usually called a *commission*, although the term *credentials* is also used.<sup>193</sup> The commission includes the name of the commissioning authority (in this case, the state legislature or its designee), the name of the commissioner, the method of

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<sup>191</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 562–63 (Max Farrand ed., 1939).

<sup>192</sup> Cf. *Dodge v. Woolsey*, 59 U.S. 331, 348 (1855) (stating that the people “have excluded themselves from any direct or immediate agency in making amendments”).

<sup>193</sup> See generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 668–70 (2013), *reprinted infra* § 5.1.

selection, the assembly to which the commissioner is being sent, and language granting power to the commissioner and defining the scope of that power. When the convention opens, commissioners are expected to present their credentials, usually to a credentials committee, for review. Several forms from prior conventions are included in Section 4.3 below.

### **§ 3.12. *Instructing and Supervising Commissioners***

In prior federal conventions, state officials issuing commissions often supplemented them with additional written instructions.<sup>194</sup> Unlike the commissions, these instructions customarily were secret in order to preserve diplomatic and negotiating leverage. The instructions defined the commissioner's authority with greater precision and informed him what measures he could or could not consider, and what goals to seek. Form instructions are included in Section 4.4 below.

### **§ 3.13. *“No Runaway” Acts and Similar Laws***

Several states have adopted, or considered, measures designed to further minimize the negligible chance that a convention for proposing amendments might exceed its authority. Such measures are not enforceable to the extent they attempt to dictate the structure of the legislature's applications, how it selects its commissioners, and when they may recall them.<sup>195</sup> They also are not enforceable to the extent that they attempt to control the convention's discretion within the scope of its authority.<sup>196</sup> Provisions imposing civil or criminal penalties on commissioners who violate legislative instructions issued immediately before or during the convention probably are valid, however. Even insofar as they are technically

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<sup>194</sup> *E.g.*, Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 631, 636, 638, 658, 663, 679, 687 (2013), *reprinted infra* § 5.1.

<sup>195</sup> *See supra* § 3.7.

<sup>196</sup> *See supra* § 3.7.

invalid, they may serve an educational function, and if an Article V assembly (usually in this case a state legislature) voluntarily operates under them, that assembly may be deemed to have accepted them.<sup>197</sup>

### **§ 3.14. *Convention Rules***<sup>198</sup>

The following discussion of convention rules was the basis for an actual set of model rules prepared in late 2015. Those model rules are available online.<sup>199</sup>

#### **§ 3.14.1. *The Legal Environment***

As discussed in Section 3.5, the courts rely heavily on historical practice when interpreting the words of Article V. This is true both of the Supreme Court<sup>200</sup> and lower courts.<sup>201</sup> The history relied on by the courts includes both the period up to the time the Constitution was ratified and practice subsequent to ratification.

Prominent in historical practice—both before and after the Constitution’s adoption—has been the uniform and exclusive prerogative of Article V assemblies to adopt their own rules.<sup>202</sup> Shortly before he ascended to the Supreme Court, Justice John Stevens, writing for a three-judge federal panel, explicitly recognized this

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<sup>197</sup> See *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (holding that Article V legislature impliedly adopted provisions of state constitution).

<sup>198</sup> The author would like to thank the seasoned lawmakers and other experts who contributed insights into the convention rules process. In the treatment that follows, these people sometimes are referred to as our “advisors.”

<sup>199</sup> *Proposed Convention Rules*, CONVENTION OF STATES, [http://www.conventionofstates.com/proposed\\_rules](http://www.conventionofstates.com/proposed_rules) (last visited May 13, 2016). A printable version of the rules is available at <https://www.i2i.org/wp-content/uploads/2015/01/proposed-rules-2015-1206-clean.pdf>.

<sup>200</sup> *United States v. Sprague*, 282 U.S. 716 (1931); *Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920); see also *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 381 (1798) (following procedure in adopting first ten amendments).

<sup>201</sup> See *supra* § 3.5; see also PAUL MASON, MASON’S MANUAL OF LEGISLATIVE PROCEDURE § 39-6 (Nat’l Conference of State Legislatures, 2010 ed.) [hereinafter MASON’S MANUAL] (“The best evidence of what are the established usages and customs is the rules as last in effect.”).

<sup>202</sup> Accord MASON’S MANUAL §§ 2-1, 10-4, 13-7.

prerogative.<sup>203</sup> The prerogative further extends to the right of a convention to judge the credentials of its delegates.<sup>204</sup> Occasional suggestions that Congress could impose rules on an Article V convention are not well-founded, either in history or law.<sup>205</sup>

The prerogative of conventions to establish their own rules does not mean that each convention acts on a blank slate. Far from it. Many, if not most, multi-state conventions have borrowed their written rules from prior multi-state conventions and from legislative bodies. For example, the rules employed by the Washington Conference Convention of 1861 derived substantially from those governing the 1787 Constitutional Convention.<sup>206</sup> The Nashville Convention of 1850 decided that when one of its own specifically adopted rules did not apply, it would consult Thomas Jefferson's manual of procedure for the United States Senate.<sup>207</sup>

Convention rules are adaptations of a branch of the Anglo-American common law referred to as *parliamentary law*.<sup>208</sup> As the name suggests, parliamentary law owes its origin to the practices of the British Parliament, but over the years it has

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<sup>203</sup> *Dyer v. Blair*, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.) (referring to power of Article V assembly to establish its own rules); *see also* MASON'S MANUAL § 71-1.

<sup>204</sup> *Opinion of the Justices*, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members); *accord* MASON'S MANUAL § 560.

<sup>205</sup> This is an assumption made in THOMAS H. NEILE, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 39 (Cong. Research Serv., Mar. 7, 2014) [hereinafter CRS REPORT], a paper that shows insufficient understanding of history, recent research, or applicable law. For example, it relies on only two of the more than forty reported Article V judicial decisions.

<sup>206</sup> A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 19 (L.E. Chittenden ed., 1861).

<sup>207</sup> RESOLUTIONS, ADDRESS, AND JOURNAL OF PROCEEDINGS OF THE SOUTHERN CONVENTION 26 (Harvey M. Watterson ed., 1850). Jefferson's Manual is now a source for procedure in the U.S. House of Representatives as well. *See* THOMAS JEFFERSON, JEFFERSON'S MANUAL, H.R. DOC. NO. 111-156 (2011), available at <http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112.pdf>.

<sup>208</sup> MASON'S MANUAL § 44-1.



been refined for use in this country by numerous legislative and judicial precedents.<sup>209</sup> Parliamentary law applies to both private and public bodies, including legislatures and conventions.<sup>210</sup> An example of a rule of parliamentary law is that convention decisions are rendered by a majority of those voting.<sup>211</sup>

Although an assembly is free to adopt its own rules, parliamentary law standards govern whenever a specifically adopted rule does not.<sup>212</sup> In the case of a convention, parliamentary law controls (1) before adoption of formal rules<sup>213</sup> and (2) after adoption of formal rules when none of them resolves an issue.<sup>214</sup>

Historically, the formal rules adopted by prior multi-state conventions have been less than comprehensive, leaving most matters to be decided by parliamentary law. Fortunately, that law is readily accessible and easy to ascertain: it is collected in *Mason's Manual of Legislative Procedure*, published by the National Conference of State Legislatures. As explained below, we recommend *Mason's Manual* as a source of guidance in absence of a formal convention rule to the contrary.

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<sup>209</sup> *Id.* §§ 35, 38.

<sup>210</sup> *Cf. id.* §§ 41, 47.

<sup>211</sup> *Id.* §§ 50-1, 51-6, 510-1, 510-4; *see also* Rhode Island v. Palmer (“National Prohibition Cases”), 253 U.S. 350 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.).

Alarmists sometimes demand to know in advance of a convention what the majority necessary for decision will be. A common question is, “Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment?” *See* ROBERT G. NATELSON, PROPOSING CONSTITUTIONAL AMENDMENTS BY A CONVENTION OF THE STATES: A HANDBOOK FOR STATE LAWMAKERS 33–34 (Am. Legislative Exch. Council, 2d ed. 2013), *available at* <http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf> (reproducing text of alarmists’ questions and providing answers).

This question, of course, reveals ignorance of parliamentary common law. Somewhat more surprisingly, a recent Congressional Research Service paper reveals a similar ignorance. *See* CRS REPORT, at 39 (suggesting that a convention majority of two-thirds would be appropriate).

<sup>212</sup> MASON’S MANUAL §§ 32-4, 37.

<sup>213</sup> *Id.* § 39.6.

<sup>214</sup> *Id.* § 37.1.

### § 3.14.2. *Historical Resources*

Before the Constitution was ratified, colonies and states met in convention over thirty times.<sup>215</sup> Since ratification, at least five additional conventions of states have met: Hartford (1814), Nashville (1850), Montgomery (1861), Washington, D.C. (1861), and Santa Fe (1922).<sup>216</sup> The formal rules of several of these gatherings survive, and the journals or proceedings enable us to reconstruct a partial list of rules from many of the others.

The records from the following meetings are helpful<sup>217</sup>:

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<sup>215</sup> See *supra* § 3.1.

<sup>216</sup> The Santa Fe convention, which negotiated the Colorado River Compact, actually gathered at different times in four different locations, convening at various times in Washington, D.C., Phoenix, and Denver. Most of the meetings, however, including the final and climatic meetings, were held in Santa Fe.

I was unable to find a single, unified, online source of the convention proceedings. I accordingly collected them and posted them at MINUTES AND RECORDS OF THE COLORADO RIVER COMMISSION (1922), *available at* <http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf>.

There may have been other twentieth century conventions that met to negotiate interstate compacts, although nearly all twentieth century compacts were negotiated more informally.<sup>216</sup> One might argue that the four-state Delaware River Basin Advisory Committee, which negotiated the Delaware River Basin Compact in 1959–1960, should be categorized as an additional interstate convention. Because this proposition is contestable, that gathering is not included here. See Robert G. Natelson, *A Modern Quasi-Convention of States*, INDEPENDENCE INST. (Mar. 1, 2014), <http://constitution.i2i.org/2014/03/01/thea-modern-quasi-convention-of-states/>.

<sup>217</sup> Since this is not a law journal article, it avoids extensive citation from these sources. Summaries of all but the last four can be found in Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013), *reprinted infra* § 5.1.

In the text above, I have listed these meetings under their usual or (where available) official names. Many of them had other names, including informal ones. For example, the Boston Convention sometimes was referred to as the “Boston Committee”; and although the first three are now remembered as “congresses,” people also applied the word “convention” to them. The term “congress” to describe a multi-state convention fell into disuse after establishment of a permanent U.S. legislature called “Congress.”

- Albany Congress (1754)
- Stamp Act Congress (1765)
- First Continental Congress (1774)
- First Providence Convention (1776–1777)
- York Town Convention (1777)
- Springfield Convention (1777)
- New Haven Convention (1778)
- First Hartford Convention (1779)
- Philadelphia Price Convention (1780)
- Boston Convention (1780)
- Second Hartford Convention (1780)
- Second Providence Convention (1781)
- Annapolis Convention (1786)
- The Constitutional Convention (1787)
- Third Hartford Convention (1814)
- Nashville Convention (1850) (also called the Southern Convention)
- Montgomery Convention (1861)
- Washington Conference Convention (1861) (also informally called the Washington Peace Conference)
- Santa Fe Convention (1922) (formally the Colorado River Commission)<sup>218</sup>

The rules and protocols followed by these gatherings show far more commonalties than differences. For several reasons, however, the rules and protocols of the Washington Conference Convention of 1861 seem particularly apt: It was our most recent general multi-state convention,<sup>219</sup> and our largest to date. It

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<sup>218</sup> Although called a “commission,” this gathering was a true regional convention of states. It should not be confused with those bodies called “commissions” that operate *after and pursuant to* compacts. The latter represent another form of multi-state cooperation, but their permanent character disqualifies them from being called conventions.

<sup>219</sup> A “general convention” is one to which all states, or at least states from all regions, are invited,

was, moreover, called for the understood purpose of proposing amendments. Thus, even though the Washington Conference Convention did not operate under Article V, it served as prototype for a duly-called convention for proposing amendments. In several places below, therefore, this section focuses on the rules of the Washington conclave.<sup>220</sup>

### **§ 3.14.3. *Formalities before Adoption of Rules***

#### ***Time and Place***

The congressional call specifies the initial time and place of meeting.<sup>221</sup> State applications cannot control the initial time and place, although state legislatures may make recommendations on those subjects to Congress. After convening, the assembly assumes control of times and places of meeting. Thus, the convention decides when and for how long to adjourn, and to what place. For example, the Nashville Convention held its initial session in June of 1850, and then adjourned to November of the same year. The Colorado River Commission (Santa Fe Convention) conducted its twenty-seven days of sitting in four different cities: Washington, D.C., Phoenix, Denver, and Santa Fe. However, Santa Fe was the site of the last eighteen of the twenty-seven meetings and of the most important negotiations.<sup>222</sup>

#### ***Commissioner Selection***

A multi-state convention is a gathering of states in their sovereign capacities, and sovereigns may choose their own representatives. Accordingly, selection of state

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irrespective of whether all participate. It is to be distinguished from a regional, or partial, convention. *See supra* § 3.1. The term “general convention” does *not* designate an assembly where the subject matter is unlimited, as some have assumed.

<sup>220</sup> *Infra* § 3.14.4–.5.

<sup>221</sup> *See supra* § 3.9.

<sup>222</sup> For a unified, online collection of the proceedings, see MINUTES AND RECORDS OF THE COLORADO RIVER COMMISSION (1922) [hereinafter COLORADO COMMISSION RECORDS], *available at* <http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf>.

committees is *always* left to the states sending them.<sup>223</sup> The strength of the rule is illustrated by the outcomes of the rare attempts to breach it: only twice has the calling entity attempted to guide the selection procedure (in 1765 and again in 1780), and on both occasions those efforts were successfully disregarded.<sup>224</sup> In any event, for Congress to dictate how commissioners are selected would radically undercut the fundamental purpose of the convention procedure as a way for the states to bypass Congress.

The selection method most often chosen by state legislatures has been election by the legislature itself, either in joint session or (more often) seriatim by chamber. However, legislatures may delegate the choice to the executive alone or to some combination of executive nomination and legislative approval. The latter methods were employed for many of the commissioners sent to Washington (1861) and to all of them sent to Santa Fe (1922).

### ***Commissioner Credentialing***

Each state determines how to commission its own representatives. Early in the convention, each commissioner is expected to present his or her *credentials*—that is, the commission or comparable document showing authority to act on behalf of his state or state legislature. The convention selects a committee that passes on those credentials.

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<sup>223</sup> See *supra* § 3.10.

<sup>224</sup> When the Massachusetts legislature called the 1765 Stamp Act Congress, it asked that other colonies select commissioners through only the lower houses of their legislatures. This was because at the time only the lower chambers were directly elected, while the upper chambers were controlled indirectly by the British Crown. Nevertheless, several colonies chose commissioners in ways other than that recommended, and those commissioners were duly seated. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615, 635–37 (2013), *reprinted infra* § 5.1. In 1780, the Massachusetts legislature called a convention of five northeastern states. Apparently because some state legislatures were in recess, it asked that commissioners be appointed by those states' official "councils of war." Several states opted to select commissioners by other means, and they also were duly seated. *Id.* at 659–60.

### ***Initial Voting Rules***

As noted above, a convention for proposing amendments is a *convention of states*: a gathering of states in their sovereign, or semi-sovereign, capacities.<sup>225</sup> To the extent the extant records address the issue, they show that conventions of states universally apply the suffrage rule of “one state, one vote.” This rule follows from the international law standard that all sovereigns are equal. *The calling entity (which, in the case of an amendments convention, is Congress), may not alter this rule.*<sup>226</sup>

Although at some conventions individual commissioners have been tagged as “members,” multi-state conventions never have applied a “one person, one vote” rule. Perhaps this is because, technically, the “members” of the convention are not individual commissioners but state committees.<sup>227</sup>

Some multi-state convention journals refer to voting “by ballot,” especially for officers and committees. This phrase does not refer to voting per capita, but to a procedure by which individual choices are secret, even within state committees.<sup>228</sup> Votes are still counted by state and state committees voted as units. However, most

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<sup>225</sup> *Supra* § 3.2.4.

<sup>226</sup> In 1783 the Massachusetts legislature attempted to break this custom by calling a five-state “one delegate, one vote” convention. The call had to be rescinded when two of the four other states invited refused to attend. Natelson, *Conventions*, at 666.

<sup>227</sup> *Cf.* PAUL MASON, MASON’S MANUAL OF LEGISLATIVE PROCEDURE § 52 (Nat’l Conference of State Legislatures, 2010 ed.) [hereinafter MASON’S MANUAL] (providing for equality of the “members” of an assembly).

<sup>228</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 2 (Max Farrand ed., 1939) (“The Members then proceeded to ballot on behalf of their respective States—and, the ballots being taken, it appeared that the said George Washington was unanimously elected.”); *see also id.* at 4: (“Mr. Wilson moved that a Secretary be appointed, and nominated Mr. Temple Franklin. Col. Hamilton nominated Major Jackson. On the ballot Majr. Jackson had 5 votes & Mr. Franklin 2 votes.”); *id.* at 29 (showing only eight slash marks representing votes). Obviously, since there were several dozen commissioners present, this low vote tally had to reflect the states.

voting is not by ballot but *viva voce* (Latin for “with live voice”).<sup>229</sup>

The tradition at general conventions has been for state-by-state votes to be tabulated in northeast-to-southwest order.

### ***Quorum and Majority Vote***

There are two kinds of quorum rules: (1) the number of commissioners who must agree to cast a state committee’s vote and (2) the number of states necessary to transact business on the floor. The former is called an *internal quorum rule*. It is determined by the commissioning authority—that is, by each state for its own committee. For example, when New York commissioned its three delegates to the Constitutional Convention, it specified that any two must be present (and agree) to cast the state’s vote.

As for the quorum of states necessary on the floor and the margin required for decision, by both common law and court decision a majority of states represented is necessary for a quorum,<sup>230</sup> and a majority of states voting (a quorum being present) is necessary to decide.<sup>231</sup>

### ***What Officers Should the Convention Have?***

Conventions of states always decide what officers are to govern them. Prior conventions seem to have made this decision pursuant to parliamentary law, before

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<sup>229</sup> MASON’S MANUAL §§ 306-2, 536.

<sup>230</sup> *Id.* §§ 49-1, 502-1; *see also id.* § 501-1 (“The total membership of a body is to be taken as the basis for computing a quorum, but when there is a vacancy, unless a special provision is applicable, a quorum will consist of the majority of the members remaining qualified.”); accord *id.* § 502-2.

Section 501-2 provides that “The authority that creates a body has the power to fix its quorum.” In the case of an amendments convention, however, that authority is the convention, not Congress, which calls it, nor the state legislatures, who apply for it and authorize and create its delegations. The Constitution does not prescribe a quorum, leaving it to the convention.

<sup>231</sup> *Rhode Island v. Palmer* (“National Prohibition Cases”), 253 U.S. 350 (1920); *Dyer v. Blair*, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.). On majorities as a rule of decision, see MASON’S MANUAL §§ 50-1, 51-6, 510-1, 510-4.

formal rules were adopted.

At the least, every convention has a presiding officer, called the president or chairman, and a secretary, executive secretary, or clerk.<sup>232</sup> Some conventions, especially larger ones, have selected other officers, such as vice president, assistant secretaries, doorkeepers, sergeants-at-arms, and messengers. One former legislator consulted on this project recommended appointment of a parliamentarian.

### ***How Officers Are Chosen.***

In prior conventions, the identity of the temporary presiding officer, pending election of a permanent chairman, seems to have been arranged in informal pre-opening meetings. Although some have suggested that Congress designate a temporary presiding officer in its convention call, no multi-state convention call has ever done this, and an attempt to do so likely would have advisory force only.

At the 1754 Albany Congress, a representative of the Crown was present and became the presiding officer. Since Independence, permanent officers invariably have been elected by the convention itself, generally before adoption of formal rules, pursuant to parliamentary law. To the extent the historical records are complete, they show that all American multi-government conventions have elected officers by a majority vote of state committees. This was true even at the 1922 Colorado River Commission, where a federal representative, Secretary of Commerce Herbert Hoover, was present. Hoover ultimately did serve as chairman, but only after free election by his fellow commissioners, one from each participating state.<sup>233</sup>

Before the 1850 Nashville Convention, a preliminary committee decided on nominees for various offices. Although this did not prevent nominations from the floor, the convention did elect the committee's nominees.

The presiding officer always has been elected from among the commissioners

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<sup>232</sup> MASON'S MANUAL § 584 refers to the secretary, executive secretary or clerk in a legislature as the "chief legislative officer."

<sup>233</sup> Because of Hoover's relief work in World War I and his reputation as an international engineer, his personal prestige at the time was enormous.



rather than from outside the convention. The secretary or clerk usually (but not always) has been a non-commissioner, presumably to better assure impartiality in preparation and preservation of the records. We recommend that state lawmakers consult in advance on preliminary nominations, and that a convention of states retain the custom of electing a commissioner as the presiding officer and a non-commissioner as secretary or clerk.

### ***How Rules Are Adopted.***

Some of the smaller conventions have been comprised of only a handful of commissioners—most of them veterans of government service or prior conventions—thereby obviating the need to adopt formal rules. The 1778 New Haven Convention adopted rules, but did not insert them in the journal. The 1922 Santa Fe Convention (Colorado River Commission) seems not to have adopted formal rules, but it did vote on agendas and procedures for each future meeting.<sup>234</sup> In the absence of formal rules, parliamentary law, essentially as represented by *Mason's Manual*, prevails.<sup>235</sup> The larger conventions all adopted formal rules and entered them on the journal, although parliamentary law served as a source of default rules.<sup>236</sup>

One of our advisors suggested that an informal committee of state legislative leaders draft proposed rules in advance of the convention, and then try to induce as many state legislatures as possible to agree to them in advance. Whether or not this is done, the final decision on convention rules belongs to the convention itself.

Immediately after election of officers, the convention should choose a rules committee. By modern parliamentary law, committee staffing is the prerogative of the presiding officer.<sup>237</sup> However, the convention may vote to select the committee

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<sup>234</sup> For a unified, online source of this convention's proceedings, see COLORADO COMMISSION RECORDS.

<sup>235</sup> MASON'S MANUAL §§ 32-4, 37.

<sup>236</sup> Default rules are discussed below in Section 3.14.4.

<sup>237</sup> MASON'S MANUAL § 600-1.

itself,<sup>238</sup> and the historical records suggest that most of the major conventions have done so. In absence of a rule to the contrary, whoever staffs the committee designates the person who chairs it.<sup>239</sup>

After drafting proposed rules, the committee presents those rules to the floor for debate, adoption, or rejection.

#### **§ 3.14.4. *Recommended Rules Not Pertaining to Debate or Decorum***

##### ***Source of Default Rules***

A “default rule” is a rule that applies in absence of an explicit rule to the contrary. For example, in American parliamentary practice, the default rule for making decisions is a majority of those voting. The federal Constitution, or that of a state, or the adopted rules of a public body, can alter a default rule.

It is impractical for a temporary gathering such as a convention of states to adopt rules to address every conceivable situation, and the historical record shows that conventions of states have not attempted to do so. Instead, like legislatures, they adopt discrete rules addressed to particular situations and rely on a common source to supply the gaps.<sup>240</sup> By way of illustration, the default rules for the 1787 Constitutional Convention appear to have been adapted from the procedures of the Confederation Congress. The 1850 Nashville Convention formally acceded to Thomas Jefferson’s *Manual of Parliamentary Practice*, which Jefferson drafted for the U.S. Senate when he served as Vice President, and therefore as President of the Senate.

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<sup>238</sup> *Id.* § 600-2.

<sup>239</sup> *Id.* § 608.

<sup>240</sup> PAUL MASON, MASON’S MANUAL OF LEGISLATIVE PROCEDURE § 30-1 (Nat’l Conference of State Legislatures, 2010 ed.) [hereinafter MASON’S MANUAL] (“Most legislative bodies adopt a manual of legislative procedure as the authority to apply in all cases not covered by constitutional provisions, legislative rules, or statutes.”); *see also id.* § 30-2 (stating that resort to manuals by “deliberative assemblies” is permissible).

We believe the convention should adopt as a source of default rules *Mason's Manual of Legislative Procedure*. There are several reasons for this.

First, *Mason's Manual* is very comprehensive. Using it as a source of default rules would make it unnecessary for the convention to struggle with such questions as which motions are in order and when, or the vote margin required for reconsideration.

Second, *Mason's Manual* is usable and practical. Not only is it time-tested, but unlike the rules and prior default sources used by earlier conventions, it has been kept up-to-date and consistent with modern technology.

Third, *Mason's Manual* relies on parliamentary common law, and is annotated heavily with legislative and judicial precedents, so the sources and reasoning behind a particular rule are easily discoverable.

Fourth, it enjoys wide currency among state legislatures: Seventy of the ninety-nine American state legislative chambers<sup>241</sup> have adopted it, and there is trend in its direction.<sup>242</sup> Therefore, *Mason's Manual*, or adopted rules based on *Mason's Manual*, are likely to be familiar to a majority of commissioners—most of whom will be chosen by state legislatures and will have had state legislative experience. *Mason's Manual* also will be familiar to any legislative officers or committees assigned to oversee their respective convention delegations.

Finally, among those lawmakers we consulted for this project, we found none who was hostile to *Mason's Manual*, and several who were very enthusiastic.

True, *Mason's Manual* was written for state legislatures rather than for conventions. As a practical matter, however, the principle implication of this fact is that certain portions of the manual, such as the portion addressing “Relations with the Executive” can be safely disregarded.<sup>243</sup>

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<sup>241</sup> See *Using Mason's Manual of Legislative Procedure*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/masons-manual-for-legislative-bodies.aspx> (last visited Mar. 27, 2014).

<sup>242</sup> *Id.*

<sup>243</sup> The two most prominent rivals to *Mason's Manual* also were designed for bodies other than

Adoption of *Mason's Manual* would make it unnecessary to craft rules for every occasion. Nevertheless, we believe some explicit rules are called for, as explained below.

### ***Voting by State***

All multi-state conventions whose journals disclose a voting rule have proceeded on the basis of “one state, one vote.” This has been both the default rule and the standard prevailing when conventions adopt explicit standards of suffrage.<sup>244</sup>

To understand the reasons for state-by-state voting, it is important to remember that a convention for proposing amendments is not a general legislature, like Congress or a state legislature. Nor is it an instrumentality of any one state. It is, rather, part of a process designed *explicitly* to enable the semi-sovereign states, acting as a group through their legislatures,<sup>245</sup> to offer ratifiable proposals. James Madison pointed out that the Constitution has both “national” (popular) and “federal” (state-based) features.<sup>246</sup> The amendments convention, like the U.S. Senate, is a clear example of the latter.

Moreover, the fundamental reason for the convention procedure was to provide the states a way to bypass Congress.<sup>247</sup> The only entity, other than the convention, that might prescribe an unprecedented voting rule would be

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conventions: *Robert's Rules of Order*, and *Jefferson's Manual*.

<sup>244</sup> For example, the rules of the 1861 Washington Conference Convention provided, “Mode of Voting. All votes shall be taken by States, and each State to give one vote. The yeas and nays of the members shall not be given or published—only the decision by States.” A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 25 (L.E. Chittenden ed., 1861) [hereinafter WASHINGTON CONFERENCE REPORT].

<sup>245</sup> See *supra* § 3.2.4.

<sup>246</sup> THE FEDERALIST No. 39 (James Madison).

<sup>247</sup> See *supra* § 3.3.

Congress.<sup>248</sup> But allowing Congress to design the convention's voting system would undercut the convention's fundamental purpose in a way that the judiciary generally does not sanction. There is no evidence that the one state, one vote rule has been impacted in any way by the "one person, one vote" requirement the modern Supreme Court imposes on general legislative bodies directly representing the people.

Although the application and convention process was not intended to be perfectly democratic, it does accommodate the need for popular consent. The requirement that two-thirds of states, rather than a simple majority, apply for a convention raises the probability of popular consent. The three-quarters ratification requirement virtually assures that any amendment will be approved by a majority (and more likely a supermajority) of the American people.<sup>249</sup>

There have been occasional attempts in multi-state conventions to challenge or alter the one state, one vote rule, invariably without success. For example, a motion to alter state voting power to reflect population differences was considered at the Nashville Convention. It was recognized that this motion would require assent by a majority of states. The motion was defeated when a majority of states refused to adopt it.<sup>250</sup>

### ***Majority Voting***

Approval of motions and proposals by a majority of those voting (in this case, a majority of states) is the prevailing rule under parliamentary law and prior

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<sup>248</sup> Some have argued that Congress has this power under the Necessary and Proper Clause, but this is inaccurate. *See supra* § 3.9.4.

<sup>249</sup> ROBERT G. NATELSON, PROPOSING CONSTITUTIONAL AMENDMENTS BY A CONVENTION OF THE STATES: A HANDBOOK FOR STATE LAWMAKERS 22 (Am. Legislative Exch. Council, 2d ed. 2013).

<sup>250</sup> RESOLUTIONS, ADDRESS, AND JOURNAL OF PROCEEDINGS OF THE SOUTHERN CONVENTION 27 (Harvey M. Watterson ed., 1850). Similarly an effort in 1783 by the Massachusetts legislature to call a one delegate, one vote convention failed because states refused to participate. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615, 666 (2013), reprinted *infra* § 5.1.

convention practice. The convention may, if a majority of state committees wishes, alter the rule. The Santa Fe Convention (Colorado River Commission) decided on a unanimity requirement among states for most purposes.<sup>251</sup> The reason, apparently, was that the group was negotiating an interstate compact, the compact would not be binding on any state that rejected it, and the compact might be useless unless all states consented.

The unanimity requirement at the Santa Fe meetings worked tolerably well, but there were only eight commissioners (one from each state and a federal representative, Secretary of Commerce Herbert Hoover), and dissenters occasionally voted “yes” so as not to obstruct the progress of the negotiations. Even at Santa Fe, late in the proceedings the unanimity rule was changed temporarily to majority consent for most purposes.<sup>252</sup>

A unanimous voting rule clearly would not be appropriate at a general convention, with far more states involved. We recommend that amendments conventions decide substantive and procedural questions by a majority of states voting, a quorum being present.

### ***Quorum***

Traditionally, a quorum is a majority of eligible voters (states),<sup>253</sup> and this rule seems to have been followed for most multi-state conventions. For example, the 1787 Constitutional Convention adopted a quorum of seven—that is, a majority of state committees—with decisions to be made by a majority of a quorum. On the other hand, the Washington Conference Convention adopted a quorum of only seven states when twenty-one were present.<sup>254</sup> In absence of unforeseen circumstances, we do not recommend departing from the majority rule. However, any future

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<sup>251</sup> MINUTES AND RECORDS OF THE COLORADO RIVER COMMISSION (1922), *available at* <http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf>.

<sup>252</sup> *Id.*

<sup>253</sup> MASON’S MANUAL § 500-2.

<sup>254</sup> WASHINGTON CONFERENCE REPORT, at 23.

convention of states should provide, as prior multi-state conventions have, that if a quorum is not present, those states that are represented should have power to adjourn from day to day.

### ***Prayers and Oaths***

Some conventions have been introduced with prayers, generally before the daily session. For example, the rules of the Hartford Convention of 1814 prescribed that “[t]he meetings of this Convention shall be opened each morning, by prayer, which it is requested may be performed, alternately, by the Chaplains of the Legislature of Connecticut, residing in the city of Hartford.”<sup>255</sup> Even the modern Congress has decided that prayer can have an uplifting effect on the proceedings.

On the other hand, the most successful American multi-state convention in history—the one that drafted the Constitution—made no provision for institutionalized prayer.

We have a preference for an initial prayer, led in turn by representatives of a wide range of faiths and denominations. However, prayer is not an objective that should be pursued if it proves divisive, since, of course, individual commissioners and committees can make their own arrangements if they wish.

The Albany Congress administered an oath to its secretary, presumably to record the proceedings honestly. Oaths of fidelity are routinely administered to American public officers, and we see no reason why a convention should not do so as well.

### ***Kinds of Committees***

A convention may decide to create any committees relevant to its mission. Typically, conventions create committees to review credentials, committees to draft language, and committees to negotiate differences. If the gathering is called under the Convention of States application, it will have to address a range of subjects,

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<sup>255</sup> A SHORT ACCOUNT OF THE HARTFORD CONVENTION 24 (Theodore Lyman ed., 1823).

including term limits, fiscal responsibility, and amendments narrowing or clarifying the jurisdiction of the federal government. In that case, the convention may opt to create a committee to develop amendment language addressing each subject.

### ***Committee Staffing***

Under modern parliamentary common law, the presiding officer staffs committees, as did the president of the 1814 Hartford Convention. An assembly may, however, provide for election instead. A rule of the 1787 Constitutional Convention specified:

That Committees shall be appointed by ballot; and that the members who have the greatest number of ballots, although not a majority of the votes present, be the Committee. When two or more Members have an equal number of votes, the Member standing first on the list in the order of taking down the ballots shall be preferred.<sup>256</sup>

Note that under this rule election was by a plurality rather than a majority.

There seems to be no reason to go through the trouble of electing members to all committees, but election may be appropriate for major areas of responsibility, such as rules and intra-convention negotiation.

### ***Secrecy***

Those conventions addressing the issue appear to have applied a rule of secrecy. A principle purpose was to allow commissioners to think aloud, debate freely, and change their minds without losing face. For example, the rules of the First Continental Congress provided that “the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honour, to keep the proceedings secret, untill [*sic*] the majority shall direct them to be made public.”<sup>257</sup> The 1861 Washington Conference Convention

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<sup>256</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (Max Farrand ed., 1939) [hereinafter FARRAND’S RECORDS].

<sup>257</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 26 (Worthington Chauncey Ford et al.



prescribed that “[t]he yeas and nays of the members shall not be given or published—only the decision by States.”<sup>258</sup>

Similarly, the rules of both the Constitutional and Washington Conference Conventions specified that “no copy be taken of any entry on the journal during the sitting of the House without leave of the House,” and that “members only be permitted to inspect the journal.”<sup>259</sup> The rules of the Constitutional Convention admonished that “nothing spoken in the House be printed, or otherwise published or communicated without leave.”<sup>260</sup>

Our advisors were unanimous in believing that such secrecy would not be publicly acceptable today. *Mason’s Manual*, accordingly, includes no such rules. Advocates of secrecy may be comforted by the realization that, although secrecy has some procedural advantages, disclosure offers some offsetting advantages (in addition to public acceptance). Among these advantages is the greater ability of legislative authorities to ensure that their commissioners remain within their instructions and remain connected with political realities.

Obviously, openness does not justify chaos: the convention will have to adopt rules assuring that its proceedings are not disrupted by outsiders. But this is no more than any modern legislative body must do.<sup>261</sup>

## ***Minutes***

All conventions direct the secretary, either personally or through a convention-authorized assistant, to record the minutes necessary for entry in the official journal. A 1787 Constitutional Convention rule specified that “Immediately after the President shall have taken the Chair, and the members their seats, the

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eds., 1904).

<sup>258</sup> WASHINGTON CONFERENCE REPORT, at 25.

<sup>259</sup> 1 FARRAND’S RECORDS, at 15; WASHINGTON CONFERENCE REPORT, at 25.

<sup>260</sup> 1 FARRAND’S RECORDS, at 15.

<sup>261</sup> MASON’S MANUAL § 705-3 (providing that a legislative body has absolute control of its chambers).

minutes of the preceding day shall be read by the Secretary.”<sup>262</sup>

### ***Number of Commissioners on the Floor***

Informal discussions among state legislative leaders prior to a convention may lead to agreed limits on the size of any one state’s committee. Based on a study of the historical record, we believe that a cap of five commissioners per state would be appropriate. Ultimately, the size of a state’s committee is a matter for that state’s legislature to determine.

It is possible that non-cooperative states may, if they do not boycott the convention,<sup>263</sup> opt to send oversized delegations. They may do so as a measure of protest, as a populist gesture, or as a way of skewing debate in their favor. An historical illustration is the decision of Tennessee to send a hundred commissioners to the Nashville Convention, when all the remaining states collectively sent only seventy-five. The presence of oversized committees does not change the one state, one vote rule (which, in fact, survived a challenge at Nashville), but the situation could present problems of crowding and fairness.

One way of forestalling this problem without impairing the prerogative of a state to govern its own committee is to adopt a convention rule limiting the number of commissioners from any one state who may participate in any given debate or appear on the floor at one time. One of our advisors suggested a limit on the amount of floor time that may be used on any day by any state committee.

#### **§ 3.14.5. *Rules of Debate and Decorum***

Several of the major multi-state conventions have adopted rules of debate and decorum specific to their needs. Notable among these are the standards applied at the Washington Conference Convention of 1861, which were based largely, although not entirely, on the rules of debate and decorum in the more famous

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<sup>262</sup> 1 FARRAND’S RECORDS, at 8.

<sup>263</sup> For example, Rhode Island objected to the 1787 Constitutional Convention, and refused to send commissioners. No multi-state convention has included committees from every single state.

conclave in Philadelphia in 1787.<sup>264</sup> For reasons mentioned earlier, the Washington Convention rules are worth examining in some detail.<sup>265</sup> Listed below are the principle rules together with commentary that may be helpful in adapting them to modern needs.<sup>266</sup>

### ***Order of Business***

The Washington Convention prescribed that (1) “[i]mmediately after the President shall have taken the chair, and the members their seats, the minutes of the preceding day shall be read by the Secretary” and that (2) “[o]rders of the day shall be read next after the minutes, and either discussed or postponed, before any other business shall be introduced.”<sup>267</sup>

*Commentary:* *Mason’s Manual* sets forth a somewhat different order.<sup>268</sup> If we disregard the items on *Mason’s* list relevant to a legislature but not to a convention, we are left with the following: (1) call to order, (2) roll call, (3) invocation, (4) reading and approval of the journal of the previous day, (5) reports of standing committees, (6) reports of special or select committees, (7) special orders, (8) unfinished business, (9) introduction and first reading of proposals, (10) consideration of daily calendar, (11) announcement of committee meetings, and (12) adjournment.

### ***Focus of the Convention***

Another rule of the Washington Convention provided as follows: “Every

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<sup>264</sup> A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS IN THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 19 (L.E. Chittenden ed., 1861) [hereinafter WASHINGTON CONFERENCE REPORT].

<sup>265</sup> *Supra* § 3.14.2.

<sup>266</sup> All the rules of that convention are not treated here—only those on debate and decorum.

<sup>267</sup> WASHINGTON CONFERENCE REPORT, at 23, 24.

<sup>268</sup> PAUL MASON, MASON’S MANUAL OF LEGISLATIVE PROCEDURE § 710 (Nat’l Conference of State Legislatures, 2010 ed.) [hereinafter MASON’S MANUAL].

member, rising to speak, shall address the President; and while he shall be speaking none shall pass between them, or hold discourse with another, or read a book, pamphlet, or paper, printed or manuscript; and of two members rising to speak at the same time, the President shall name him who shall first be heard.”<sup>269</sup>

*Commentary:* Addressing the presiding officer is in accord with modern practice.<sup>270</sup> The presiding officer’s obligation to select the person rising earlier, and to choose between those rising at the same time, also is consistent.<sup>271</sup> The proscription on reading extraneous matter may seem alien in a time of universal multi-tasking, particularly with tablet computers and smartphones; but there is something to be said for requiring commissioners to direct their attention to the debate. If, however, written motions are to be disseminated instantly, commissioners should have receiving devices available. If computers are used for that purpose, then preventing commissioners from reading unrelated matter on them may be impractical.

### ***Frequency and Length of Speaking***

“A member shall not speak oftener than twice, without special leave upon the same question; and not a second time before every other who had been silent shall have been heard, if he choose to speak upon the subject.”<sup>272</sup>

*Commentary:* The two-time rule had been used in the First Continental Congress of 1774 and in other fora, and its success argues for emulation. *Mason’s Manual* provides that a person may speak only once on a question at the same stage of procedure on a given day, and sometimes even on different days.<sup>273</sup>

We found no multi-state convention that limited the amount of time a commissioner could speak on the floor. An effort to impose time limits at the

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<sup>269</sup> WASHINGTON CONFERENCE REPORT, at 23.

<sup>270</sup> MASON’S MANUAL §§ 91-2, 110-1.

<sup>271</sup> *Id.* § 91-3(a), (b).

<sup>272</sup> WASHINGTON CONFERENCE REPORT, at 23–24.

<sup>273</sup> MASON’S MANUAL § 102.

Washington Conference Convention was unsuccessful. Because a modern convention for proposing amendments will represent more states than any prior multi-state gathering—and therefore probably contain more commissioners—we recommend imposition of time limits.

### ***Motions***

The Washington Convention rules specified as follows: “A motion made and seconded, shall be repeated; and if written, as it shall be when any member shall so require, read aloud by the Secretary before it shall be debated; and may be withdrawn at any time before the vote upon it shall have been declared.”<sup>274</sup> The rules further stated that “[w]hen a debate shall arise upon a question, no motion, other than to amend the question, to commit it, or to postpone the debate, shall be received.”<sup>275</sup>

*Commentary:* Today’s technology makes it more practical to require that all but the simplest, most standardized motions be written; and they can be disseminated instantly by electronic means.<sup>276</sup> *Mason’s Manual* does not require seconds; thus in the absence of a seconder, the movant alone may withdraw.<sup>277</sup> As for the precedence of motions, the treatment in *Mason’s Manual* should suffice.<sup>278</sup>

### ***Simplifying Complex Questions***

The applicable Washington rule was as follows: “A question which is complicated, shall, at the request of any member, be divided and put separately

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<sup>274</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>275</sup> *Id.*

<sup>276</sup> *Cf.* MASON’S MANUAL § 144-2 (“A motion is usually presented orally, but if particularly long or involved, the presiding officer may require that it be presented . . . in writing.”).

<sup>277</sup> *Id.* §§ 62, 157-1.

<sup>278</sup> *Id.* § 441 (“Form of Presenting Main Motions”); *id.* § 442 (“Precedence of Main Motions”).

upon the propositions of which it is compounded.”<sup>279</sup>

*Commentary:* This rule is probably best retained, as more appropriate for a convention than the single-subject-related tests for bills set forth in *Mason’s Manual*.<sup>280</sup> To avoid confusion, the term “member” should be replaced by “commissioner.”

### ***Calls to Order***

The Washington rules stated that “[a] member may be called to order by another member, as well as by the President, and may be allowed to explain his conduct or expressions supposed to be reprehensible. ~~And all questions of order shall be decided by the President, without appeal or debate.~~”<sup>281</sup>

*Commentary:* Not even the great prestige of former President John Tyler, the Washington Convention’s presiding officer, enabled the stricken non-appealability language to survive a motion to amend. The convention decided that any ruling from the chair could be appealed, although without debate. We also recommend that appeals be permitted to prevent undue influence from the chair.<sup>282</sup> This is particularly important because any person with sufficient reputation to be elected presiding officer is likely to have, or to have had, ties (and perhaps sympathies) with the same federal government the convention has gathered to reform.

The word “member” in this rule should be changed to “commissioner.” *Mason’s Manual* does not refer to a participant being called to order by any other participant, although the presiding officer may call anyone to order.<sup>283</sup>

### ***Motions to Adjourn***

“Upon a question to adjourn for the day, which may be made at any time, if it

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<sup>279</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>280</sup> MASON’S MANUAL §§ 311-2, 313-1, 313-2.

<sup>281</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>282</sup> Cf. MASON’S MANUAL §§ 230-1, 246-4 (permitting appeals).

<sup>283</sup> *Id.* § 122.

be seconded, the question shall be put without debate.”<sup>284</sup>

*Commentary:* In *Mason’s Manual*, adjournment for the day is called a “recess,” and a motion to recess is not debatable.<sup>285</sup> A permanent adjournment is called an adjournment *sine die* (Latin for “without day,” meaning “without a day for reconvening”). A convention may adjourn *sine die* at any time, whether or not its work is complete.<sup>286</sup>

### ***Decorum on Adjournments for the Day***

“When the Convention shall adjourn, every member shall stand in his place until the President pass him.”<sup>287</sup>

*Commentary:* This rule derived from the 1787 convention, and was a tribute to the enormous prestige of its president, General Washington. The 1861 convention retained the rule, probably as a tribute to John Tyler. Whether a modern convention adopts it may depend on the personal prestige of its presiding officer.

### ***Absences***

“That no member be absent from the Convention, so as to interrupt the representation of the State, without leave.”<sup>288</sup>

*Commentary:* This is in accord with the modern practice of compelling attendance at the “call of the house.”<sup>289</sup>

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<sup>284</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>285</sup> MASON’S MANUAL §§ 215, 216-3.

<sup>286</sup> *Id.* § 204-1. The Founding Generation specifically recognized that a convention for proposing amendments may adjourn without proposing any amendments. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 743–44 n.342 (2011), *reprinted infra* § 5.2., at (quoting James Madison and an anti-federalist writer).

<sup>287</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>288</sup> *Id.*

<sup>289</sup> MASON’S MANUAL § 190.

### ***Sitting of Committees and Assuring Proper Notice of Proposals***

The Washington Convention prescribed that “Committees do not sit while the Convention shall be, or ought to be sitting, without leave of the Convention.”<sup>290</sup>

*Commentary:* This rule also is duplicated in modern practice.<sup>291</sup> It assures that all commissioners have full notice of pending measures and time to consider them. For similar reasons, the rules of the First Continental Congress prescribed that “no question shall be determined the day, on which it is agitated and debated, if anyone of the Colonies desire the determination to be postponed to another day.”<sup>292</sup> This prompted one of our advisors to recommend a requirement of at least a day’s lapse between committee approval of a measure and action by the full house. *Mason’s Manual* states, “It is the usual procedure not to consider bills reported by committees when the report is received by the house, but to order the bill to second reading.”<sup>293</sup> Because this reference seems inapplicable to conventions (which do not consider bills nor customarily provide for “readings”) a day’s delay between committee report and house vote may serve the purpose better.

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<sup>290</sup> WASHINGTON CONFERENCE REPORT, at 24.

<sup>291</sup> MASON’S MANUAL § 628-1.

<sup>292</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 26 (Worthington Chauncey Ford et al. eds. 1904).

<sup>293</sup> MASON’S MANUAL § 670-5.



## Part IV: Forms

### § 4.1. *Citizens for Self-Governance Form Application*

#### **Application for a Convention of the States under Article V of the U.S. Constitution**

*Whereas*, the Founders of our Constitution empowered State Legislators to be guardians of liberty against future abuses of power by the federal government, and

*Whereas*, the federal government has created a crushing national debt through improper and imprudent spending, and

*Whereas*, the federal government has invaded the legitimate roles of the states through the manipulative process of federal mandates, most of which are unfunded to a great extent, and

*Whereas*, the federal government has ceased to live under a proper interpretation of the Constitution of the United States, and

*Whereas*, it is the solemn duty of the States to protect the liberty of our people—particularly for the generations to come, to propose Amendments to the Constitution of the United States through a Convention of the States under Article V to place clear restraints on these and related abuses of power,

*Be it therefore resolved* by the legislature of the State of \_\_\_\_\_:

Section 1. The legislature of the State of \_\_\_\_\_ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for Members of Congress.

Section 2. The Secretary of State is hereby directed to transmit copies of this application to the President and Secretary of the United States Senate and to the Speaker and Clerk of the United States House of Representatives, 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 legislative houses in the several States, requesting their cooperation.

Section 3. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject.

**§ 4.2. Sample Form Electing Commissioners**

**Resolution Electing Commissioners to Convention to  
Propose Amendments Restraining the  
Abuse of Power by the Federal Government**

*Whereas*, the legislature of the State of \_\_\_\_\_ has applied to Congress under Article V of the United States Constitution for a convention for proposing amendments to the Constitution limited to proposing amendments that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials; and

*Whereas*, the legislature has decided to select its commissioners to the convention, if such is held:

*Be it resolved* by the legislature of the State of \_\_\_\_\_,

Section 1. (commissioner 1), (commissioner 2), (commissioner 3), (commissioner 4), and (commissioner 5) are hereby elected commissioners from this state to such convention, with power to confer with commissioners from other states on the sole and exclusive subject of whether the convention shall propose amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for Members of Congress, and, if so, what the terms of such amendments shall be; and further, by the decision of a majority of the commissioners from this state, to cast this state's vote in such convention.

Section 2. Unless extended by the legislature of the State of \_\_\_\_\_, the authority of such commissioners shall expire at the earlier of (1) December 31, 20\_\_ or (2) upon any addition to the convention agenda or convention floor consideration of potential amendments or other constitutional changes other than amendments as aforesaid.

### **§ 4.3. *Sample Commissions***

Commissions are the documents appointing commissioners to represent the state legislature at a convention for proposing amendments. Below is an example of a commission issued by the State of New Jersey to five commissioners to the 1787 Constitutional Convention. One of the listed individuals, John Neilson, did not serve:

The State Of New Jersey.

To the Honorable David Brearly, William Churchill Houston, William Patterson and John Neilson Esquires. Greeting.

The Council and Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you the said David Brearley, William Churchill Houston, William Patterson and John Neilson Esquires, or any three of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, at the City of Philadelphia in the Commonwealth of Pensylvania [*sic*], on the second Monday in May next for the purpose of taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.

In testimony whereof the Great Seal of the State is hereunto affixed. Witness William Livingston Esquire, Governor, Captain General and Commander in Chief in and over the State of New Jersey and Territories thereunto belonging Chancellor and Ordinary in the same, at Trenton the Twenty third day of November in the Year of our Lord One thousand seven hundred and Eighty six and of our Sovereignty and Independence the Eleventh.

Wil: Livingston.

By His Excellency's Command

Bowes Reed Secy.

Some modern changes:

- The state legislature rather than the state itself is arguably the represented party at a convention for proposing amendments. This suggests that the presiding officers of each house of the state legislature ought to issue the commission.
- The commission should be tailored to the purpose of the convention, and of course modern language should be employed. The following is a possible modification:

The State Of New Jersey.

To John Jones. Greeting.

The Senate and General Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you, Jane Doe, and Prudence Watley, or any two of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, in convention at the City of Denver in the State of Colorado, on May 17, 20 \_\_, pursuant to Article V of the Constitution of the United States, for the sole purpose of considering whether to propose, and if so, to draft, amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials.

In testimony whereof the Great Seal of the State is hereunto affixed.

Witness: Frankly F. Fineagle, President of the Senate, and Georgia G. Gripper, Speaker of the Assembly, at Trenton, on the \_\_ day of November, 20\_\_.

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Speaker

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President of the Senate

#### **§ 4.4. *Sample Instructions***

Instructions for previous multi-state conventions were usually secret, and are difficult to recover. Some of them apparently were rambling documents, providing general guidance rather than specific rules.

The following instructions were issued by the Massachusetts legislature in 1779 as instructions for the 1780 Philadelphia Price Convention, a meeting designed to cope with continental inflation. As one can see, the commissioners were Samuel Osgood and Elbridge Gerry. The latter served as a commissioner to the Constitutional Convention as well, and ultimately as governor of Massachusetts and Vice President of the United States. The instructions are found in volume 21 of the Acts and Resolves of the Province of Massachusetts Bay. They do not reveal much confidence in the viability of wage and price controls.

VOTE INSTRUCTING ELBRIDGE GERRY AND SAMUEL OSGOOD,  
ESQUIRES, COMMISSIONERS TO THE CONVENTION AT  
PHILADELPHIA IN JANUARY NEXT TO CONSIDER THE  
LIMITING OF PRICES OF PRODUCE AND MERCHANDIZE.

To the Hon. Elbridge Gerry, Esq., and Samuel Osgood, Esq.  
GENTLEMEN,

The General Assembly having appointed you Commissioners to represent this State at the Convention to be held at Philadelphia, on the 1st Wednesday of January next; you are hereby authorized and impowered to meet at the time and place before mentioned such Commissioners as may be appointed by other United States, and to confer and consult with them upon the expediency of limiting the prices of articles of produce and merchandize.

In your deliberations upon this important subject, you will duly consider on the one side the advantages that it has been suggested will accrue from such a measure among others, that it will tend to give stability to our currency, prevent that inequality and injustice in

private dealings, as well as in furnishing the public supplies from the several States, which have arisen from the fluctating [*sic*] state of prices, and that it will render it practicable for Congress and the several States to make the proper estimates for their future expences, and to fix adequate salaries upon those who are in the public service; these are important objects, and ought to be attended to. On the other side, you will duly advert to the many objections that have been made to such a plan, and the many difficulties that will attend the execution of it; for in case such a measure should be attempted and fail in the execution, you must be sensible it will be attended with many pernicious consequences, it will greatly weaken the bonds of government, as well as throw us into the greatest embarrassment, and will have a fatal tendency further to depreciate our currency. Among many other objections and difficulties that might be mentioned, and which will naturally occur to your minds in the discussion of this subject, it may be well to consider whether it has not been found that a limitation of prices, instead of appreciating or giving stability to our money has not rendered it in a manner useless, has not shut up our granaries, discouraged husbandry and commerce, and starved our Sea-Ports, in short, whether it has not created such a stagnation of business and such a withholding of articles as has obliged the people to give up the measure or submit to starving: Whether from these repeated trials and failures, that confidence, (which is so absolutely necessary in case of a limitation) is not so far lost between the States and the members of each State that this alone must prevent the execution of such a measure, as each person will be waiting to see his neighbours compliance, in the mean time withholding [*sic*] every supply from his friend and his country; whether it has not thrown the honest and conscientious part of the community into the hands of Sharpers, Monopolizers and Extortioners, and while it has operated as a

restraint upon the former to their great loss and damage, it has not afforded an opportunity to the latter, whose only principle is that of Gain, by their cunning and deceit to aggrandize and enrich themselves, to the no small detriment of their Country.

You will also consider whether it is possible to carry an act for this purpose into execution in the method prescribed by Congress, when upon trial, it will be found, that by the method they propose the prices of labour and produce will be reduced more than two-thirds, while the articles of foreign produce will be reduced but a trifle, if any thing at all; can it be supposed the people in general will submit to it? For however reasonable it may appear to men of candour and discernment, and those who will thoroughly examine into the causes of it, yet the bulk of the people will apprehend they are imposed upon, and it will be extreamly [*sic*] difficult, if possible, to convince them to the contrary: You will further consider whether if such a limitation should take place, and could be effectually carried into execution, it would not be the means of disappointing Congress of such supplies of money as they depend upon from the late recommendations for taxation, and thereby oblige them to that measure which they are so very solicitous to avoid, viz. the making further emissions to defray the public expences; for is it to be supposed that the people in general would submit to such a large reduction of the prices of their produce, and at the same time submit to such large taxes as the requisitions from Congress now demand? We trust you will give these objections, as well as every thing else that may be offered pro and con upon this interesting matter in convention, their due weight, and after all, we leave it with you to act according to your best judgment and discretion, and in case you should, after mature and thorough consideration judge the measure to be expedient and practicable, and find that it is highly probable it will be adopted by all the rest of the United States, you will

then proceed upon the business and make report of your proceedings to this Court, that they may take such order thereupon, as they shall then judge will best promote the public weal.



#### **§ 4.5. “No Runaway” Acts**

Commentators have proposed state enactment of legislation designed to dispel fears that a convention for proposing amendments could exceed the scope of its authority. In 2011, Michael Stern and this author prepared a draft model law for state legislatures to consider. The model law is set forth below, along with its annotations. The term “delegate” has been changed to the more precise “commissioner” throughout.

This model law is designed both for Article V and other interstate conventions. Any portions not applicable to Article V (because the legislative authority of the state may not control the amendment process) may be adhered to voluntarily by the state legislature when exercising its Article V functions.

Following the model law are two similar enactments of the Indiana legislature.

### § 4.5.1. *Uniform Interstate Convention Act*

#### **Uniform Interstate Convention Act**

(Annotations in Footnotes)

##### Section 1. Definitions.

- (a) “Application” means an application for a convention for proposing amendments relied upon by Congress in calling such a convention.
- (b) “Commission” means the document or documents whereby the state, state legislature, or duly authorized officer of the state empowers a commissioner to an interstate convention and fixes the scope of his or her authority.<sup>294</sup>
- (c) “Committee” means a delegation of persons commissioned to an interstate convention.<sup>295</sup>
- (d) “Convention for proposing amendments”<sup>296</sup> means an interstate convention consisting of committees commissioned by the legislatures of the several states and called by Congress on the application of at least two-thirds of such legislatures under the authority of Article V of the United States Constitution.
- (e) “Instructions” means directions given to commissioners by the commissioning authority or by that authority’s agent designated for that purpose. Instructions are given contemporaneously with or subsequent to a commission, and may be amended before or during an interstate convention.<sup>297</sup>
- (f) “Interstate convention” means a diplomatic meeting,<sup>298</sup> however

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<sup>294</sup> This term is taken from previous interstate convention practice.

<sup>295</sup> This term is taken from previous interstate convention practice.

<sup>296</sup> This is the official name given in Article V of the Constitution.

<sup>297</sup> This also follows previous convention practice.

<sup>298</sup> Interstate conventions were modeled on meetings of international diplomats. *See* RUSSELL CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 95–96 (1988).

denominated, of delegations (“committees”) from three or more states or state legislatures<sup>299</sup> to consult upon and propose or adopt measures pertaining to one or more issues previously prescribed by applications, by the convention call, or by the commissioning authority.<sup>300</sup>

## Section 2. Statements of understanding.

- (a) In the years since the Declaration of Independence, and both before and after ratification<sup>301</sup> of the United States Constitution, the states and state legislatures have from time to time met in interstate conventions (however denominated) to consult upon and propose or adopt measures to address prescribed problems.<sup>302</sup> This continued a pre-Independence practice of

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<sup>299</sup> The smallest interstate convention ever held was the Boston Convention (1780) a meeting of three states. The 1785 two-state Maryland-Virginia negotiation at Mt. Vernon pertaining to the Potomac River apparently was not considered a convention.

<sup>300</sup> The scope of this Uniform Law includes conventions for proposing amendments but is not limited to them. This is partly to clarify through standardization and partly to reassure people that delegates to conventions and conferences outside Article V (such as the Conference of the States proposed in the 1990) are subject to instructions from “back home.”

<sup>301</sup> For example, the interstate convention known as the “Washington Peace Conference” was held in 1861. See Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America’s First Century* (Nov. 4, 2010), available at <http://goldwaterinstitute.org/article/learning-experience-how-states-used-article-v-applications-americas-first-century-part-2>.

<sup>302</sup> During the Founding Era, at least 11 interstate conventions met as follows:

<u>Date</u>	<u>Name/Place</u>	<u>Scope/Topic</u>
1776–1777	Providence, RI	Price stabilization/defense
1777	Yorktown, PA	Price stabilization
1777	Charleston, SC	Price stabilization
1777	Springfield, MA	General economic issues
1778	New Haven, CN	Price stabilization
1779	Hartford, CN	Currency & trade issues
1780	Philadelphia, PA	Price stabilization
1780	Boston, MA	War measures
1780	Hartford, CN	Army supply
1781	Providence, RI	Army supply for current year

American colonies meeting in inter-colonial conventions and congresses.<sup>303</sup>

- (b) The United States Constitution recognizes the authority of states and state legislatures to commission commissioners to interstate conventions, subject to the limitations set forth in the Constitution. It does so implicitly in Article I, Section 10 (recognizing interstate compacts, subject to congressional approval), explicitly through Article V (authorizing conventions for proposing amendments), and by reserving this previously-existing state power to the states through the Tenth Amendment.
- (c) Although the authority to meet in convention is generally a power reserved to the states by the Constitution, in the case of a convention for proposing amendments the power is granted to the several state legislatures through the Article V of the Constitution.<sup>304</sup>
- (d) Leading American Founders, among them James Madison, recognized the authority of states to coordinate their efforts in ways that necessarily or properly included interstate conventions.<sup>305</sup>

Section 3. Purposes. The purposes of this Act are

- (a) to clarify the scope of authority of commissioners and committees representing this state [commonwealth] or the legislature of this state [commonwealth] at interstate conventions;
- (b) to provide for enforcing limits on such authority;
- (c) to provide methods of selecting and replacing commissioners to conventions;

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1786	Annapolis, MD**	Interstate commerce
1787	Philadelphia, PA	Propose new federal political system

\* Not certain to have met.

\*\* Insufficient representation to conduct business; made a recommendation only.

<sup>303</sup> For example the Albany Congress (1754) and the First Continental Congress (1774) (also called a “convention”).

<sup>304</sup> On the last clause, see *United States v. Sprague*, 282 U.S. 716, 733 (1931), *Hawke v. Smith*, 253 U.S. 221 (1920), and *Dyer v. Blair*, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) (Stevens, J.) (“[T]he delegation [from Article V] is not to the states but rather to the designated ratifying bodies . . .”).

<sup>305</sup> See, e.g., THE FEDERALIST NO. 46 (James Madison).

and

- (d) to prescribe an oath to be taken by interstate convention commissioners.

#### Section 4. Number, selection, and removal of commissioners.

- (a) Commissioners to a convention for proposing amendments shall be selected by a majority vote of a joint session of the legislature [or, in Nebraska “by a majority vote of the legislature].<sup>306</sup> Unless a different number is prescribed by the same [joint] session, the number of commissioners in this state’s committee shall be three [five].<sup>307</sup>
- (b) Commissioners to a convention for proposing amendments may be recalled and removed at any time and for any reason by a majority vote of a [joint] session of the legislature, and, if the legislature is not in session, may be suspended pending such a vote by a [joint] legislative committee duly authorized by the legislature for that purpose.
- (b) The number and methods of selection and removal of commissioners to other conventions shall be as prescribed by law.<sup>308</sup>

#### Section 5. Vacancies.

- (a) Vacancies in committees representing the state legislature at a convention for proposing amendments shall be filled by the [joint] legislative committee duly authorized for that purpose until such time as a vote by [a joint session of] the legislature shall select a permanent replacement.
- (b) Vacancies in committees of commissioners at other interstate conventions shall be filled as prescribed by law or, in absence of governing law, by the authority commissioning the commissioners.

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<sup>306</sup> Nebraska’s legislature is unicameral. Bracketed language hereinafter should be deleted in Nebraska.

<sup>307</sup> The legislature should choose an odd number so the state committee will not be deadlocked in state-by-state voting. State committees at the 1787 Constitutional Convention ranged from two commissioners (New Hampshire) to eight (Pennsylvania).

<sup>308</sup> This is left flexible so it may vary according the nature and importance of the convention.

Section 6. Limitations on commissioners' powers.

- (a) No delegate shall exceed the scope of authority granted by his or her commission or violate his or her instructions.
- (b) In the case of a convention for proposing amendments, the scope of authority granted by any commission and instructions shall not be deemed to exceed the narrowest of
  - (i) the scope of the congressional call,
  - (ii) the scope of the narrowest application among those cited by Congress as mandating the convention call, or
  - (iii) the actual terms of the commission and instructions.<sup>309</sup>

Section 7. Oath.

- (a) Prior to or contemporaneously with receiving his or her commission, each commissioner shall take the following oath: "I do solemnly swear (or affirm) that I accept and will act according to the limits of authority specified in my commission, by any present or subsequent instructions, and by the Uniform Interstate Convention Act. I understand that violating this oath may subject me to penalties provided by law."
- (b) No person shall serve as a commissioner prior to taking the oath specified in subsection (a).

Section 8. Offense of exceeding scope of authority at an interstate convention.

- (a) A person commits the offense of exceeding the scope of authority at an interstate convention if, while serving as a delegate at an interstate convention, he or she votes for, votes to consider, or otherwise promotes any action of the convention not within the scope defined in Section 6; provided, however, that a delegate may vote for or otherwise support a measure clearly identified as a non-binding recommendation rather than as a formal

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<sup>309</sup> This is kept narrow so that the commissioners do not exceed the scope of the convention as agreed to by all applying states. It is unfair to impose a broader call upon a state that agreed in its application only to a narrower call.

proposal.<sup>310</sup>

- (b) A person committing the offense of exceeding the scope of authority at an interstate convention shall be subject to the same punishments applicable to a person convicted of perjury.<sup>311</sup>

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<sup>310</sup> Issuing non-binding recommendations—clearly denominated as such—is a universally-recognized prerogative of American conventions, adopted, for example, by seven of the state conventions that ratified the Constitution and by the Annapolis Convention of 1786.

<sup>311</sup> The perjury benchmark is selected because of the oath. States may apply other benchmarks, and where there are degrees of a crime, must select a degree.

#### **§ 4.5.2. *Indiana Acts Limiting Commissioners***

Below are two laws recently passed by the Indiana legislature designed to limit the authority of commissioners to an Article V convention. Unlike the above model application, these laws apply only to Article V conventions, not all multi-state conventions.



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Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

## SENATE ENROLLED ACT No. 224

AN ACT to amend the Indiana Code concerning the general assembly.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 2-8 IS ADDED TO THE INDIANA CODE AS A **NEW ARTICLE TO READ AS FOLLOWS** [EFFECTIVE JULY 1, 2013]:

### **ARTICLE 8. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES**

#### **Chapter 1. General Provisions**

**Sec. 1. This article applies whenever an Article V convention is called.**

#### **Chapter 2. Definitions**

**Sec. 1. The definitions in this chapter apply throughout this article.**

**Sec. 2. "Alternate delegate" refers to an individual appointed as an alternate delegate as provided by law.**

**Sec. 3. "Article V convention" refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.**

**Sec. 4. "Delegate" refers to an individual appointed as provided by law to represent Indiana at an Article V convention.**

**Sec. 5. "House of representatives" refers to the house of representatives of the general assembly.**

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**Sec. 6. "Paired delegate"** refers to the delegate with whom an alternate delegate is paired as provided by law.

**Sec. 7. "Senate"** refers to the senate of the general assembly.

**Chapter 3. Duties of Delegates and Alternate Delegates**

**Sec. 1. (a)** At the time delegates and alternate delegates are appointed, the general assembly shall adopt a joint resolution to provide instructions to the delegates and alternate delegates regarding the following:

(1) The rules of procedure.

(2) Any other matter relating to the Article V convention that the general assembly considers necessary.

(b) The general assembly may amend the instructions at any time by joint resolution.

**Sec. 2. An alternate delegate:**

(1) shall act in the place of the alternate delegate's paired delegate when the alternate delegate's paired delegate is absent from the Article V convention; and

(2) replaces the alternate delegate's paired delegate if the alternate delegate's paired delegate vacates the office.

**Sec. 3. A vote cast by a delegate or an alternate delegate at an Article V convention that is outside the scope of:**

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

is void.

**Sec. 4. (a)** A delegate or alternate delegate who votes or attempts to vote outside the scope of:

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

forfeits the delegate's appointment by virtue of that vote or attempt to vote.

(b) The paired alternate delegate of a delegate who forfeits appointment under subsection (a) becomes the delegate at the time

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the forfeiture of the appointment occurs.

**Sec. 5.** The application of the general assembly to call an Article V convention for proposing amendments to the Constitution of the United States ceases to be a continuing application and shall be treated as having no effect if all of the delegates and alternate delegates vote or attempt to vote outside the scope of:

- (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
- (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

**Sec. 6.** A delegate or alternate delegate who knowingly or intentionally votes or attempts to vote outside the scope of:

- (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
- (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

commits a Class D felony.

#### **Chapter 4. Article V Convention Delegate Advisory Group**

**Sec. 1.** As used in this chapter, "advisory group" refers to the Article V convention delegate advisory group established by section 2 of this chapter.

**Sec. 2.** The Article V convention delegate advisory group is established.

**Sec. 3.** The advisory group consists of the following members:

- (1) The chief justice of the supreme court.
- (2) The chief judge of the court of appeals.
- (3) The judge of the tax court.

**Sec. 4.** The chief justice of the supreme court is the chair of the advisory group.

**Sec. 5.** The advisory group shall meet at the call of the chair.

**Sec. 6.** The advisory group shall establish the policies and procedures that the advisory group determines necessary to carry out this chapter.

**Sec. 7. (a)** Upon request of a delegate or alternate delegate, the advisory group shall advise the delegate or alternate delegate whether there is reason to believe that an action or an attempt to

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take an action by a delegate or alternate delegate would:

- (1) violate the instructions established by a joint resolution adopted under IC 2-8-3-1; or
- (2) exceed the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

(b) The advisory group may render an advisory determination under this section in any summary manner considered appropriate by the advisory group.

(c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for a determination.

(d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner possible to the delegate or alternative delegate who requested the advisory determination.

(e) If the advisory group renders an advisory determination under this section, the advisory group may also take an action permitted under section 8 of this chapter.

Sec. 8. (a) On its own motion or upon request of the speaker of the house of representatives, the president pro tempore of the senate, or the attorney general, the advisory group shall advise the attorney general whether there is reason to believe that a vote or an attempt to vote by a delegate or alternate delegate has:

- (1) violated the instructions established by a joint resolution adopted under IC 2-8-3-1; or
- (2) exceeded the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

(b) The advisory group shall issue the advisory determination under this section by one (1) of the following summary procedures:

- (1) Without notice or an evidentiary proceeding.
- (2) After a hearing conducted by the advisory group.

(c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for an advisory determination.

(d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner

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possible to the attorney general.

**Sec. 9. Immediately, upon receipt of an advisory determination under section 8 of this chapter that finds that a vote or attempt to vote by a delegate or alternate delegate is a violation described in section 8(a)(1) of this chapter or in excess of the authority of the delegate or alternate delegate, as described in section 8(a)(2) of this chapter, the attorney general shall inform the delegates, alternate delegates, the speaker of the house of representatives, the president pro tempore of the senate, and the Article V convention that:**

- (1) the vote or attempt to vote did not comply with Indiana law, is void, and has no effect; and**
- (2) the credentials of the delegate or alternate delegate who is the subject of the determination are revoked.**

SECTION 2. IC 4-6-2-1.1, AS AMENDED BY P.L.126-2012, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1.1. The attorney general has concurrent jurisdiction with the prosecuting attorney in the prosecution of the following:

- (1) Actions in which a person is accused of committing, while a member of an unlawful assembly as defined in IC 35-45-1-1, a homicide (IC 35-42-1).
- (2) Actions in which a person is accused of assisting a criminal (IC 35-44.1-2-5), if the person alleged to have been assisted is a person described in subdivision (1).
- (3) Actions in which a sheriff is accused of any offense that involves a failure to protect the life of a prisoner in the sheriff's custody.
- (4) Actions in which a violation of IC 2-8-3-6 (concerning constitutional convention delegates) has occurred.**

SECTION 3. IC 35-32-2-7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: **Sec. 7. A person may be tried for a violation of IC 2-8-3-6 in:**

- (1) Marion County; or**
- (2) the county where the person resides.**

SECTION 4. IC 35-51-2-1, AS ADDED BY P.L.70-2011, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1. The following statutes define crimes in IC 2:

- IC 2-4-1-4 (Concerning legislative investigations).
- IC 2-7-6-2 (Concerning lobbying).
- IC 2-7-6-3 (Concerning lobbying).
- IC 2-7-6-4 (Concerning lobbying).

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Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

## SENATE ENROLLED ACT No. 225

AN ACT to amend the Indiana Code concerning the general assembly.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 2-8.2 IS ADDED TO THE INDIANA CODE AS A **NEW ARTICLE TO READ AS FOLLOWS** [EFFECTIVE JULY 1, 2013]:

### **ARTICLE 8.2. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES**

#### **Chapter 1. General Provisions**

**Sec. 1. This article applies whenever an Article V convention is called.**

#### **Chapter 2. Definitions**

**Sec. 1. The definitions in this chapter apply throughout this article.**

**Sec. 2. "Alternate delegate" refers to an individual appointed as an alternate delegate as provided by law.**

**Sec. 3. "Article V convention" refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.**

**Sec. 4. "Chamber" refers to either the house of representatives or the senate.**

**Sec. 5. "Delegate" refers to an individual appointed as provided by law to represent Indiana at an Article V convention.**

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**Sec. 6. "House of representatives"** refers to the house of representatives of the general assembly.

**Sec. 7. "Paired delegate"** refers to the delegate with whom an alternate delegate is paired as provided by law.

**Sec. 8. "Senate"** refers to the senate of the general assembly.

**Chapter 3. Qualifications and Appointment of Delegates and Alternate Delegates**

**Sec. 1. (a)** An individual must satisfy the following to be appointed as a delegate to an Article V convention:

- (1) The individual must reside in Indiana.
- (2) The individual must be a registered voter in Indiana.
- (3) The individual must be at least eighteen (18) years of age.
- (4) The individual is not registered or required to be registered as a lobbyist under IC 2-2.1, IC 4-2-7, IC 4-2-8, 2 U.S.C. 1603, or rules or regulations adopted under any of these laws.

**(b)** An individual may not be appointed as a delegate if the individual holds a federal office.

**Sec. 2.** An individual appointed as an alternate delegate must have the same qualifications as an individual appointed as a delegate under section 1 of this chapter.

**Sec. 3. (a)** Whenever an Article V convention is called, the general assembly shall appoint:

- (1) the number of delegates allocated to represent Indiana; and
- (2) an equal number of alternate delegates;

under rules adopted jointly by the house of representatives and the senate. Unless established otherwise by the rules and procedures of an Article V convention, it shall be assumed that Indiana has two (2) delegates and two (2) alternate delegates designated to represent Indiana.

**(b)** If the general assembly is not in session during the time during which delegates to an Article V convention must be appointed, the governor shall call the general assembly into special session under Article 4, Section 9 of the Constitution of the State of Indiana for the purpose of appointing delegates and alternate delegates.

**Sec. 4. (a)** To be appointed a delegate or an alternate delegate, an individual must receive, in each chamber, the vote of a majority of all the members elected to that chamber.

**(b)** At the time of appointment, each alternate delegate must be paired with a delegate as provided in a joint resolution adopted by

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the general assembly.

**Sec. 5.** The general assembly may recall any delegate or alternate delegate and replace that delegate or alternate delegate with an individual appointed under this article at any time.

**Sec. 6.** The general assembly shall appoint or recall delegates or alternate delegates by joint resolution.

**Sec. 7. (a)** A delegate or an alternate delegate is:

- (1) entitled to receive the same mileage and travel allowances paid to individuals who serve as legislative members of interim study committees established by the legislative council; and
- (2) not entitled to receive a salary or a per diem instead of salary for serving as a delegate or alternate delegate.

**(b)** For purposes of Article 2, Section 9 of the Constitution of the State of Indiana, the position of delegate or alternate delegate is not a lucrative office.

**(c)** All funds necessary to pay expenses under subsection (a) shall be paid from appropriations to the legislative council and the legislative services agency.

**Sec. 8.** Each delegate and alternate delegate shall, after appointment and before the delegate or alternate delegate may exercise any function as delegate or alternate delegate, execute an oath in writing that the delegate or alternate delegate will:

- (1) support the Constitution of the United States and the Constitution of the State of Indiana;
- (2) faithfully abide by and execute any instructions to delegates and alternate delegates adopted by the general assembly and as may be amended by the general assembly at any time; and
- (3) otherwise faithfully discharge the duties of delegate or alternate delegate.

**Sec. 9. (a)** A delegate's or alternate delegate's executed oath shall be filed with the secretary of state.

**(b)** After a delegate's or alternate delegate's oath is filed with the secretary of state, the governor shall issue a commission to the delegate or alternate delegate as provided in IC 4-3-1-5(2).

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**Part V: Full-Text Source Materials**

**§ 5.1. *Robert Natelson, Founding-Era Conventions***

**Founding-Era Conventions and the Meaning of the Constitution's  
“Convention for Proposing Amendments”**

Robert G. Natelson

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## ARTICLES

### FOUNDING-ERA CONVENTIONS AND THE MEANING OF THE CONSTITUTION'S "CONVENTION FOR PROPOSING AMENDMENTS"

*Robert G. Natelson*\*

#### *Abstract*

Under Article V of the U.S. Constitution, two thirds of state legislatures may require Congress to call a "Convention for proposing Amendments." Because this procedure has never been used, commentators frequently debate the composition of the convention and the rules governing the application and convention process. However, the debate has proceeded almost entirely without knowledge of the many multi-colony and multi-state conventions held during the eighteenth century, of which the Constitutional Convention was only one. These conventions were governed by universally-accepted convention practices and protocols. This Article surveys those conventions and shows how their practices and protocols shaped the meaning of Article V.

INTRODUCTION: DEFINING THE CONFUSION.....618

I. WHY THE CONSTITUTION INCLUDES A PROPOSING CONVENTION  
AS AN ALTERNATIVE TO CONGRESSIONAL PROPOSAL .....621

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The author expresses his gratitude to the Independence Institute and its president, Jon Caldara, and research director, Dave Kopel, for providing a welcoming home for his scholarship; to Zakary Kessler (J.D., University of Colorado, 2013), for exceptional research assistance; to Scott Lillard, M.A. candidate in History at Case Western Reserve University for insights into the Navigation Convention; and to Virginia Dunn, Archives & Library Reference Services Manager, Library of Virginia; Dr. Charles H. Lesser, Senior Archivist, Emeritus, South Carolina Dept. of Archives and History; and Bruce H. Haase, Public Services Manager, Delaware Public Archives.

II.	OVERVIEW OF PRIOR AMERICAN EXPERIENCE WITH CONVENTIONS, AND THEIR RECORDS AND TERMINOLOGY ....	624
A.	<i>Conventions Before the Constitution</i> .....	624
B.	<i>Historical Records</i> .....	628
C.	<i>Convention Terminology</i> .....	629
III.	SUMMARY OF CONVENTIONS PRIOR TO THE CONSTITUTION ....	632
A.	<i>The Albany Congress of 1754</i> .....	632
B.	<i>The Stamp Act Congress of 1765</i> .....	635
C.	<i>The Continental Congress of 1774</i> .....	637
D.	<i>The Providence Convention of 1776–1777</i> .....	640
E.	<i>The York Town and Abortive Charleston Price Conventions of 1777</i> .....	644
F.	<i>The Springfield Convention of 1777</i> .....	647
G.	<i>The New Haven Price Convention of 1778 (and the Abortive Meetings in Charleston and Fredericksburg)</i> ....	649
H.	<i>The Hartford Convention of 1779</i> .....	652
I.	<i>The Philadelphia Price Convention of 1780</i> .....	655
J.	<i>The Boston Convention of 1780</i> .....	659
K.	<i>The Hartford Convention of 1780</i> .....	662
L.	<i>The Abortive and Successful Providence Conventions of 1781</i> .....	664
M.	<i>On the Road to Annapolis: Abortive Conventions and the First State Legislative “Application”</i> .....	665
N.	<i>The Annapolis Commercial Convention of 1786</i> .....	671
O.	<i>The Constitutional Convention of 1787</i> .....	674
IV.	DID PRIOR MULTI-GOVERNMENT CONVENTIONS FORM THE CONSTITUTIONAL MODEL FOR THE AMENDMENTS CONVENTION? .....	680
	CONCLUSION: WHAT PRIOR CONVENTIONS TELL US ABOUT THE CONVENTION FOR PROPOSING AMENDMENTS.....	686
	APPENDICES A & B <sup>1</sup> .....	691

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1. *Bibliographical Note:* This footnote collects alphabetically the secondary sources cited more than once, including several of the author’s prior publications. The sources and short form citations used are as follows:

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## INTRODUCTION: DEFINING THE CONFUSION

The United States Constitution authorizes two methods by which amendments may be proposed for ratification: (1) by a two thirds majority of each house of Congress or (2) by a “Convention for proposing Amendments,” which Congress is required to call upon receiving applications from two thirds of the state legislatures.<sup>2</sup>

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Scott Lillard, *The Cement of Interest: Interstate Canals and the Transition from the Articles of Confederation to the Constitution, 1783–1787* (2012) (on file with author). Robert G. Natelson, *Amending the Constitution by Convention: A More Complete View of the Founders’ Plan* (Independence Institute, Working Paper No. IP-7-2010, 2010) [hereinafter Natelson, *Founders’ Plan*], available at [http://constitution.i2i.org/files/2010/12/IP\\_7\\_2010\\_a.pdf](http://constitution.i2i.org/files/2010/12/IP_7_2010_a.pdf).

Robert G. Natelson, *Amending the Constitution by Convention: Lessons for Today from the Constitution’s First Century*, (Independence Institute, Working Paper No. IP-5-2011, 2011) [hereinafter Natelson, *First Century*], available at [http://liberty.i2i.org/files/2012/03/IP\\_5\\_2011\\_c.pdf](http://liberty.i2i.org/files/2012/03/IP_5_2011_c.pdf).

Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011) [hereinafter Natelson, *Rules*].

ROBERT C. NEWBOLD, THE ALBANY CONGRESS AND PLAN OF UNION OF 1754 (1955) [hereinafter NEWBOLD].

CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966) [hereinafter ROSSITER].

Benjamin Rush, *Historical Notes of Dr. Benjamin Rush, 1777*, 27 PA. MAG. HIST. & BIOGRAPHY 129 (1903) (comp. S. Weir Mitchell) [hereinafter Rush, *Notes*].

Kenneth Scott, *Price Control in New England During the Revolution*, 19 NEW ENG. Q. 453 (1946).

TIMOTHY J. SHANNON, INDIANS AND COLONISTS AT THE CROSSROADS OF EMPIRE: THE ALBANY CONGRESS OF 1754 (2000) [hereinafter SHANNON].

Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, Statement Before the Committee on Ways and Means of the California State Assembly (Feb. 1, 1979), reprinted in 10 PAC. L.J. 627 (1979) [hereinafter Tribe].

HARRY M. WARD, UNITE OR DIE: INTERCOLONY RELATIONS 1690-1763 (1971) [hereinafter WARD].

C.A. WESLAGER, THE STAMP ACT CONGRESS (1776) (hereinafter WESLAGER).

2. The relevant language is as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a *Convention for proposing Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

Although state legislatures have applied repeatedly, at no time has the necessary minimum of two thirds been reached on any one topic, so Congress has never called an amendments convention.

In recent decades, commentators have expressed uncertainty about the scope of an amendments convention, the effectiveness of limits on its charge, how delegates should be selected, and who should determine its operative rules.<sup>3</sup> They also have posed the question of whether it is essentially (to use James Madison's dichotomy)<sup>4</sup> a "national" or a "federal" body. In other words, is it a national assembly elected by the people and presumably apportioned by population? Or is it an assembly of delegates representing the states?<sup>5</sup>

Many of these questions arise because of a general failure to examine sufficiently the history behind and surrounding Article V. For example, the late Professor Charles L. Black, Jr. of Yale Law School concluded that an amendments convention is a "national" rather than "federal" body.<sup>6</sup> He deduced this conclusion without referring to anything the Founders had to say on the matter and while under the misimpression that the only relevant precedent was the 1787 Constitutional Convention.<sup>7</sup> Other questions derive from the ahistorical error of assuming that an *amendments* convention is the same thing as a *constitutional* convention,<sup>8</sup> despite clear historical differences between the two.<sup>9</sup>

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

3. E.g., Tribe, *supra* note 1, at 634–40. Some commentators argue that Congress should decide all or some of those questions. See, e.g., Samuel J. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 879, 892 (1968).

4. THE FEDERALIST NO. 39, *supra* note 1, at 196–99 (James Madison).

5. E.g., Black, *supra* note 1, at 964–65.

6. *Id.*

7. See *id.*

8. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 738 (1993) ("[T]here can be no such thing as a 'limited' constitutional convention. A constitutional convention, once called, is a free agency.").

9. In a nutshell, the difference is as follows: a constitutional convention is a body that drafts an entirely new constitution, often (although not always) outside any pre-existing constitutional structure. Natelson, *Founders' Plan*, *supra* note 1, at 5–7. An amendments convention meets pursuant to the Constitution and is essentially a drafting committee for determining the language of amendments addressing subjects identified in the state legislative applications. *Id.*; see also Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 PUBLIUS 113, 137 ("An Article V convention could propose one or many amendments, but it is not for the purpose of 'an unconditional reappraisal of constitutional foundations.' Persisting to read Article V in this way, so that it contemplates a constitutional convention that writes—not amends—a constitution, is often a rhetorical ploy to terrify sensible people." (footnote omitted)). Confusion between the two first arose in the nineteenth century, sowed by opponents of the process. See Natelson, *First Century*, *supra* note

What nearly all commentators have overlooked<sup>10</sup> is that the Framers did not write, nor did the Ratifiers adopt, Article V on a blank slate. They wrote and ratified against the background of a long tradition of multi-colony and multi-state conventions. During the century before the drafting of Article V, there had been at least 32 such gatherings—at least 21 before Independence<sup>11</sup> and another eleven between 1776 and 1786.<sup>12</sup> In addition, there had been several abortive, although still instructive, convention calls. These multi-government gatherings were the direct predecessors of the convention for proposing amendments, and formed the model upon which the convention for proposing amendments was based.

Universally-accepted protocols determined multi-government convention procedures. These protocols fixed the acceptable ways of calling such conventions, selecting and instructing delegates, adopting convention rules, and conducting convention proceedings. The actors involved in the process—state legislatures and executives, the Continental and Confederation Congresses, and the delegates themselves—each had recognized prerogatives and duties, and were subject to recognized limits.<sup>13</sup>

These customs are of more than mere Founding-Era historical interest. They governed, for the most part, multi-state conventions held in the nineteenth century as well—notably but not exclusively, the Washington Conference Convention of 1861.<sup>14</sup> More importantly for present purposes, they shaped the Founders' understanding of how the constitutional language would be interpreted and applied.

Moreover, the Constitution, as a legal document, must be understood in the context of the jurisprudence of the time. In that jurisprudence, custom was a key definer of the "incidents" or attributes that accompanied principal (i.e., express) legal concepts and powers.<sup>15</sup> Thus,

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1, at 10. Today it is rampant in the legal literature and other areas of public discourse. *See, e.g.,* Tribe, *supra* note 1 (calling an amendments convention a "constitutional convention").

10. Russell L. Caplan is an important exception. *See* CAPLAN, *supra* note 1.

11. *Infra* Part II.A (listing conventions).

12. *Infra* Part III.C–III.O (listing and discussing post-Independence convention).

13. *Infra* Part III.

14. The Washington Conference Convention was a gathering of 21 states called by Virginia in an effort to propose a constitutional amendment that would avoid the Civil War. *See* ROBERT GRAY GUNDERSON, OLD GENTLEMEN'S CONVENTION: THE WASHINGTON PEACE CONFERENCE OF 1861 (1961). This convention followed eighteenth century convention protocol virtually to the letter. *See, e.g., id.* at 48 (describing "one state, one vote" rule). *See also* THELMA JENNINGS, THE NASHVILLE CONVENTION: SOUTHERN MOVEMENT FOR UNITY, 1848–1850 (1980) (describing the nine-state Nashville Convention of 1850, which followed the same voting rule). *Id.* at 137–38.

15. The Founding-Era law of principals and incidents and its implication for constitutional interpretation are discussed in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I.

the customs by which the founding generation initiated and conducted interstate conventions tell us how an Article V convention should be initiated and conducted; further, they help define the powers and prerogatives of the actors in the process. But beyond that, there is considerable affirmative evidence that the Founders *specifically* understood these customs to define the language of Article V. These practices enable us to re-capture the constitutional meaning of the terms "Application," "call," and "Convention for proposing Amendments."<sup>16</sup>

Part I of this Article explains why the Founders inserted the convention method for proposing amendments into the Constitution. Part II introduces the early-American convention tradition and some of its terminology. Part III summarizes the protocols for fourteen multi-colony and multi-state conventions held between 1754 and 1787, and also discusses the procedures employed for calling several abortive conventions. Part IV collects the evidence showing that the established protocols inhere in Article V. Part IV also explains that the Constitution specifies rules for the few cases in which there were procedural variations. The discussion concludes with an explanation of how the practice surrounding the predecessor conventions impacts the rules for amendments conventions today. Two Appendices follow, the first listing alphabetically the delegates to the fourteen conventions examined in detail, and the second listing the same delegates by state.

#### I. WHY THE CONSTITUTION INCLUDES A PROPOSING CONVENTION AS AN ALTERNATIVE TO CONGRESSIONAL PROPOSAL

Article V grants powers<sup>17</sup> to two principal sorts of assemblies: legislatures, both state and federal; and conventions, both state and federal. It assigns *in-state* conventions the task of ratifying or rejecting the Constitution itself<sup>18</sup> and (when Congress so determines) the task of ratifying or rejecting proposed amendments.<sup>19</sup> Article V assigns to a *general* convention power to propose amendments.<sup>20</sup>

The initial draft of the Constitution, composed by the Committee of Detail, provided that "This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of

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SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 60–68 (2010).

16. U.S. CONST. art. V.

17. The assemblies designated in Article V exercise "federal functions" derived from the Constitution. State legislatures and conventions do not exercise reserved powers pursuant to the Tenth Amendment. Natelson, *Rules*, *supra* note 1, at 703 (collecting cases).

18. U.S. CONST. art. VII.

19. *Id.* art. V.

20. *Id.*; see *infra* note 63 and accompanying text on the meaning of "general convention."



the United States shall call a Convention for that Purpose.”<sup>21</sup> In other words, the states would trigger a process requiring Congress to call a convention, which in turn would draft, and possibly adopt, all amendments. Gouverneur Morris successfully proposed permitting Congress, as well as the states, to initiate the amendment process.<sup>22</sup> When the document emerged from the Committee of Style, it appeared to give Congress *exclusive* power to propose amendments for state ratification.<sup>23</sup> George Mason then objected because he feared Congress might become abusive or refuse to adopt necessary or desirable amendments, particularly those curbing its own power.<sup>24</sup> For this reason, the draft was changed to insert the convention for proposing amendments to enable the states to propose amendments without a substantive veto by Congress.<sup>25</sup> The immediate inspiration for the application procedure seems to have been a provision in the Georgia constitution whereby a majority of counties could demand amendments on designated topics, and require the legislature to call a convention to draft the language.<sup>26</sup>

It was well for the Constitution that the state application and convention procedure was added. Without it, the document may never have been ratified. This is because many believed the Constitution could lead to congressional abuse and overreaching, and that Congress would

21. 2 FARRAND’S RECORDS, *supra* note 1, at 159.

22. *Id.* at 468 (Aug. 30, 1787); *see also id.* at 558 (Sept. 10, 1787) (“The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments. . . .” (quoting Alexander Hamilton)).

23. *Id.* at 578 (Aug. 30, 1787) (“The Legislature of the United States, 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 . . .”).

24. The record, paraphrasing George Mason, stated:

As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as [Mason] verily believed would be the case.

*Id.* at 629 (Sept. 15, 1787).

25. *See id.* at 629–30.

26. Georgia’s constitution provided that:

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

GA. CONST. of 1777, art. LXIII. The Committee of Detail’s draft convention looked much like the Georgia provision. 2 FARRAND’S RECORDS, *supra* note 1, at 188.

be unlikely to curb itself.<sup>27</sup> The state application and convention procedure of Article V provided the Constitution's advocates with a basis for arguing that the system was a balanced one,<sup>28</sup> and that Congress could be bypassed, if appropriate.<sup>29</sup> Illustrative are comments by the widely-read Federalist essayist Tench Coxe:

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will shew [*sic*] this to be a groundless remark. It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures; and all amendments proposed by such convention, are to be *valid* when approved by the conventions or legislatures of three fourths of the states. It

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27. *An Old Whig I*, PHILA. INDEP. GAZETTEER, Oct. 12, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 376–77 (“[W]e shall never find two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance”); see also A Plebeian, *An Address to the People of the State of New York*, Apr. 17, 1788, reprinted in 20 DOCUMENTARY HISTORY, *supra* note 1, at 942, 944 (“The amendments contended for as necessary to be made, are of such a nature, as will tend to limit and abridge a number of the powers of the government. And is it probable, that those who enjoy these powers will be so likely to surrender them after they have them in possession, as to consent to have them restricted in the act of granting them? Common sense says—they will not.”).

28. *E.g.*, 23 DOCUMENTARY HISTORY, *supra* note 1, at 2522 (Feb. 4, 1789) (reproducing remarks of Samuel Rose, that Congress could propose amendments if it did not have sufficient power and the states, acting through the convention, could propose if it had too much).

29. 3 ELLIOT'S DEBATES, *supra* note 1, at 101 (“[Patrick Henry] thinks amendments can never be obtained, because so great a number is required to concur. Had it rested solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originated with Congress. On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments. . . .” (quoting George Nicholas at the Virginia ratifying convention)); James Iredell, at the North Carolina ratifying convention, also explained:

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

4 ELLIOT'S DEBATES, *supra* note 1, at 177.

must therefore be evident to every candid man, that two thirds of the states can *always* procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them. Congress therefore cannot hold *any* power, which three fourths of the states shall not approve, on *experience*.<sup>30</sup>

## II. OVERVIEW OF PRIOR AMERICAN EXPERIENCE WITH CONVENTIONS, AND THEIR RECORDS AND TERMINOLOGY

### A. *Conventions Before the Constitution*

The Founders understood a political “convention” to be an assembly, other than a legislature, designed to undertake prescribed governmental functions.<sup>31</sup> The convention was a familiar and approved device: several generations of Englishmen and Americans had resorted to them. In 1660 a “convention Parliament” had recalled the Stuart line, in the person of Charles II, to the throne of England.<sup>32</sup> A 1689 convention Parliament had adopted the English Bill of Rights, declared the throne vacant, and invited William and Mary to fill it.<sup>33</sup> Also in 1689, Americans resorted to at least four conventions in three different colonies as mechanisms to replace unpopular colonial governments, and in 1719 they held yet another.<sup>34</sup>

During the run-up to Independence, conventions within particular colonies issued protests, operated as legislatures when the *de jure* legislature had been dissolved, and removed British officials and governed in their absence.<sup>35</sup> After Independence, conventions wrote

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30. Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283–84 (alteration added) (emphasis in original). Coxe made the same points in *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, reprinted in 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142. Coxe had been Pennsylvania’s delegate to the Annapolis convention.

31. Natelson, *Founders’ Plan*, *supra* note 1, at 6; see also *In re Op. of the Justices*, 167 A. 176, 179 (Sup. Jud. Ct. Me. 1933) (“The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes.”); CAPLAN, *supra* note 1, at 5–6 (discussing the development of the word “convention” in the seventeenth century).

32. CAPLAN, *supra* note 1, at 5; see also Natelson, *Founders’ Plan*, *supra* note 1, at 6.

33. CAPLAN, *supra* note 1, at 5; Natelson, *Founders’ Plan*, *supra* note 1, at 6.

34. CAPLAN, *supra* note 1, at 6–7 (discussing two conventions in Massachusetts, one in New York, one in Maryland, and one in South Carolina).

35. See *id.* at 8–10.

several state constitutions.<sup>36</sup>

Those state constitutions also resorted to conventions as elements of their amendment procedures. The Pennsylvania Constitution of 1776 and the Vermont Constitution of 1786 both authorized amendments conventions limited as to subjects by a "council of censors."<sup>37</sup> The Massachusetts Constitution of 1780 provided for amendment by convention.<sup>38</sup> The Georgia Constitution of 1777 required the legislature to call a convention to draft constitutional amendments whose gist had been prescribed by a majority of counties.<sup>39</sup>

Conventions within individual colonies or states represented the people, towns, or counties.<sup>40</sup> Another sort of "convention" was a

36. CAPLAN, *supra* note 1, at 10–13. Sometimes a joint session of the legislature met as a convention to write a constitution, as happened with the unsuccessful Massachusetts constitution of 1777. 20 MASS. RECORDS, *supra* note 1, at 315.

37. Pennsylvania's original constitution provided, in relevant part:

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

PA. CONST. of 1776, § 47; *see also* VT. CONST. of 1786, art. XL (similar language).

38. The Massachusetts constitution of 1780 stated that:

[T]he general court which shall be in the year of our Lord [1795] shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to [*sic*] amendments.

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

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

39. GA. CONST. of 1777, art. LXIII.

40. HOAR, *supra* note 1, at 2–10 (describing state constitutional conventions at the Founding); *see also* CAPLAN, *supra* note 1, at 8–16 (also discussing conventions). Thus, state conventions for ratifying the Constitution represented the people. *See, e.g.*, 3 DOCUMENTARY HISTORY, *supra* note 1, at 110 (setting forth the Delaware form of ratification); *id.* at 275–78 (setting forth the Georgia form of ratification); *id.* at 560 (setting forth the Connecticut form of

gathering of three or more American governments under protocols modeled on international diplomatic practice.<sup>41</sup> These multi-government conventions were comprised of delegations from each participating government, including, on some occasions, Indian tribes. Before Independence, such gatherings often were called “congresses,” because “congress” was an established term for a gathering of sovereignties.<sup>42</sup> After Independence, they were more often called “conventions,”<sup>43</sup> presumably to avoid confusion with the Continental and Confederation Congresses. But both before<sup>44</sup> and after<sup>45</sup> Independence the terms could be employed interchangeably.

Multi-government congresses or conventions were particularly common in the Northeast, perhaps because governments in that region had a history of working together. In 1643 the four colonies of Massachusetts, Plymouth Colony, Connecticut, and New Haven formed the United Colonies of New England. Essentially a joint standing committee of colonial legislatures, this association was not always active, but endured at least formally until 1684.<sup>46</sup> In 1695, the Crown created the Dominion of New England, a unified government imposed on New England, New York, and New Jersey.<sup>47</sup> The Dominion proved

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ratification); *cf. In re Op. of the Justices*, 167 A. 176, 179 (Sup. Jud. Ct. Me. 1933) (noting that conventions within states directly represented the people).

41. There also were many meetings of representatives of only two colonial governments—for example, the 1684 and 1746 conferences with the Iroquois, and the 1785 meeting between Maryland and Virginia at Mount Vernon, but two-sovereign meetings seem not to have been called “conventions.” IROQUOIS DIPLOMACY, *supra* note 1, at 161, 182, 201. On the pre-Independence conferences with the Iroquois, *see generally id.* at 157–208; *see generally* FRANKLIN, INDIAN TREATIES, *supra* note 1.

42. *See, e.g.*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (defining “congress” in part as “an appointed meeting for settlement of affairs between different nations”).

43. *See* Parts III.D through III.O (discussing post-Independence multi-state conventions)..

44. *See, e.g.*, 2 N.Y. RECORDS, *supra* note 1, at 545 (reproducing Massachusetts commission to Albany Congress, referring to it as “a General convention of Commissioners for their Respective Governments”); 1 J. CONT. CONG., *supra* note 1, at 17 (reproducing the Connecticut credentials for the First Continental Congress, which empower Connecticut’s delegates to attend the “congress, or convention of commissioners, or committees of the several Colonies”); DANIEL LEONARD, MASSACHUSETTENSIS 106 (Boston, 1775) (referring to the Albany Congress as a “congress or convention of committees from the several colonies”).

45. Rush, *Notes*, *supra* note 1, at 129 (Dec. 25, 1776) (referring to the Providence Convention as “a Congress composed of Deputies from the 4 New Eng<sup>d</sup> [*sic*] States”); Letter from Daniel St. Thomas Jenifer to Thomas Sim Lee (Sept. 26, 1780), in 5 LETTERS, *supra* note 1, at 391–92 (calling the 1780 Boston Convention a “Congress or Convention”); Gov. James Bowdoin, Speech before Council Chamber (May 31, 1785), *reprinted in* 1784–85 MASS. RECORDS, *supra* note 1, at 706, 710 (referring to a proposed general convention as a “Convention or Congress” of “special delegates from the States”).

46. NEWBOLD, *supra* note 1, at 24–25.

47. *Id.* at 1, at 26.

unpopular, and in 1689 colonial conventions swept it away; nevertheless, northeastern governments continued to confer together. Many of these meetings were conclaves of colonial governors, usually conferring on issues of defense against French Canada and her allied Indian tribes, rather than conventions of diplomatic delegations.<sup>48</sup> An example from outside the Northeast was the meeting of five governors held at Alexandria, Virginia in 1755.<sup>49</sup> Many others, however, were full-dress conventions among commissioners appointed from three or more colonies. These meetings were usually, but not always, held under the sanction of royal authorities.

To be specific: Three colonies met at Boston in 1689 to discuss defense issues.<sup>50</sup> The following year, the acting New York lieutenant governor called, without royal sanction, a defense convention of most of the continental colonies to meet in New York City. The meeting was held on May 1, 1690, with New York, Massachusetts Bay, Connecticut, and Plymouth colonies in attendance.<sup>51</sup> A similar gathering occurred in 1693 in New York, this time under Crown auspices.<sup>52</sup> Other defense conventions were held in New York City in 1704,<sup>53</sup> Boston in 1711,<sup>54</sup> Albany in 1744 and 1745,<sup>55</sup> and New York City in 1747.<sup>56</sup> The New England colonies held yet another in 1757.<sup>57</sup>

In addition to defense conventions, there were conventions serving as diplomatic meetings among colonies and sovereign Indian tribes, particularly the Iroquois. There were at least ten such conclaves between 1677 and 1768 involving three or more colonies. Those ten included gatherings in 1677, 1689, 1694, and 1722 at Albany, New York; in 1744 at Lancaster, Pennsylvania; in 1745, 1746, 1751, and 1754 at Albany; and in 1768 at Fort Stanwix (Rome), New York.<sup>58</sup>

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48. See generally, WARD, *supra* note 1, at 52–65 (summarizing war conferences and conventions).

49. *Id.* at 58.

50. *Id.* at 52.

51. *Id.* at 52–53. The brief proceedings are in 2 N.Y. HISTORY, *supra* note 1, at 134–35.

52. WARD, *supra* note 1, at 53–54.

53. *Id.* at 54.

54. *Id.* at 56.

55. *Id.*

56. *Id.* at 56–57.

57. *Id.* at 62.

58. IROQUOIS DIPLOMACY, *supra* note 1, at 160, 161, 173, 181 (listing two), 182, 185, 187, 190 & 197. WARD, *supra* note 1, adds the conventions held in 1689, 1694, and 1746. *Id.* at 131, 133 & 139. NEWBOLD, *supra*, note 1, at 28, seems to be counting Indian conferences at which only one colony attended. He specifically names as multi-state gatherings only the 1744 Lancaster, Pennsylvania convention (Indians plus Pennsylvania, Maryland, and Virginia); a 1748 (possibly an error for 1746) Albany meeting (Indians plus Massachusetts and New York); and a 1751 gathering, also in Albany (Indians plus Massachusetts, Connecticut, New York, and South Carolina). *Id.* Cf. SHANNON, *supra*, note 1, at 132 & 133 (adding the 1745 Albany

The assembly at Lancaster became one of the more noted. Participants included Pennsylvania, Maryland, Virginia, and several Indian tribes. The proceedings lasted from June 22 to July 4, 1744, and produced the Treaty of Lancaster.<sup>59</sup> Even more important, however, was the seven-colony Albany Congress of 1754, whose proceedings are discussed in Part III.A.

The most famous inter-colonial conventions were the Stamp Act Congress of 1765 and the First Continental Congress of 1774, discussed in Parts IV.B and IV.C. As for the *Second* Continental Congress (1775-81), participants might initially have thought of it as a convention, but it is not so classified here because it really served as a continuing legislature.

After the colonies had declared themselves independent states, they continued to gather in conventions. All of these meetings were called to address specific issues of common concern. Northeastern states convened twice in Providence, Rhode Island—in December, 1776 and January, 1777, and again in 1781. Other conventions of northeastern states met in Springfield, Massachusetts (1777); New Haven, Connecticut (1778); Hartford, Connecticut (1779 and 1780); and Boston, Massachusetts (1780).<sup>60</sup> Conventions that included states outside the Northeast included those at York Town, Pennsylvania (1777), Philadelphia, Pennsylvania (1780 and, of course, 1787), and Annapolis, Maryland (1786).<sup>61</sup> There also were abortive calls for multi-state conventions in Fredericksburg, Virginia, Charleston, South Carolina, and elsewhere.<sup>62</sup>

Thus, the Constitutional Convention of 1787—far from being the unique event it is often assumed to be—was but one in a long line of similar gatherings.

### B. *Historical Records*

Each convention produced official records referred to as its *journal*, *minutes*, or *proceedings*. These records vary widely in length and completeness. For example, the journals of the First Continental Congress and of the Constitutional Convention consume hundreds of pages, but the proceedings of the 1781 Providence Convention cover

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conference between the Indians and Pennsylvania, Massachusetts, Connecticut, and New York, and stating accurately that four colonies attended the 1751 meeting in Albany).

59. WARD, *supra* note 1, at 137-38. Maryland and Virginia signed treaties with the Indians at this conference, with Pennsylvania serving as a broker. The lieutenant governor of Pennsylvania also served as a representative of the colony of Delaware. See FRANKLIN, INDIAN TREATIES, *supra* note 1, at 41.

60. See Natelson, *First Century*, *supra* note 1, at 1-2.

61. See *id.*

62. *Infra* Part III.K-L.

less than a page and a half. Fortunately, a fair amount of other historical material supplements the journals. This material includes legislative records, other official documents, and personal correspondence. The journals and other sources tend to show consistency in convention protocol and procedures.

The Albany Congress, the Stamp Act Congress, the First Continental Congress, and the Constitutional Convention have been subjects of detailed historical study. The other multi-state conventions have been largely neglected.

### C. *Convention Terminology*

Convention practice included certain standard terminology, some of which appears in Article V. The convention *call* was the initial invitation to meet. Most calls were issued by individual states or colonies. Some were issued by the Continental Congress or by previous conventions.

The usual role of a multi-state convention was as a problem-solving task force, so the call necessarily specified the issue or issues to be addressed. However, the call never attempted to dictate a particular outcome or to limit the convention to answering a prescribed question affirmatively or negatively. The call also specified the initial time and place of meeting and whether the convention resolutions would bind the participating states or serve merely as recommendations or proposals. The call did not determine how the colonies or states were to select their delegates, nor did it establish convention rules or choose convention officers. An invited government was always free to ignore a call.

A *general* convention was one to which all or most colonies or states were invited, even if limited to a single subject.<sup>63</sup> A *partial* convention was one restricted to a certain region, such as New England or the Middle States. The terms "general" or "partial" referred only to geographic area; they had nothing to do with the scope of the subject matter specified by the call. Thus, a convention for proposing amendments is a general convention, even if limited to a single subject.<sup>64</sup> Failure to understand why a convention for proposing

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63. E.g., *A Freeman*, NEWPORT HERALD, Apr. 3, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 220–21 (referring to the Constitutional Convention as "the General Convention of the States"). The Philadelphia Price Convention of 1780 was referred to as a general convention because all but the three southernmost states were invited. PA. JOURNALS, *supra* note 1, at 396–97 (Nov. 15, 1779).

64. E.g., 4 ELLIOT'S DEBATES, *supra* note 1, at 177 ("The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a *general convention* for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by *such general convention*, are afterwards



amendments is referred to as a general convention has led some writers to conclude that it must be unlimited as to topic.<sup>65</sup>

A *plenipotentiary* convention was one whose topic was unlimited. The credentials issued to delegates to the First Continental Congress were so broad, that it was arguably plenipotentiary.<sup>66</sup> The powers of the other multi-government conventions ranged from the very broad (the Springfield Convention of 1777,<sup>67</sup> the 1787 Constitutional Convention)<sup>68</sup> to the very narrow (e.g., the Providence Convention of 1781).<sup>69</sup>

A *committee* was a colonial or state delegation—that is, the body into which the diplomacy of the colony or state had been *committed*. Thus, an interstate convention, while often referred to by a variant of the phrase “convention of the states,”<sup>70</sup> also could be called a “convention of committees”<sup>71</sup> or a “convention of committees of the several states.”<sup>72</sup>

Each participating colony or state empowered its representatives by documents called *commissions*, sometimes referred to also as *credentials*.<sup>73</sup> Although a representative could be referred to informally as a “delegate,” the formal title was *commissioner*.<sup>74</sup> Each commission

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to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and, upon the ratification of three fourths of the states, will become a part of the Constitution.” (quoting James Iredell, at the North Carolina ratifying convention)) Iredell, a leading lawyer and judge, later served as associate justice on the United States Supreme Court.

65. E.g., Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 202 (1972).

66. *Infra* Part III.C.

67. *Infra* Part III.F.

68. On the broad scope of the powers of most delegates at the Constitutional Convention, see *infra* Part III.N–O.

69. *Infra* Part III.L.

70. E.g., *A Freeman*, NEWPORT HERALD, Apr. 3, 1788, reprinted in 24 DOCUMENTARY HISTORY, *supra* note 1, at 220; 19 J. CONT. CONG. 235 (Mar. 6, 1781) (referring to the second Hartford convention as a “convention of sundry states”).

71. E.g., 11 J. CONT. CONG., *supra* note 1, at 843 (Aug. 27, 1778) (referring to the Springfield gathering); 15 *id.* at 1254 (Nov. 10, 1779) (referring to the first Hartford convention the same way); *id.* at 1272 (Nov. 15, 1779) (same); 17 *id.* at 790 (Aug. 29, 1780) (referring to the 1780 Boston Convention); 18 *id.* at 931–32 (Oct. 16, 1780) (same); *id.* at 1141 (Dec. 12, 1780) (referring to the second Hartford convention the same way).

72. E.g., 9 *id.* at 1043 (Dec. 20, 1777) (referring to the prospective New Haven convention).

73. See generally *infra* Part III (discussing proceedings at various conventions).

74. Hence, such a convention sometimes was called a “convention of commissioners.” See, e.g., 15 *id.* at 1287 (Nov. 18, 1779) (so labeling the first Hartford convention); PA. JOURNALS, *supra* note 1, at 398 (Nov. 18, 1779) (also so labeling the first Hartford Convention).

specified the topic of the meeting and the scope of authority granted.<sup>75</sup> *Instructions* might supplement the commission.<sup>76</sup> Unlike commissions, instructions were not usually reproduced in the convention journal, and might be secret.<sup>77</sup> A delegate's commission or instructions could restrict his authority to a scope narrower than the scope of the call. For example, the commissions issued by New York, Massachusetts, and Delaware to their delegates to the Constitutional Convention limited their authority to a scope narrower than the call.<sup>78</sup>

Like other agents, commissioners were expected to remain within the limits of their authority, and *ultra vires* acts were not legally binding.<sup>79</sup> However, also like other agents, commissioners could make non-binding recommendations to their principals. To put this in modern terms: A convention for proposing amendments could recommend that Congress or the states consider amendments outside the subject-matter assigned to the convention, but those recommendations would be legally void—that is, they would not be ratifiable “proposals.”

Each state determined how to appoint its commissioners, but in practice the legislature usually selected them, with chambers in bicameral legislatures acting either by joint vote or *seriatim*.<sup>80</sup> If the legislature was not in session or had authorized the executive to fill vacancies, then selection was by the executive—normally the governor and his executive council, but in wartime often by the state's committee of safety.<sup>81</sup> Each colony or state paid its own delegates.<sup>82</sup>

75. See THE FEDERALIST NO. 40, *supra* note 1, at 199 (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.”).

76. E.g., 2 CONN. RECORDS, *supra* note 1, at 574 (reproducing Rhode Island's instructions to its delegates at the 1780 Philadelphia Price Convention); 21 MASS. RECORDS, *supra* note 1, at 307–08 (reproducing instructions to delegates at the 1780 Philadelphia Price Convention); 1786–1787 *id.* at 320 (reproducing instructions to delegates to the Annapolis Convention); *id.* at 447–49 (reproducing instructions to delegates to the Constitutional Convention).

77. As the Massachusetts instructions set forth *supra* note 76 undoubtedly were, since they quarreled with the purposes of the convention.

78. See *infra* notes 411 & 415 and accompanying text.

79. THE FEDERALIST NO. 78, *supra* note 1, at 403 (Alexander Hamilton) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”); see THOMAS BRADBURY CHANDLER, WHAT THINK YE OF THE CONGRESS NOW? 7 (New York, J. Rivington 1775) (stating that a principal is bound by an agent's actions within the scope of the commission, but not by actions that exceed the scope of the commission). For a summary of eighteenth-century fiduciary law, see generally Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 251–69 (2007).

80. See, e.g., Part III.F (discussing selection of delegates to the 1777 Springfield convention).

81. See generally Part III; cf. U.S. CONST. art. I, § 3, cl. 2 (“[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive

As observed earlier, the official proceedings of the convention, drafted by the convention secretary or clerk, constituted its *journal*, *minutes*, or *proceedings*.

### III. SUMMARY OF CONVENTIONS PRIOR TO THE CONSTITUTION

This Part III summarizes the central procedures and characteristics of the three inter-colonial conventions for which records are most complete and all of the interstate conventions for which I have found records. This is not intended to be an exhaustive history of these meetings. It focuses principally on the protocols and usages employed in calling, conducting, and considering the recommendations of inter-governmental conventions.

#### A. *The Albany Congress of 1754*

Of the multi-colonial conventions in Albany during the eighteenth century, the gathering between June 19 and July 11, 1754 is by far the best documented. It also has been the subject of several scholarly studies.<sup>83</sup>

Twenty-five delegates from seven colonies participated in the 1754 Albany Congress. The number of colonies actually was eight if one counts Delaware, which had its own legislature but an executive held in common with Pennsylvania. Georgia had not been invited; the other

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thereof may make temporary Appointments. . . ."); *id.* art. IV, § 4 ("[May protect the states from domestic violence] on Application of the Legislature, or of the Executive (when the Legislature cannot be convened). . . .") For the roles of committees of safety (also called "councils of war" and "councils of safety") during "the recess" of Founding-Era state legislatures, see Robert G. Natleson, *The Origins and Meaning of "Vacancies that May Happen During the Recess" in the Constitution's Recess Appointments Clause*, 37 HARVARD J. L. & PUB. POL'Y (forthcoming, 2014).

82. *E.g.*, 3 CONN. RECORDS, *supra* note 1, at 270–71 (showing payment of delegates to the two Hartford Conventions); 20 MASS. RECORDS, *supra* note 1, at 175 (showing payment to commissioners to first Hartford Convention); *id.* at 233 (showing payment to New Haven commissioners); *id.* at 296 (showing payment to commissioners to first Hartford Convention); *id.* at 308 (payment for Philadelphia Price Convention); *id.* at 387 (same); 1786–1787 *id.* at 304 (showing allowance to commissioners to Annapolis Convention); *id.* at 519 (showing allowance to commissioners to Constitutional Convention); 15 PA. RECORDS, *supra* note 1, at 135 (Minutes of the Supreme Executive Council of Pennsylvania, showing payment to Tench Coxe for service in Annapolis); *id.* at 546 (showing payment to widow of William Henry for service at the Philadelphia Price Convention); 8 R.I. RECORDS, *supra* note 1, at 301 (showing payments to delegates to the first Providence and Springfield Conventions); *id.* at 369 (showing payment to New Haven commissioner); 9 *id.* at 293 (showing payment to commissioner to first Hartford Convention).

83. See generally, *e.g.*, NEWBOLD, *supra* note 1; SHANNON, *supra* note 1; see also Beverly McAnear, Notes and Documents, *Personal Accounts of the Albany Congress of 1754*, 39 MISS. VALLEY HIST. REV. 727 (1953); John R. Alden, *The Albany Congress and the Creation of the Indian Superintendencies*, 27 MISS. VALLEY HIST. REV. 193 (1940). The minutes of the Albany Congress appear in 6 N.Y. RECORDS, *supra* note 1, at 853–92.

colonies had been invited but did not attend. Appendixes A and B list the commissioners and the colonies they represented for the Albany Congress and for the other (non-abortive) conventions discussed in this Article.

In a few ways the Albany Congress varied from most subsequent multi-government gatherings. Because it was called primarily to conduct diplomacy with the Six Nations of the Iroquois, it included delegates from the Six Nations as well as commissioners from the colonies.<sup>84</sup> Although the immediate call came from James DeLancey, the royal lieutenant governor of New York,<sup>85</sup> DeLancey was acting as a proxy for the British Lords of Trade.<sup>86</sup> Thus, the Albany Congress was different from future conventions in that the British government was represented. Moreover, as the representative of the Crown,<sup>87</sup> DeLancey was expected to preside; beginning in 1774, multi-colonial and multi-state conventions invariably elected their own presiding officers. Otherwise, the practices followed before and during the Albany Congress were consistent with those of later gatherings.

First, like the call of most subsequent conventions, the call for the Albany Congress was limited rather than plenipotentiary.<sup>88</sup> The specified topic was improving relations with the Iroquois and signing an inter-colonial treaty with them.<sup>89</sup>

Second, each participating colony sent "commissioners" empowered by "commissions" or "credentials." An exception was New York, where the lieutenant governor and members of the executive council comprised that state's committee. Those delegates needed no commissions because their offices granted them sufficient authority.<sup>90</sup>

Third, the colonies themselves decided how to select their delegates. New York, as noted, sent its executive council. In Pennsylvania the lieutenant governor chose the commissioners with the consent of the colony's proprietors.<sup>91</sup> In Maryland, the governor made the selection.<sup>92</sup> In the other four colonies, the legislature elected the commissioners.<sup>93</sup>

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84. See 6 N.Y. RECORDS, *supra* note 1, at 866.

85. DeLancey undertook the task because the royal governor, Sir Danvers Osborne, had committed suicide. NEWBOLD, *supra* note 1, at 23.

86. The Lords of Trade letter appears at N.Y. RECORDS, *supra* note 1, at 854–56.

87. SHANNON, *supra* note 1, at 130 ("James DeLancey ironically became the king's mouthpiece at the Albany Congress.").

88. See NEWBOLD, *supra* note 1, at 47–48.

89. 6 N.Y. RECORDS, *supra* note 1, at 856 (quoting letter from Lords of Trade to New York governor).

90. SHANNON, *supra* note 1, at 147.

91. 2 N.Y. HISTORY, *supra* note 1, at 549–50.

92. *Id.* at 551.

93. The Massachusetts commission recites selection by the General Court (legislature). 2 N.Y. RECORDS, *supra* note 1, at 545. The New Hampshire commission is not entirely clear, but

In subsequent conventions, the legislative election method became dominant.

Fourth, each colony decided how many delegates to send. New Hampshire credentialed four commissioners, Massachusetts five, Rhode Island two, Connecticut three, New York five, Pennsylvania four, and Maryland two.<sup>94</sup> By far the best-known today of the delegates was Benjamin Franklin, although two others are well known to students of the period: Thomas Hutchinson of Massachusetts was to become the royal governor of his colony and perhaps the continent's most prominent Tory. Rhode Island's Stephen Hopkins would become a leading Founder and signer of the Declaration of Independence.<sup>95</sup>

Fifth, despite the different size of colonial committees, the weight of each colony seems to have been equal. The Albany Congress established a precedent followed by all subsequent conventions: "to avoid all disputes about the precedence of the Colonies," they always were ordered in the minutes from north to south.<sup>96</sup>

Sixth, the Albany Congress kept an official record of its proceedings, which it denominated the *minutes*.<sup>97</sup>

Seventh, the gathering elected a non-delegate, Peter Wraxall, as secretary (in later conventions sometimes entitled "clerk"), and he was put on oath.<sup>98</sup>

Finally, the group established its own committees, and elected members to staff them.<sup>99</sup>

Most of the time at the Albany Congress was consumed by negotiations with the Iroquois. At the urging of Franklin, however, the gathering also recommended to the colonies and to Parliament a "Plan of Union" uniting most of British North America under a single Grand Council and President-General. The vote for the Plan at the Albany Congress was unanimous, but the scheme became highly controversial. Many saw it as beyond the scope of the Congress's call, even though the language of most of the commissions was broad enough to authorize the recommendation.<sup>100</sup> Some colonies refused to consider it,

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implies selection of two delegates from each legislative chamber. *Id.* at 546-47. The Connecticut credentials recite selection by the general assembly, *id.* at 547-48, as do those of Rhode Island, *id.* at 548-49.

94. See Newbold, *supra* note 1, at 45.

95. See *id.* at 42-43.

96. 6 N.Y. RECORDS, *supra* note 1, at 859.

97. *Id.* at 853-59.

98. *Id.* at 859.

99. *Id.* at 860.

100. The Commissions are located at 2 N.Y. HISTORY, *supra* note 1, at 545-53, at 47. Newbold claims that only the Massachusetts commissioners had such authority, but he reads the other commissions far too narrowly. NEWBOLD, *supra* note 1, at 47. Historian Timothy J. Shannon, SHANNON, *supra* note 1, at 176, is more accurate, but is incorrect when he states that

and those that did consider it, rejected it.<sup>101</sup> This reception assured that the Plan was never introduced in Parliament.<sup>102</sup>

### B. *The Stamp Act Congress of 1765*

The Stamp Act Congress was held at the instigation of the colonists; it was not sponsored by the Crown. The gathering is fairly well documented, largely due to C.A. Weslager's diligent research, and his 1976 book based on that research.<sup>103</sup>

This convention (as in other cases, the word was used interchangeably with "congress")<sup>104</sup> was called by the lower house of the Massachusetts legislature "to Consult together [sic] on the present Circumstances of the Colonies and the Difficulties to which they are and must be reduced by the operation of the late Acts of Parliament [sic]," particularly the Stamp Act.<sup>105</sup> The call was, therefore, quite broad but not plenipotentiary. It asked that the invited colonies send "such Committees as the other Houses of Representatives, or Burgesses in the Several Colonies on this Continent may think fit to Appoint. . . ."<sup>106</sup> The call specified the date of meeting (October 1, 1765) and the place (New York City). The invitation was not extended to the British colonies in Canada or in the Caribbean.

Nine of the 13 invited colonies sent committees: New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, and South Carolina. The number of commissioners on each committee ranged from two to five. There were 27 in all. Despite the call's suggestion that the lower house of each colony elect commissioners, the colonies used their judgment in the matter. Several colonies whose legislatures had been prorogued or dissolved chose delegates by other means. In New York, the legislature

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Maryland commissioners were forbidden to discuss a union: they were barred merely from committing to one. 2 N.Y. HISTORY, *supra* note 1, at 552. The Plan of Union was a recommendation only. In his subsequent pamphlet advocating the plan, Rhode Island commissioner Stephen Hopkins defensively included language from the credentials of four colonies that seemed to authorize the Plan, but omitted the Pennsylvania credentials, which were more restrictive. STEPHEN HOPKINS, A TRUE REPRESENTATION OF THE PLAN FORMED AT ALBANY, FOR UNITING ALL THE BRITISH NORTHERN COLONIES, IN ORDER TO THEIR COMMON SAFETY AND DEFENSE 1-3 (Newport, 1755).

101. NEWBOLD, *supra*, note 1, at 169-70.

102. *Id.* at 173.

103. WESLAGER, *supra* note 1.

104. On the interchangeability of the two terms to describe meetings of governments, see *supra* notes 44 and 45 and accompanying text. Thus, the word "convention" frequently was applied to the Stamp Act Congress. See, e.g., WESLAGER, *supra* note 1, at 62 (referring to the meeting as a convention) & *id.* at 89 (quoting Thomas Whately as referring to it as a convention); 116 (citing attack on the meeting as an "illegal convention").

105. The call is reproduced *id.* at 181-82.

106. *Id.*

previously had designed five New York City lawmakers as a committee of correspondence; after informal consultation with their colleagues, that committee decided to act as the delegation.<sup>107</sup> In Delaware, out-of-session lawmakers chose the commissioners.<sup>108</sup> The convention seated delegates even if their selection was not in accord with the mode suggested by the call.

The commissioners included Oliver Partridge of Massachusetts, who had served at the 1754 gathering in Albany, and a number of other members destined to become "old convention hands."<sup>109</sup> Eliphat Dyer of Connecticut, for example, served in four subsequent Founding Era conventions.<sup>110</sup> The roster also included three men who performed distinguished service at the 1787 Constitutional Convention: John Dickinson of Pennsylvania (who represented Delaware in Philadelphia), William Samuel Johnson of Connecticut, and John Rutledge of South Carolina.<sup>111</sup> The gathering was late getting started, but finally convened on October 7.

The protocols and procedures followed in organizing and operating the Stamp Act Congress foreshadowed those of all subsequent gatherings of the type. As we have seen, the call was a sparse document, limited to date, place and subject. Although unlike most subsequent convention calls, it suggested how delegates might be appointed, the colonies did not find this suggestion binding and the convention seated each colony's delegates however selected.<sup>112</sup> Each colony paid its own committee,<sup>113</sup> and issued credentials and instructions.<sup>114</sup> Some of these authorized their delegates only to consult,<sup>115</sup> while the rest empowered them to join in any proposed course of action.

The convention adopted its own rules and chose its own committees.<sup>116</sup> It selected a commissioner, Timothy Ruggles of Massachusetts, as President,<sup>117</sup> and a non-commissioner, John Cotton, as Secretary.<sup>118</sup> It elected those two gentlemen by ballot, but then

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107. *Id.* at 80–81.

108. *Id.* at 93–95. Such was also the case in South Carolina, *id.* at 148.

109. For a list of all commissioners, see *id.* at 255.

110. See Appendix A.

111. *Id.*; WESLAGER, *supra* note 1, at 255.

112. WESLAGER, *supra* note 1, at 198 (reproducing portion of journal reporting seating of irregularly-selected delegates).

113. See, e.g., *id.* at 62 (Massachusetts), 69 (Connecticut), 73 (Maryland), 85 (Pennsylvania).

114. The credentials are reproduced *id.* at 183–97; for an example of instructions, see *id.* at 88 (Rhode Island).

115. These included Connecticut, *id.* at 69 and South Carolina. *Id.* at 148.

116. *Id.* at 124 (discussing election of committee to inspect minutes and proceedings).

117. *Id.* at 122.

118. *Id.* at 123.

reverted to the rule of one colony/one vote.<sup>119</sup> It also kept a journal.<sup>120</sup> The convention adjourned on October 25 after issuing four documents: A declaration of the rights of the colonists, an address to the king, a memorial to the House of Lords, and a petition to the House of Commons.<sup>121</sup>

### C. *The Continental Congress of 1774*

The call for a continental congress or convention came from the New York Committee of Correspondence in a circular letter authored by John Jay.<sup>122</sup> The gathering was a general rather than a partial convention, since all the colonies were invited.<sup>123</sup>

The Congress met in Philadelphia on September 5, 1774 and adjourned on October 26 of the same year. Fifty-six commissioners from twelve of the thirteen continental colonies south of Canada attended; Georgia was absent. (See Appendices A and B.) The journal of the proceedings is extensive, and of course the history of the Congress has inspired a massive amount of retelling. The task here is not to recite that history, but to identify key protocols and procedures.

In most colonies, commissioners were chosen by the *de facto* legislative authority. In Rhode Island, the *de jure* legislature also governed *de facto*, so it named that colony's commissioners. In other colonies, royal officials and upper-house councilors had become recalcitrant, so commissioners were selected either by the lower house (as in Massachusetts or Pennsylvania) or by colonial conventions acting as legislatures (New Jersey, Delaware, Maryland, Virginia, and North Carolina). In Connecticut, the lower house empowered the committee of correspondence to appoint the commissioners. In New York, voters elected them directly in local meetings.<sup>124</sup>

In its scope, the First Continental Congress was perhaps the most nearly plenipotentiary of multi-colonial and multi-state conventions. Colony-issued credentials granted very broad authority to consult and recommend solutions to the crisis with Great Britain. The narrowest credentials, those issued by Rhode Island, empowered that colony's

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119. *Id.* at 124–25 (discussing the one colony/one vote decision).

120. The journal is reproduced *id.* at 181–218.

121. These documents are reproduced in the journal.

122. The text of the letter is reproduced at [http://avalon.law.yale.edu/18th\\_century/letter\\_ny\\_comm\\_1774.asp](http://avalon.law.yale.edu/18th_century/letter_ny_comm_1774.asp) (last accessed Mar. 12, 2013). For an account, see Edward D. Collins, *Committees of Correspondence of the American Revolution* 262 (1901).

123. The New York invitation stated that the gathering should be a “congress of deputies from the colonies in general. . .” See [http://avalon.law.yale.edu/18th\\_century/letter\\_ny\\_comm\\_1774.asp](http://avalon.law.yale.edu/18th_century/letter_ny_comm_1774.asp) (last accessed Mar. 12, 2013).

124. The credentials of delegates from attending states other than North Carolina are reproduced at 1 J. CONT. CONG., *supra* note 1, at 15–24. Those for North Carolina are reproduced at *id.* at 30.



delegates

to *meet and join* with the commissioners or delegates from the other colonies, *in consulting* upon proper measures to obtain a repeal of the several acts of the British parliament, for levying taxes upon his Majesty's subjects in America, without their consent, and particularly an act lately passed for blocking up the port of Boston, and upon proper measures to establish the rights and liberties of the Colonies, upon a just and solid foundation, agreeable to the instructions given you by the general Assembly.<sup>125</sup>

The other credentials were wider still, for they not only authorized almost unlimited discussion, but also conveyed authority to bind their respective colonies to collective decisions. For example, the Delaware commissions empowered delegates "to consult and advise [i.e., deliberate] with the deputies from the other colonies, and to *determine upon* all such prudent and lawful measures, as may be judged most expedient for the Colonies immediately and unitedly to adopt. . . ."<sup>126</sup> Pennsylvania bestowed authority "to form *and adopt* a plan for the purposes of obtaining redress of American grievances,"<sup>127</sup> and New Jersey used the general formula, "to represent the Colony of New Jersey in the said general congress."<sup>128</sup> Thus, Rhode Island had in mind a *proposing* convention, but the other colonies sought one that actually could *decide* matters. When a commissioner had authority to bind his government, international lawyers said he had power to *pledge the faith* of his government.<sup>129</sup> Variants on "pledge the faith" appear in the proceedings of several later multi-state conventions.<sup>130</sup>

Ultimately, however, the First Continental Congress made no decisions legally binding on the colonies. It merely issued a series of recommendations and petitions, memorials and other communications. Thus, it remained within the scope of power authorized by the narrowest credentials.

As the Stamp Act Congress had done,<sup>131</sup> the First Continental Congress elected all its own officers and staffed all its own committees.

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125. *Id.* at 17 (emphasis added).

126. *Id.* at 22 (emphasis added).

127. *Id.* at 20 (emphasis added).

128. *Id.*

129. *Cf.* EMER DE VATTEL, THE LAW OF NATIONS bk. 2, §§ 163, 220, 329.4 (Liberty Fund ed., 2008) (1758) (discussing the faith of treaties); *id.* bk. 2, § 225 (discussing the pledge of faith in an oath); *id.* bk. 2, § 234 (discussing tacit pledges of faith), bk. 3, § 238 (discussing the pledge of faith in truces and suspensions of arms).

130. This is most notable in the commissions issued for the Philadelphia Price Convention. *Infra* notes 261–63 and accompanying text.

131. *Supra* Part III.B.

At the first session, the gathering elected Peyton Randolph, a delegate from Virginia, as president, and Charles Thompson, a non-delegate, as secretary.<sup>132</sup> The following day, the convention set about adopting rules. The first of these was the principle of suffrage:

*Resolved*, That in determining questions in this Congress, each Colony or Province shall have one Vote.—The Congress not being possess'd of, or at present able to procure proper materials for ascertaining the importance of each Colony.<sup>133</sup> [The session then adopted the following additional rules.]

*Resolved*, That no person shall speak more than twice on the same point, without the leave of the Congress.

*Resolved*, That no question shall be determined the day, on which it is agitated and debated, if any one of the Colonies desire the determination to be postponed to another day.

*Resolved*, That the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honour, to keep the proceedings secret, untill [*sic*] the majority shall direct them to be made public.

*Resolved*, unan: That a Committee be appointed to State the rights of the Colonies in general, the several instances in which these rights are violated or infringed, and the means most proper to be pursued for obtaining a restoration of them. . . .

*Resolved*, That the Rev.<sup>d</sup> Mr. Duché be desired to open the Congress tomorrow morning with prayers, at the Carpenter's Hall, at 9 o'Clock.<sup>134</sup>

These rules were adopted by the Second Continental Congress as well.<sup>135</sup>

Before adjournment, the Congress issued a conditional call for a second congress to meet on May 10, 1775, "unless the redress of grievances, which we have desired, be obtained before that time."<sup>136</sup> The body then dissolved itself.<sup>137</sup>

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132. 1 J. CONT. CONG., *supra* note 1, at 14.

133. *Id.* at 25.

134. *Id.* at 26.

135. 2 *id.* at 55.

136. 1 *id.* at 102.

137. *Id.* at 114.

#### D. *The Providence Convention of 1776–1777*

The first multi-government convention after Independence was that held from December 25, 1776 to January 2, 1777 in Providence, Rhode Island.

On November 16, 1776, the Massachusetts House of Representatives passed, and the council approved, a resolution that served both as the call and as the appointment of delegates. It specified as subjects paper currency and public credit. The convention was to confer on those subjects and make proposals to the legislatures sending them, as well as to Congress.<sup>138</sup> The power of the Massachusetts delegation to communicate proposals to other states and to Congress was conditional on agreement by the committees of the other states. The resolution appointed Tristram Dalton and Azor Orne as “a Committee to meet Committees from the General Assemblies of the States of Connecticut, New-Hampshire and Rhode-Island, at Providence in Rhode-Island the tenth day of December next. . . .”<sup>139</sup>

On November 21, the Rhode Island general assembly accepted the call and appointed its own committee.<sup>140</sup> Just four days later, Connecticut rejected the call. In a letter to Massachusetts Council president James Bowdoin, Connecticut Governor Jonathan Trumbull explained that “[I] am desired by the Assembly of this State to advise” that such a convention might “give umbrage to the other States” because Congress previously had “taken the subject into consideration.” Trumbull added that Connecticut already had laws dealing with

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138. The Massachusetts resolution stated:

*Resolved*, That the Honourable *Tristram Dalton* and *Aaron Orne*, Esquires, with such as the honourable Board shall join, be a Committee to meet Committees from the General Assemblies of the States of *Connecticut*, *New-Hampshire*, and *Rhode-Island*, at *Providence*, in *Rhode-Island*, the tenth day of *December* next, provided said Assemblies think proper to appoint such Committees, then and there to hold a conference respecting further emissions of Paper Currency on the credit of any of said States; also on measures necessary for supporting the credit of the publick [*sic*] Currencies thereof: And the said Committee (if the Committees of the other States so met agree thereto) be empowered to communicate to the other *United States of America* the intention of their Convention, and urge that some measures be taken by them to the same purpose, and to give like information to the honourable the Continental Congress, and propose to them whether the regulation of the Currencies is not an object of necessary attention, and to report as soon as may be.

And it is *Ordered*, That the Secretary immediately transmit authenticated copies of the Resolve to the General Assemblies of the several States aforementioned.

3 AMERICAN ARCHIVES, *supra* note 1, at 772.

139. 19 MASS. RECORDS, *supra* note 1, at 661.

140. 8 R.I. RECORDS, *supra* note 1, at 48–49.

currency and credit issues.<sup>141</sup>

Initially, the Massachusetts Council voted to proceed with the convention "the foregoing letter notwithstanding,"<sup>142</sup> but the House was opposed. With the ultimate concurrence of the Council, the legislature wrote to New Hampshire and Rhode Island informing them the gathering was canceled.<sup>143</sup> President Bowdoin expressed the belief, however, that "this matter will be taken up again."<sup>144</sup>

Bowdoin turned out to be right. On December 6 (the same day the Massachusetts legislature decided not to pursue the convention) Rhode Island's Governor Nicholas Cooke, surveying the military situation, wrote to Bowden that Rhode Island would "readily concur in proper measures with the Assemblies of the States of *Massachusetts-Bay* and *Connecticut*."<sup>145</sup> Just three days after that, Trumbull sent a missive to Massachusetts bemoaning the sad state of the American cause. He added:

When we had an intimation from you a few weeks past for Commissioners from the *New-England* States to meet at *Providence*, to confer on the affair of our currency, it was then thought, for prudential reasons given you in answer then, to decline; but I beg leave to suggest whether, in the present aspect of affairs, our main army drove to the southward, the communication being greatly interrupted and in danger of being totally obstructed between the Southern and *New-England* Colonies, whether it will not be best, as soon as the enemy are retired into winter quarters, for the *New-England* States to meet by their Commissioners to consult on the great affairs of our safety, and of counteracting the enemy in their future operations. . . . We hope we shall soon hear from you on this subject.<sup>146</sup>

With the Massachusetts House then in recess, the Council, through Bowdoin, responded warmly. Bowdoin assured Trumbull that

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141. Letter from Jonathan Trumbull to James Bowdoin (Nov. 25, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 845. Trumbull further explained the decision in a letter to Governor Cooke of Rhode Island. Letter from Governor Trumbull to Governour Cooke (Dec. 4, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1077.

142. 3 AMERICAN ARCHIVES, *supra* note 1, at 845–46 (Dec. 6, 1776).

143. *Id.* at 846.

144. James Bowdoin to President Weare (President of the Council of New Hampshire), Dec. 6, 1776, *reprinted in* 3 AMERICAN ARCHIVES, *supra* note 1, at 1104–05.

145. Letter from Governor Cooke to James Bowdoin (Dec. 6, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1104.

146. Letter from Governor Trumbull to Mass. Council (Dec. 9, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1142–43.

Massachusetts was still willing to participate, and that the authority of the Bay State delegates would be expanded to include military affairs:

The regulation of the price of things, (the mode you have adopted,) was thought of, and might have been the best, but many objections arose, which at that time prevented it. However, as we have renewed our application to you to join with the other States of *New-England* in the appointing a Committee to consider this and other matters, we hope you will approve the measure, and that great good will result from it. By our proposal their commission is to be so extensive as to include the important business you mention of consulting on the great affairs of our safety, and counteracting the enemy in their future operations. But if this is not expressed in terms sufficiently explicit, you can agree to our proposal with such additions as you think proper, and there is no doubt we shall concur with you.<sup>147</sup>

After that communication, all the invited states acted quickly. On December 18, for example, Massachusetts delegate Tristram Dalton acknowledged receiving his orders,<sup>148</sup> and on the same day the Connecticut legislature appointed its delegates and defined their authority.<sup>149</sup> The committees had gathered in Providence by Christmas Day.

Thirteen delegates represented the four states: four from Connecticut and three each from Rhode Island, New Hampshire, and Massachusetts (which had added Thomas Cushing to its committee).<sup>150</sup> All had been appointed by their respective legislatures, except for the Rhode Island commissioners. The British had occupied much of that state, so the legislature had deputized a council of war to exercise its powers. The council of war appointed its commissioners, two of whom were members of the council itself.<sup>151</sup>

The states had granted their delegates authority that, while not unlimited, was quite broad. As promised, Massachusetts had expanded the power conferred on its committee to include military as well as

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147. Letter from Massachusetts Council to Governor Trumbull (Dec. 13, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1209–10.

148. Letter from Tristram Dalton to John Avery (Dec. 18, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1287.

149. 3 AMERICAN ARCHIVES, *supra* note 1, at 1389.

150. For the delegates, see Appendices A and B. One delegate, a man from New Hampshire, rejoiced in the name of Supply Clap. Apparently he was a competent fellow. See Letter from John Langdon to Josiah Bartlett (June 3, 1776), in BARTLETT PAPERS, *supra* note 1, at 67, 68 n.2.

151. 1 CONN. RECORDS, *supra* note 1, at 585, 588.

economic measures, with the proviso that they avoid subjects "repugnant to or interfering with the powers and authorities of the Continental Congress."<sup>152</sup> Connecticut granted authority to address public credit and "every measure . . . necessary for the common defense."<sup>153</sup> The authority of the Rhode Island committee was similar.<sup>154</sup> Only New Hampshire issued narrower credentials, which encompassed military matters but did not mention currency or public credit.<sup>155</sup>

However, a key reason for the decision to address currency and public credit was the need to keep armies in the field. Accordingly, the New Hampshire delegates finally concluded that commissions were broad enough to include them. As Josiah Bartlett, one of those delegates explained:

I am fully sensible of the difficulties attending the setting prices to any thing, much more to every thing, but unless something was done so as the soldier might be ascertained of what he could purchase for his forty shillings, no more would enlist, nor could we with reason expect it: what will be the effect of establishing prices I know not, however it must be tried . . . .<sup>156</sup>

The call had been for a convention that would make proposals only, without authority to "pledge the faith" of the participating governments. This limitation, reflected in a letter from the Rhode Island's Stephen Hopkins, the first president of the convention, to the Massachusetts council,<sup>157</sup> also appeared in the credentials and in the proceedings: The latter repeatedly referred to convention resolutions as "representations" or "applications" (in a precatory sense).<sup>158</sup>

The convention elected its own officers, initially choosing Hopkins as president.<sup>159</sup> When Hopkins left midway through the proceedings, the convention replaced him with William Bradford, also from Rhode

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152. *Id.* at 585, 586.

153. *Id.* at 587.

154. *Id.* at 588.

155. *Id.* at 587.

156. Letter from Josiah Bartlett to William Whipple (Jan. 15, 1777), in BARTLETT PAPERS, *supra* note 1, at 143–44; *see also* 1 CONN. RECORDS, *supra* note 1, at 585, 592 (a convention resolution expressing the view that "exorbitant [*sic*] price[s] of every necessary and convention article of life . . . disheartens and disaffects the soldiers.").

157. Letter from Stephen Hopkins to James Bowdoin, 3 AMERICAN ARCHIVES, *supra* note 1, at 1423 (stating in part, "we . . . are of opinion" and "We submit this representation, and desire you would give orders").

158. 1 CONN. RECORDS, *supra* note 1, at 585, 589.

159. *Id.* at 589.

Island.<sup>160</sup> As clerk, the delegates selected Rowse J. Helme, a non-delegate.<sup>161</sup>

The Providence Convention of 1776–1777 issued a wide range of recommendations, covering prices, auctions, and an embargo of luxury goods.<sup>162</sup> Its final proposal—a “Day of Fasting, Public Humiliation, and Prayer”<sup>163</sup>—would in those religious times and in religious New England certainly, be seen as within the delegates’ respective powers. On January 2, 1777, the group adjourned *sine die*.<sup>164</sup> The convention’s recommendations were taken seriously, and later in the year, Massachusetts and Connecticut both sent troops to Rhode Island in accordance with them.<sup>165</sup>

#### E. *The York Town and Abortive Charleston Price Conventions of 1777*

When the Continental Congress received letters from Connecticut and Massachusetts describing the Providence recommendations, Congress scheduled the matter for discussion.<sup>166</sup> That discussion spread over several days in late January and the first half of February, 1777.<sup>167</sup> Some congressional delegates questioned whether the meeting of the New England states had been proper, in view of the power vested in Congress. Those delegates were in the minority, however; contemporaneous reports relate that Congress in general was quite pleased with the recommendations, particularly those pertaining to prices.<sup>168</sup>

160. *Id.* at 592.

161. *Id.* at 589.

162. *See id.* at 589–99. For the embargo recommendation, see *id.* at 597.

163. *Id.* at 598–99.

164. *Id.* at 589.

165. *Id.* at 161; 19 MASS. RECORDS, *supra* note 1, at 732–33.

166. 7 J. CONT. CONG., *supra* note 1, at 65–66 (referring to receipt of the letters and scheduling of discussion on Jan. 28, 1777).

167. 7 J. CONT. CONG., *supra* note 1, at 79, 80–81 (Jan. 31, 1777); *id.* at 85, 87–88 (Feb. 4, 1777); *id.* at 88, 93–94 (Feb. 5, 1777); *id.* at 94, 97 (Feb. 6, 1777); *id.* at 108, 111–12 (Feb. 12, 1777); *id.* at 112, 118 (Feb. 13, 1777); *id.* at 118, 121–22 (Feb. 14, 1777); *id.* at 123, 124–25 (Feb. 15, 1777).

168. 7 J. CONT. CONG., *supra* note 1, at 88 (committee of the whole report, Feb. 4, 1777); *id.* at 118, 121–22 n.4 (Feb. 14, 1777); *id.* at 123, 124–25 (Feb. 15, 1777); *see also* Letter of the Massachusetts Delegates to the President of the Massachusetts Council (Jan. 31, 1777), 196 MASSACHUSETTS ARCHIVES 183, *reprinted in* 2 LETTERS, *supra* note 1, at 228–29 (“[A] similar Mode for giving Stability to the Currency will probably be recommended to the Southern and middle Departments of the Continent.”); Letter from Samuel Adams to James Warren (Feb. 1, 1777), *in* 2 LETTERS, *supra* note 1, at 233 (stating that the Providence resolutions “are much applauded as being wise and salutary”); Letter from John Adams to Abigail Adams (Feb. 7, 1777), *reprinted in* 2 LETTERS, *supra* note 1, at 237 (“The attempt of New England to regulate prices is extremely popular in Congress, who will recommend an imitation of it to the other States.”); Letter from Abraham Clark to the Speaker of the New Jersey Assembly (Feb. 8,

On February 15, Congress formally approved the military and economic recommendations of the Providence Convention, "except that part which recommends the striking bills bearing interest."<sup>169</sup> Congress resolved further:

That the plan for regulating the price of labour, of manufactures and of internal produce within those states, and of goods imported from foreign parts, except military stores, be referred to the consideration of the other [U]nited States: and that it be recommended to them, to adopt such measures, as they shall think most expedient to remedy the evils occasioned by the present fluctuating and exorbitant prices of the articles aforesaid[.]<sup>170</sup>

Congress then proceeded to call two additional conventions, both of the "proposing" or recommendatory kind:

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pensylvania [*sic*], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pensylvania, on the 3d Monday in March next, 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:

That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown [*sic*], in South Carolina, on the first Monday in May next[.]<sup>171</sup>

The Charleston convention apparently was never held.<sup>172</sup> One likely reason was the objection by North Carolina that Virginia, the economic powerhouse of the region, had been grouped with the middle rather than

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1777), in 2 LETTERS, *supra* note 1, at 242 (reporting that congressional approbation is expected); Rush, *Notes*, *supra* note 1, at 131–39.

169. 7 J. CONT. CONG., *supra* note 1, at 124 (Feb. 15, 1777).

170. *Id.*

171. *Id.* at 124–25 (Feb. 15, 1777).

172. CAPLAN, *supra* note 1, at 17. South Carolina legislative records from the time are lost, and Georgia records are spotty, but my investigation and those of two experienced state archivists makes this conclusion probable.



the southern states.<sup>173</sup> However, eighteen commissioners from New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia had convened in York Town by March 26.<sup>174</sup> The committees from each state ranged in size from two commissioners to five.<sup>175</sup> The convention minutes do not reproduce their credentials. I have been able to find only the authority of the Virginia delegates, which was much the same as called for by Congress. After reciting the fact of the call, the Virginia executive council (acting presumably during a legislative recess) authorized its delegates to discuss "regulating the prices of Commodities within those States respectively, and of Goods imported in the same."<sup>176</sup>

The York Town Price Convention elected Lewis Burwell, a Virginia commissioner, as chairman, and Thomas Annor, a non-commissioner, as clerk.<sup>177</sup> Like other gatherings of the type, the convention appointed committees,<sup>178</sup> particularly a ways-and-means committee, to recommend a scheme of price controls for the consideration of the entire assembly.<sup>179</sup>

The York Town minutes reveal that the delegates fully understood that their role was only to propose to state legislatures, not to decide.<sup>180</sup> Yet they could not agree on a proposal. When the ways-and-means committee issued its report, the states split evenly on a motion to reject it.<sup>181</sup> A motion to amend the plan was voted down five states to one.<sup>182</sup>

173. 2 LETTERS, *supra* note 1, at 253–54, 257–58; 7 J. CONT. CONG. 121–22 n.4 (reporting objections of Thomas Burke, delegate from North Carolina, to placing Virginia in convention of middle states).

174. The York Town minutes have been hard to locate; even archivists in Pennsylvania and in York were unaware that such a convention ever met. They can be found, however, in N.J. SELECTIONS, *supra* note 1, at 34–45 (1848).

175. *Id.* at 35.

176. The authorization of Virginia read as follows:

This Board, taking under their Consideration the Resolutions of Congress, bearing date the 15th of [F]ebruary last, respecting the appointment of Commissioners from this State, to meet Commissioners of several other States at York Town in Pensylvania [sic] for regulating the prices of Commodities within those States respectively, and of Goods imported in the same, do appoint Lewis Burwell, and Thomas Adams esquires, commissioners for the purposes aforesaid on Behalf of this State.

1 JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA 359 (H. R. McIlwain ed., 1931) (Mar. 4, 1777).

177. N.J. SELECTIONS, *supra* note 1, at 35–36.

178. *Id.* at 36, 38.

179. *Id.* at 36–37.

180. *See id.* at 40–42 (reproducing a proposed resolution to recommend various measures to state legislatures).

181. On April 1, 1777, the record stated as follows:

The deadlock appears to have been brought on, at least in part, because many delegates did not believe price controls to be wise or effective public policy.<sup>183</sup> Accordingly, the convention voted on April 3 to send copies of its proceedings to Congress and to the legislatures of the participating states—and thereupon to dissolve.<sup>184</sup>

#### F. *The Springfield Convention of 1777*

On June 27, 1777, the Massachusetts legislature called for a convention of "Committees from the General Assemblies" of the New England states and New York.<sup>185</sup> The legislature disseminated the call in a circular letter sent to the other four states.<sup>186</sup> The designated location was Springfield, Massachusetts.<sup>187</sup> The subject matter was expansive, encompassing paper money, laws to prevent monopoly and economic oppression, interstate trade barriers, and "such other matters as particularly [c]oncern the immediate [w]elfare" of the participating states.<sup>188</sup> But it was limited by the stipulation that the convention confine itself to matters "not repugnant to or interfering with the powers and authorities of the Continental Congress."<sup>189</sup>

Like the York Town and Providence gatherings, this was to be only a proposal convention. The call asked that the delegates "consider" measures and "report the result of their conference to the General Courts [legislatures] of their respective States."<sup>190</sup> The convention's

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A motion was made and seconded, that the report be rejected, and the question being put it was received in the negative, in the manner following: viz:

For the affirmative, Pennsylvania, Delaware, Maryland.

For the negative, New York, New Jersey, Virginia.

*Id.* at 43.

182. *Id.* at 44.

183. *Id.* at 45.

184. *Id.* The exhaustion of the delegates is captured by the presiding officer's certification line on the resolution to adjourn: "LEWIS BURWELL, Chairman. Signed Thursday evening, By candle-light, April 3, 1777." *Id.*

185. 1 CONN. RECORDS, *supra* note 1, at 601.

186. *E.g.*, Letter from Jeremiah Powell to Nicholas Cooke, Governor of Rhode Island (July 2, 1777), in 8 R.I. RECORDS, *supra* note 1, at 280 (containing call).

187. 20 MASS. RECORDS, *supra* note 1, at 49–50; *see also* 1 CONN. RECORDS, *supra* note 1, at 601 (reproducing Massachusetts resolution); *id.* at 602 (reproducing New York resolution reciting Massachusetts call).

188. 20 MASS. RECORDS, *supra* note 1, at 49–50.

189. 1 CONN. RECORDS, *supra* note 1, at 599; 8 R.I. RECORDS, *supra* note 1, at 276 (reciting and accepting the call); *id.* at 278 (appointing committee).

190. *See* 1 CONN. RECORDS, *supra* note 1, at 599.

resolutions are consistent with that limitation.<sup>191</sup>

On July 30, eleven commissioners from all five states had appeared.<sup>192</sup> They included, among others, New York's John Sloss Hobart, who had attended at York Town, and several Providence veterans: Titus Hosmer of Connecticut, Thomas Cushing of Massachusetts, Josiah Bartlett of New Hampshire, and William Bradford and Stephen Hopkins of Rhode Island.<sup>193</sup> Their credentials mostly tracked the language of the call or, in the case of New York, referred to the call when defining the scope of authority.<sup>194</sup> State officials were learning that uniformity is important when credentialing.

The mode of selection varied by state. A joint session of the legislature had elected New Hampshire's and Rhode Island's committees.<sup>195</sup> In Massachusetts the legislature had chosen its committee by the two chambers voting seriatim.<sup>196</sup> In New York, the council of safety selected the delegates, and in Connecticut the governor and council of safety.<sup>197</sup>

As the Providence Convention had done, the Springfield gathering elected Stephen Hopkins as President. It chose William Pynchon, Sr., a non-commissioner, as clerk.<sup>198</sup>

It is a shame that more historical work has not been done on the Springfield Convention,<sup>199</sup> for it turned out to be an important and productive assembly. It met only from July 30 through August 5, but produced a series of significant recommendations on a range of economic and military subjects.<sup>200</sup> The day after adjournment, President Hopkins submitted the convention proposals to "the Honorable Congress, that such measures may be taken for that end as they in their great wisdom shall think proper."<sup>201</sup> These recommendations formed the basis for extensive congressional debate and further recommendations

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191. *E.g., id.* at 603 (resolving "[t]hat it be earnestly recommended" and, again, "[t]hat it be recommended"); *id.* at 604 (resolving "[t]hat it be recommended"); *id.* at 605 (resolving, "as the opinion of this Committee").

192. *Id.* at 600.

193. *Id.*

194. *Id.* at 600-02. The Connecticut commissions initially omitted the exception in favor of the power of Congress, but then seemed to limit its delegates' authority to the items in the call. *Id.* at 601-02.

195. *See id.* at 600, 602.

196. *See id.* at 601.

197. *Id.* at 601, 602.

198. *Id.* at 605.

199. For example, Scott, *supra* note 1, which discusses the other New England conventions dealing with prices, fails to mention Springfield.

200. 1 CONN. RECORDS, *supra* note 1, at 605.

201. *Id.* at 605-06. Hopkins' letter was read in Congress on August 18. 8 J. CONT. CONG., *supra* note 1, at 649-50.

to the states,<sup>202</sup> although not all recommendations were effectuated.<sup>203</sup>

*G. The New Haven Price Convention of 1778 (and the Abortive Meetings in Charleston and Fredericksburg)*

On November 22, 1777, as part of continuing efforts to curb price inflation, the Continental Congress issued calls for three separate multi-state conventions.<sup>204</sup> Congress requested that the eight northernmost states meet at New Haven, Connecticut on January 15, 1778; that

202. 8 J. CONT. CONG., *supra* note 1, at 727, 731 (voting on September 10, 1777 to add five members to committee to consider Springfield recommendations). For further response, see 9 *id.* at 948, 953–58 (Nov. 22, 1777); *id.* at 967–970 (Nov. 26, 1777); *id.* at 970–971 (Nov. 27, 1777); *id.* at 985 (Dec. 2, 1777); *id.* at 988–89 (Dec. 3, 1777); 10 *id.* at 43, 46 (Jan. 13, 1778); 11 *id.* at 758–60 (Aug. 7, 1778); 8 R.I. RECORDS, *supra* note 1, at 286 (appointing legislative committee to encapsulate military supply recommendations in a bill).

203. Letter from William Greene, Governor of Rhode Island to Jonathan Trumbull, Governor of Connecticut (May 16, 1778), in 8 R.I. RECORDS, *supra* note 1, at 424 (complaining that Rhode Island had not received the troops promised from other states); Letter from William Greene, Governor of Rhode Island to the Council of Massachusetts (May 31, 1778), in 8 R.I. RECORDS, *supra* note 1, at 425 (same); Letter from Jonathan Trumbull, Governor of Connecticut, to William Greene, Governor of Rhode Island (Jun. 5, 1778), in 8 R.I. RECORDS, *supra* note 1, at 443 (excusing failure to meet Connecticut quota); see 8 R.I. RECORDS, *supra* note 1, at 519–20 (representing to Congress the difficulty this failure has inflicted on Rhode Island); Letter from Nicholas Cooke, Governor of Rhode Island, to General Sullivan (Mar. 30, 1778), in 8 R.I. RECORDS, *supra* note 1, at 526–27 (outlining same problems).

204. See 9 J. CONT. CONG., *supra* note 1, at 948, 955–57. The November 22 resolution stated:

*Resolved*, That it be recommended to the legislatures, or, in their recess, to the executive power of the respective states of New Hampshire, Massachusetts bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania [*sic*], and Delaware, respectively, to appoint commissioners to convene at New Haven, in Connecticut, on the 15 day of January next; and to the states of Virginia, Maryland, and North Carolina, respectively, to appoint commissioners to convene at Fredericksburg, in Virginia, on the said 15 day of January; and to the states of South Carolina and Georgia, respectively, to appoint commissioners to convene at Charleston, on the 15 day of February next; in order to regulate and ascertain the price of labour, manufactures, internal produce, and commodities imported from foreign parts, military stores excepted; and also to regulate the charges of inn-holders; and that, on the report of the commissioners, each of the respective legislatures enact suitable laws, as well for enforcing the observance of such of the regulations as they shall ratify, and enabling such inn-holders to obtain the necessary supplies, as to authorize the purchasing commissaries for the army, or any other person whom the legislature may think proper, to take from any engrossers, forestallers, or other person possessed of a larger quantity of any such commodities or provisions than shall be competent for the private annual consumption of their families, and who shall refuse to sell the surplus at the prices to be ascertained as aforesaid, paying only such price for the same.

*Id.* at 956–57 (footnote omitted).

Maryland, Virginia, and North Carolina convene at Fredericksburg, Virginia on the same day; and that South Carolina and Georgia gather on February 15 at Charleston. I have found no evidence the latter two conventions ever met.<sup>205</sup>

The call specified as the convention subject-matter developing a comprehensive schedule of price controls for non-military products, developing enforcement mechanisms, and empowering authorities to seize goods from engrossers (hoarders). The call further provided that state legislatures should adopt laws to implement “such of the regulations as they shall ratify.”<sup>206</sup> The precatory nature of that language communicated that these gatherings, too, were to be merely agencies to propose.

Like the York Town and Springfield meetings, the New Haven Convention has received little scholarly attention.<sup>207</sup> One reason may be that its journal was so thin.<sup>208</sup> Yet the gathering at New Haven was one of the better-attended meetings of the kind. It was comprised of committees from seven states: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania. Delaware had been invited but did not send delegates.

The states had named 21 commissioners, but one from New Jersey and two from Pennsylvania failed to attend. By January 15, three committees had arrived; six days later, all seven were on hand.<sup>209</sup> Except for the New York committee, all had been elected by their state legislatures,<sup>210</sup> with bicameral legislatures (Pennsylvania’s was unicameral) voting either jointly or by chambers *seriatim*. The New York committee was appointed by the state convention, a body that served as the legislature when the regular legislature was in recess or disrupted by the British.<sup>211</sup>

The convention elected Thomas Cushing of Massachusetts, a veteran of both the First Continental Congress and of Providence and

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205. *Accord* CAPLAN, *supra* note 1, at 18.

206. 9 J. CONT. CONG., *supra* note 1, at 957.

207. The principal treatment, Baldwin, *supra* note 1, is a sketchy and unsatisfying account that spends much of its time on other events and gets some facts wrong (for example, claiming that New Jersey delegate John Neilson was subsequently a delegate at the Constitutional Convention). *Id.* at 46. This work is sometimes referred to by the consecutive titles of its first two papers: “The New Haven Convention of 1778; The Boundary Line between Connecticut and New York.”

208. *See generally* 1 CONN. RECORDS, *supra* note 1, at 607–20.

209. *Id.* at 610–11 (reporting that “[t]he Commissioners arrived from the State of Pennsylvania” on that date).

210. The credentials stated how the committees were selected. *Id.* at 607–11; *see also* 8 R.I. RECORDS, *supra* note 1, at 340 (reproducing Rhode Island’s acceptance of the congressional call, and election of the commissioners by a joint ballot of both houses of the general assembly).

211. 1 CONN. RECORDS, *supra* note 1, at 609–10 (setting forth resolution of New York convention).

Springfield, as its president. It chose Henry Daggett, a non-delegate, as secretary.<sup>212</sup> Besides Cushing, four other commissioners had convention experience. William Floyd of New York had attended the First Continental Congress. Robert Treat Paine of Massachusetts had been at that Congress and at Springfield, as had Connecticut's Roger Sherman. Nathaniel Peabody of New Hampshire also had represented his state at Springfield.<sup>213</sup>

On January 22, 1778, the New Haven convention adopted rules of conduct. The content of those rules does not appear in the journal, except the rule of suffrage: each state had one vote.<sup>214</sup> Like other such assemblies, the convention appointed its own committees.<sup>215</sup>

The official journal tells us little of the proceedings. It does reproduce the lengthy text of the principal resolution,<sup>216</sup> which in accordance with the call is purely recommendatory.<sup>217</sup> The journal likewise includes a formal letter to Congress,<sup>218</sup> a letter to the absent state of Delaware,<sup>219</sup> and a recommendation that states write circular letters to other states assuring them that the senders had stopped issuing paper money and were honoring congressional requisitions.<sup>220</sup>

The New Haven convention also exercised its prerogative *not* to propose. For reasons it explained, the convention refused to list maximum prices for certain items listed in the congressional call.<sup>221</sup>

The gathering apparently adjourned on February 1.<sup>222</sup> Congress received its recommendations on February 16.<sup>223</sup> The convention proposals were the subject of later congressional debate and some implementation,<sup>224</sup> and four states enacted its wage-price schedule into

212. 1 CONN. RECORDS, *supra* note 1, at 607.

213. See Appendix A.

214. 1 CONN. RECORDS, *supra* note 1, at 611.

215. *Id.* at 612 (appointing committees "to draw up a report of the doings of this Convention" and "draw up a letter" to Congress).

216. *Id.* at 613–18.

217. The resolution is not clearly identified as a recommendation until near the end. *Id.* at 618.

218. *Id.* at 618–19.

219. *Id.* at 619–20.

220. *Id.* at 620.

221. *Id.* at 615 (explaining why certain items of foreign production are excepted).

222. As unlikely as this appears, the journal seems to report that the delegates convened on a Sunday (February 1) at 5:00 p.m. to adopt the circular-letter resolution and to adjourn. *Id.* at 620.

223. 10 J. CONT. CONG., *supra* note 1, at 170, 172 (Feb. 16, 1778).

224. *Id.* at 53, 55 (Jan. 15, 1778) ("[N]o limitation to be made by the Board of War, with respect to price, shall contravene any . . . of the regulations which may be made hereafter by the convention of committees which is to meet at New Haven, in Connecticut, on this fifteenth day of January[.]"). See also *id.* at 170, 172 (Feb. 16, 1778); *id.* at 258, 260 (Mar. 16, 1778); *id.* at 321–24 (May 8, 1778); 11 *id.* at 472 (May 7, 1778).

law.<sup>225</sup> Those price controls were soon repealed on the recommendation of Congress, but adopted to an extent on the local level.<sup>226</sup>

#### H. *The Hartford Convention of 1779*<sup>227</sup>

As the Revolutionary War continued, the value of paper money nosedived and trade wars grew among states.<sup>228</sup> In a further effort to coordinate interstate price controls and other economic policies, the Massachusetts General Court (legislature) on September 28, 1779 called yet another multi-state convention.<sup>229</sup> Massachusetts invited New York and the other New England states to meet at Hartford, Connecticut on October 20.<sup>230</sup> The call provided that the convention was to promote "a free and general Intercourse . . . upon Principles correspondent with the public Good, and effectually to cut up and destroy the Practices of those People who prey both upon you and us . . ."<sup>231</sup> The commissions of the Massachusetts delegates instructed them specifically to explain the motives for Massachusetts' embargo law, to "concert . . . such Measures as may appear proper to appreciate our Currency," and to "open a free and general Intercourse of Trade upon Principles correspondent with the public Good."<sup>232</sup>

The Massachusetts documents were not clear whether they contemplated a mere consultation or a meeting at which committees could "pledge the faith" of their respective governments. The call denominated the convention as a "Consultation," but stated that its

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225. CAPLAN, *supra* note 1, at 18; *see also* 1 CONN. RECORDS, *supra* note 1, at 521–22 (reproducing Governor Trumbull's recommendation based on the New Haven resolutions); 8 R.I. RECORDS, *supra* note 1, at 361 (reproducing resolution of the Rhode Island general assembly accepting the convention proceedings); *id.* at 381 (accepting committee report for bill controlling prices).

226. CAPLAN, *supra* note 1, at 18; *see* Letter from Jonathan Trumbull, Governor of Connecticut, to William Green, Governor of Rhode Island (May 19, 1778), in 8 R.I. RECORDS, *supra* note 1, at 423–24 (complaining of Rhode Island's non-compliance); Letter from William Green, Governor of Rhode Island, to Jonathan Trumbull, Governor of Connecticut (May 29, 1778), in 8 R.I. RECORDS, *supra* note 1, at 425 (explaining that Rhode Island cannot comply until Massachusetts does).

227. As is true of the conventions at Providence, York Town, Springfield, and New Haven, little has been written about the 1779 Hartford Convention. One must not confuse it with the far more famous interstate gathering at Hartford in 1814.

228. Josiah Bartlett, who represented New Hampshire at 1779 Hartford conclave, observed that "Land Embargoes" were then in effect in most of the five states at the convention. *See* Letter from Josiah Bartlett to Nathaniel Peabody (Oct. 20, 1779), in BARTLETT PAPERS, *supra* note 1, at 271.

229. 21 MASS. RECORDS, *supra* note 1, at 165–66.

230. *Id.* at 165.

231. *Id.*

232. *Id.* at 175; *see also* 2 CONN. RECORDS, *supra* note 1, at 564 (reproduction of Massachusetts resolution).

commissioners would have "full Powers to appear on the Part of this State."<sup>233</sup> The Massachusetts commissions used the verb "concert" rather than merely "consult," "deliberate," or "recommend."

The documents issued by the other states were clearer, but the commissions issued by New Hampshire contradicted the rest. New Hampshire authorized its delegates to "consult and agree" to virtually any measures.<sup>234</sup> Rhode Island authorized its commissioners only to "meet" with the other delegates.<sup>235</sup> Connecticut empowered its delegates to "deliberate and consult,"<sup>236</sup> and New York empowered its commissioners to "consult and confer" on the subjects identified by Massachusetts as well as any others that might arise.<sup>237</sup> Because of conflicting commissions, the convention could do no more than propose.

The five states appointed 14 commissioners, of whom 13 attended. Massachusetts appointed its committee by legislative action, as did Connecticut and New York. In Rhode Island, commissioners were designated by the council of war, to which the legislature had delegated legislative power.<sup>238</sup> In New Hampshire, they were appointed by the committee of safety, charged with the affairs of state during legislative recess.<sup>239</sup>

The proceedings opened promptly on October 20, 1779. The more notable figures present included three Connecticut commissioners: Eliphat Dyer, veteran of three prior conventions;<sup>240</sup> Benjamin Huntington, who had been at New Haven; and Oliver Ellsworth, new to the convention circuit, but fated to be a central figure at the Constitutional Convention and eventually Chief Justice of the Supreme Court.<sup>241</sup> Representing Massachusetts were Thomas Cushing, now serving in his fifth multi-state convention, and Nathaniel Gorham, who eight years later would chair the Committee of the Whole in Philadelphia.<sup>242</sup> From New Hampshire came Josiah Bartlett, attending his third convention, and from New York William Floyd and John Sloss Hobart, each also attending his third. Stephen Hopkins, one of the two Rhode Island delegates, was now serving in his fifth multi-state

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233. 21 MASS. RECORDS, *supra* note 1, at 165.

234. 2 CONN. RECORDS, *supra* note 1, at 563.

235. *Id.* at 564.

236. *Id.* at 564–65.

237. *Id.* at 565.

238. *Supra* note 151 and accompanying text.

239. 2 CONN. RECORDS, *supra* note 1, at 563–65.

240. See Appendix A (setting forth convention experience for each commissioner).

241. For a short sketch of Ellsworth's contributions to this meeting and to the Philadelphia Price Convention, see BROWN, *supra* note 1, at 72.

242. ROSSITER, *supra* note 1, at 171 (reporting Gorham's chairmanship of the committee of the whole).



meeting. He was elected president, as he had been at Providence and Springfield. In keeping with the tradition of choosing a non-delegate for secretary, the assembly elected Lt. Col. Hezekiah Wyllys.<sup>243</sup>

With this kind of accumulated experience, it was scarcely necessary to adopt formal rules, and the journal mentions none. After reproducing the credentials, the journal does little but report final recommendations.<sup>244</sup> They included repeal of embargoes, supplying Massachusetts, Rhode Island, and New Hampshire with flour, and further price regulations. Perhaps as a result of growing skepticism about the efficacy of the latter, the convention stressed the need to obtain supplies by taxing and borrowing rather than printing.<sup>245</sup>

The group also decided to propose yet another multi-state convention. The call read as follows:

That a Convention of Commissioners from the States of New Hampshire, Massachusetts, Rhode Island, Connecticut [*sic*], New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, be requested to meet at Philadelphia on the first Wednesday of January next, for the purpose of considering the expediency of limiting the prices of merchandize and produce, and if they judge such a measure to be expedient, *then to proceed to limit the prices* of such of said articles as they think proper in their several States in such manner as shall be best adapted to their respective situation and circumstances, *and to report their proceedings to their respective Legislatures.*<sup>246</sup>

As the italicized language suggests, decisions at the Philadelphia meeting would bind their sovereigns. Hopkins's circular letter to the other states also asserted that the proposed Philadelphia convention would "proceed to limit the prices" of articles, if it deemed proper.<sup>247</sup>

The Hartford Convention did not invite the three southernmost states to Philadelphia. The purported reason was "[t]he great distance of North Carolina, South Carolina, and Georgia."<sup>248</sup> Another possible reason is that those states may have been even more skeptical about price controls

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243. 2 CONN. RECORDS, *supra* note 1, at 564. For his rank, see *id.* at 356.

244. *Id.* at 566-69.

245. *Id.* at 569. Josiah Bartlett of New Hampshire believed that price controls remained necessary because taxes would be insufficient to stabilize the currency. Letter from Josiah Bartlett to Nathaniel Peabody (Nov. 4, 1779), in BARTLETT PAPERS, *supra* note 1, at 272-73.

246. 2 CONN. RECORDS, *supra* note 1, at 568 (emphasis added).

247. *Id.* at 571.

248. *Id.* at 570.

than some northerners were.<sup>249</sup> Recall that all those states had refused to honor the two congressional calls for price conventions at Charleston.<sup>250</sup>

After issuing its recommendations, the gathering adjourned, probably on October 28.<sup>251</sup> Its proceedings seem to have been generally approved in Congress,<sup>252</sup> and the convention's price recommendations served as the basis for some of Congress's own price edicts.<sup>253</sup>

### I. *The Philadelphia Price Convention of 1780*

The call for the Philadelphia Price Convention—yet another multi-government gathering largely overlooked by scholars—was issued by the preceding Hartford Convention.<sup>254</sup> The Philadelphia Price Convention was fated to be the final chapter in the sorry history<sup>255</sup> of Revolutionary-Era interstate price controls.

Of the ten states invited, seven attended.<sup>256</sup> They were Massachusetts, New Hampshire, Rhode Island, Connecticut,

249. See, e.g., Letter from the Connecticut Delegates to the Governor of Connecticut (Apr. 29, 1778), in 3 LETTERS, *supra* note 1, at 202 (quoting the Connecticut delegates to Congress as doubting that the southern states would regulate prices).

250. See *supra* notes 172 and 205 and accompanying text.

251. The journal is not completely clear on that point, but the final documents are dated October 28. 2 CONN. RECORDS, *supra* note 1, at 570–71.

252. See Letter from Henry Marchant to William Greene, Governor of Rhode Island (Nov. 14, 1779), in 4 LETTERS, *supra* note 1, at 518–19 (expressing confidence that Congress would approve the convention's proceedings); Letter from Samuel Huntington to Oliver Wolcott (Nov. 26, 1779), in 4 LETTERS, *supra* note 1, at 527 (expressing a similar view).

253. 15 J. CONT. CONG., *supra* note 1, at 1287–91 (Nov. 19, 1779 resolution); Letter from Elbridge Gerry to the President of Congress (Feb. 19, 1780), in 5 LETTERS, *supra* note 1, at 41–42 (stating that Congress fixed the price of flour according to the price agreed on at Hartford).

254. See *supra* text accompanying note 246; see also 8 R.I. RECORDS, *supra* note 1, at 634 (reproducing Rhode Island resolution reciting the Hartford call while empowering a commissioner to Philadelphia).

255. As one historian recounts:

Attempts at price control during the Revolution were all ineffectual. In general even advocates of such regulation looked upon it as a temporary expedient and palliative, while taxation, retrenchment in government expenditures, no further emissions of irredeemable paper currency, and the sinking of such paper already emitted were considered as the true cure for inflationary prices. Most members of Congress realized that large issues of fiat money would cause a decline in its value. . . . New Hampshire and other states learned from trial that price ceilings could be imposed but that producers could not be forced to sell their wares, that control often produced shortages in the midst of plenty, that beef would appear on the market when ceilings were removed and would vanish when they were imposed. People learned, too, that black-market operations would flourish under regulation. . . .

See Scott, *supra* note 1, at 472.

256. Cf. BROWN, *supra* note 1, at 72 (alleging that four invited states did not show, but this refers to the very beginning of the convention).

Pennsylvania, Delaware, and Maryland. Those states were represented by 20 commissioners, among them such experienced convention hands as Connecticut's Roger Sherman (three prior multi-state conventions) Oliver Ellsworth and Samuel Huntington (each with one prior); Delaware's Thomas McKean (one), Maryland's William Paca (one prior, but also a signer of the Declaration of Independence); and New Hampshire's Nathaniel Folsom and Nathaniel Peabody (two each). This was also the first multi-state convention for Elbridge Gerry of Massachusetts, who like Ellsworth and Sherman would play a significant role in writing the Constitution.<sup>257</sup>

State legislatures had elected all these delegates.<sup>258</sup> In Massachusetts, and perhaps in other states, the two chambers acted by joint ballot rather than *seriatim*.<sup>259</sup> Unicameral Pennsylvania required, of course, only the vote of one house.<sup>260</sup>

The commissions empowering the delegates displayed more uniformity than they had at Hartford. As requested by the call, all the commissions authorized delegates to bind their respective states. For example, New Hampshire empowered its commissioners "to limit the prices of articles,"<sup>261</sup> New Jersey to "consult and agree" and "confer and agree,"<sup>262</sup> and Massachusetts "to pledge the faith of this government."<sup>263</sup> These commissions restricted the scope of delegates' authority to bind their states to the subject of price limitation, sometimes with explicit reference to the call.<sup>264</sup> Additionally, Rhode Island empowered its delegates to urge the convention to recommend repeal of state embargoes.<sup>265</sup>

Initially, hopes had been high. In preparation for the convention, some commissioners conferred during early January of 1780.<sup>266</sup> Formal proceedings began on January 29, 1780 in the Pennsylvania state house,

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257. 2 CONN. RECORDS, *supra* note 1, at 415.

258. Connecticut designated its delegates in Congress as commissioners. *Id.*

259. *Id.* at 573. Some of the other commissions are not clear on this point. *See, e.g., id.* at 576 (describing Pennsylvania's selection of commissioners).

260. *See* PA. JOURNALS, *supra* note 1, at 398 (Nov. 18, 1779).

261. 2 CONN. RECORDS, *supra* note 1, at 572.

262. *Id.* at 575. The New Jersey commission also empowered its committee to "report whatever measures the said Convention may think proper to recommend, to this Legislature," *id.* at 576, but in light of the earlier wording this presumably applied to recommendations outside the call.

263. *Id.* at 573.

264. The commissions are reproduced at *id.* at 572-77. The commissions of Connecticut and New Jersey refer explicitly to Hartford. *Id.* at 574, 575.

265. *Id.* at 574 (reproducing resolution appointing William Ellery as commissioner).

266. Letter from Roger Sherman to Andrew Adams (Jan. 7, 1780), in 5 LETTERS, *supra* note 1, at 4 (reporting that six commissioners from four states had met, as well as an unauthorized representative from New York).

the building now called Independence Hall.<sup>267</sup> The convention elected William Moore, then serving as vice president of Pennsylvania, as its president. Contrary to custom, the commissioners elected one of their number, Samuel Osgood of Massachusetts, as secretary.<sup>268</sup> Because Osgood was a delegate, the convention decided that in the president's absence Osgood was "authorized to take and declare the sense of the [convention] on all questions that shall come before them."<sup>269</sup>

The convention soon encountered snags. New Jersey had appointed two delegates, but when the convention opened they were nowhere to be found. The assembly wrote to request their attendance, apparently without success.<sup>270</sup> In addition, they wrote to New York and Virginia, which also were absent.<sup>271</sup>

Most of the delegates believed that without the participation of Virginia and New York, any general price-fixing agreement would fail.<sup>272</sup> The results for the convention were multiple adjournments and inconclusive discussions.

Whatever the reason for New Jersey's absence, the non-participation by Virginia and New York seems to have been calculated. Virginia had attended the abortive and frustrating price convention at York Town (where it apparently had supported a price control recommendation),<sup>273</sup> but when Congress later asked Virginia to convene with neighboring states at Fredericksburg, it failed to do so.<sup>274</sup> During the Philadelphia gathering a New Jersey congressional delegate complained that "Virginia seems to hang back; no members have attended fr[m] [sic] thence, and as far as I can learn none have been appointed."<sup>275</sup> As for New York, there was no overt political basis for its absence, since the government in Albany already had "pledge[d] the faith of the State for carrying into effect a general plan for regulating prices . . . ."<sup>276</sup> Nor was there a practical basis, for Ezra L'Hommedieu, who had represented the state at Hartford, was readily available. In fact, he had been in Philadelphia meeting with authorized delegates since early January.<sup>277</sup>

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267. 2 CONN. RECORDS, *supra* note 1, at 572.

268. *Id.* at 577.

269. *Id.*

270. *See id.*

271. *Id.* at 578.

272. *Id.*

273. *Supra* note 181 and accompanying text.

274. *Supra* note 205 and accompanying text.

275. Letter from Abraham Clark to Caleb Camp, Speaker of the Assembly (Feb. 7, 1780), in N.J. SELECTIONS, *supra* note 1, at 212.

276. 2 CONN. RECORDS, *supra* note 1, at 578.

277. Letter from Roger Sherman to Andrew Adams (Jan. 7, 1780), in 5 LETTERS, *supra* note 1, at 4 (reporting on L'Hommedieu's meeting with six commissioners from four states).

The fundamental reason for the failure of Virginia and New York to cooperate may have been widespread doubts about the feasibility and justice of price controls. Even in 1777, the same year Congress called several price conventions, Dr. Benjamin Rush had argued that:

The wisdom & power of government have been employed in all ages to regulate the price of necessities to no purpose. It was attempted in Eng<sup>d</sup> in the reign of Edward II by the English parliament, but without effect. The laws for limiting the price of every thing were repealed, and M<sup>r</sup> Hume [David Hume, the historian and philosopher], who mentions this fact, records even the very attempt as a monument of human folly. The Congress with all its authority have failed in a former instance of regulating the price of goods.<sup>278</sup>

At the time, Rush's views had been seconded by such leading figures as James Wilson, Jonathan Witherspoon, and John Adams.<sup>279</sup>

Since 1777, reservations about the prudence of price controls had grown. The York Town Price Convention had failed, and the southernmost states had refused to hold any price conventions at all. Where controls had been imposed, they had proved spectacularly unsuccessful.<sup>280</sup> So by the time the Philadelphia convention met, "[e]nthusiasm for [price] regulation was on the wane."<sup>281</sup> In instructions withheld from the rest of the convention, the Massachusetts legislature had communicated to its own commissioners grave doubts about the entire price-fixing enterprise.<sup>282</sup>

In an effort to rescue the situation, on February 7 an unnamed commissioner moved several resolutions. One was to request the presence of Virginia and another of New York. A third resolution was to appoint a committee to draft a price-limitation plan. The journal is unclear whether this motion was adopted, although it likely was.<sup>283</sup> What is clear is that the following day the assembly adjourned until April 4, apparently never to re-convene.<sup>284</sup>

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278. Rush, *Notes*, *supra* note 1, at 135.

279. *Id.* at 137-38.

280. See Scott, *supra* note 1, at 472.

281. *Id.* at 471.

282. 21 MASS. RECORDS, *supra* note 1, at 307-08 (reproducing a letter of instruction in which perhaps half consisted of an attack on price controls' that portion was deleted in the convention version); see also 2 CONN. RECORDS, *supra* note 1, at 573.

283. 2 CONN. RECORDS, *supra* note 1, at 578-79.

284. *Id.* at 579; see also BROWN, *supra* note 1, at 72-73; CAPLAN, *supra* note 1, at 19; PA. JOURNALS, *supra* note 1, at 422 (Feb. 14, 1780).

### J. *The Boston Convention of 1780*

The Boston Convention of 1780 was the smallest of the Founding Era multi-government conventions: five delegates from three states.<sup>285</sup> Contemporaries sometimes referred to it as "the Committee from the New England States"<sup>286</sup> or the "Eastern Convention."<sup>287</sup> It has received slightly more scholarly attention than most of the other Founding-Era conventions.<sup>288</sup>

The motive for the gathering appears to have been military, although Daniel of St. Thomas Jenifer of Maryland thought it might also have been related to New York's diplomatic movement away from New England and toward Virginia.<sup>289</sup> But no other motive other than military appears in the records.

For the Americans, the military situation in 1780 was grave. Moreover, New England (specifically Rhode Island) was hosting a French army, and that army needed to be supplied. Letters from General Washington asked Congress to ensure adequate supplies, and Congress in turn urged the states to do so.<sup>290</sup>

The convention call came from Connecticut, and was addressed to the other three New England states.<sup>291</sup> It was initiated in a letter dated July 14, 1780 from Governor Jonathan Trumbull to Governor William Greene of Rhode Island in which Trumbull sought the support of Rhode Island for the meeting.<sup>292</sup> In the letter, Trumbull bemoaned the war situation and noted the difficulties of supplying the French and their irritation at high prices, and proceeded as follows:

To effect which, with the greater Expedition, we have thought it necessary to send one of our Board [i.e., council] to meet such Gentlemen as may be appointed from the States of Rhode Island, Massachusetts and New

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285. If 1768 be judged part of the Founding Era, the statement in the text must be qualified. That year, only three colonies attended a meeting with the Iroquois at Fort Stanwix (Rome), rendering it as small (aside from the Iroquois) as the Boston Convention. The attending colonies at Fort Stanwix were New Jersey, Pennsylvania, and Virginia. *IROQUOIS DIPLOMACY*, *supra* note 1, at 197.

286. Letter from Ezekial Cornell to William Greene (Aug. 29, 1780), in 5 *LETTERS*, *supra* note 1, at 347.

287. Letter from James Duane to George Washington (Sept. 19, 1780), in 5 *LETTERS*, *supra* note 1, at 378–79.

288. See generally *BOSTON PROCEEDINGS*, *supra* note 1.

289. Letter from Daniel of St. Thomas Jenifer to Thomas Sim Lee (Sept. 26, 1780), in 5 *LETTERS*, *supra* note 1, at 391–92.

290. See *BOSTON PROCEEDINGS*, *supra* note 1, at ix–xxix (reproducing correspondence).

291. Baldwin, *supra* note 1, at 38; see *BOSTON PROCEEDINGS*, *supra* note 1, at 53–55 (reproducing letter); 9 *R.I. RECORDS*, *supra* note 1, at 153 (same).

292. See Letter from Jonathan Trumbull to William Green (July 15, 1780), in *BOSTON PROCEEDINGS*, *supra* note 1, at 53–55.

Hampshire, or such of them as shall concur in the Measure, at Boston, as early next Week as possible, to confer on these and other important Subjects peculiarly necessary at this Day; to agree upon and adopt such similar Measures as may be most conducive to the general Interest.

We have forwarded this Intimation by an Express to the Council of War, at Providence; and if agreeable to them, it is requested they would unite in their request with ours, to the Council of War at Boston, by them immediately to be communicated to the President and Council in New Hampshire, for the Purpose that such Convention may be held at Boston with all possible Expedition.<sup>293</sup>

The call seemed to ask for Rhode Island and Massachusetts commissioners to be designated by those states' councils of war and for the New Hampshire commissioners to be appointed by the legislature. However, a call from one sovereign could not dictate how other sovereigns selected their delegates, as the convention realized by seating delegates however selected. In Massachusetts and Connecticut, the council of safety did appoint the commissioners, but in both of the other states the authorities deviated from Governor Trumbull's suggested method of appointment. In New Hampshire, the delegate was chosen not by the legislature, but by the committee of safety.<sup>294</sup> In Rhode Island, the governor referred the request to the general assembly,<sup>295</sup> which elected William Bradford.<sup>296</sup>

When the convention met on August 3, three commissioners from Massachusetts were in attendance together with one each from Connecticut and New Hampshire. Bradford, the Rhode Island delegate, proved unable to attend.<sup>297</sup>

Three of the five commissioners had prior convention experience. They were Nathaniel Gorham and Thomas Cushing of Massachusetts and Jesse Root of Connecticut, who substituted for Eliphalet Dyer (another seasoned conventioneer). Cushing had attended five previous conventions.<sup>298</sup> The group elected him president, and a non-delegate,

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293. BOSTON PROCEEDINGS, *supra* note 1, at 54–55.

294. 3 CONN. RECORDS, *supra* note 1, at 559–60.

295. 9 R.I. RECORDS, *supra* note 1, at 161 (reproducing letters from Governor William Greene of Rhode Island to the governor of Connecticut and the president of the council [governor] of Massachusetts).

296. *Id.* at 172–73.

297. 3 CONN. RECORDS, *supra* note 1, at 559; see Letter from James Bowdoin, President of Massachusetts Council, to William Greene, Governor of Rhode Island (July 24, 1780), in 9 R.I. RECORDS, *supra* note 1, at 300 (complaining of Rhode Island's absence).

298. 3 CONN. RECORDS, *supra* note 1, at 559.

Henry Alline, clerk.<sup>299</sup>

This was a proposal convention merely. The Massachusetts commission empowered delegates only to

consult and advise [deliberate] on all such business and affairs as shall be brought under consideration, relative to the war, and to promote and forward the most vigorous exertions of the present campaign, and to cultivate a good understanding and procure a generous treatment of the officers and men of our great and generous Ally [i.e., France], and make report thereof accordingly.<sup>300</sup>

The language of the other commissions was similar, except that New Hampshire, as at Hartford, permitted its commissioner to wander farther afield: He could "consult and advise . . . on any other matters that may be thought advisable for the public good."<sup>301</sup>

The journal tells us little about the substance of the convention, except for a lengthy list of recommendations. Most dealt with matters of military detail. However, the convention further recommended that land embargoes be repealed and water embargoes be continued, that bills of credit be sunk, and that those states that had not ratified the Articles of Confederation do so.<sup>302</sup> The recommendations dealing with bills of credit and embargoes might seem to be outside the scope of the convention, but prices and trade restrictions were key aspects of the military struggle. In fact, the convention call included specific reference to the need to protect the French army from "being imposed and extorted upon by extravagant Prices by Individuals."<sup>303</sup> The convention justified its two-fold recommendations on embargoes by stating that land embargoes should be repealed because they tended to injure rather than serve the common cause, while water embargos should remain with "particular care . . . to prevent all illicit trade with the enemy."<sup>304</sup>

Just as the first Hartford Convention had called the convention at Philadelphia, the Boston gathering extended a conditional invitation to any and all other states to a second meeting at Hartford.<sup>305</sup> It adjourned on August 9.<sup>306</sup>

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299. *Id.* at 561.

300. *Id.* at 559.

301. *Id.* at 560–61.

302. *Id.* at 561–64.

303. See BOSTON PROCEEDINGS, *supra* note 1, at 54.

304. 3 CONN. RECORDS, *supra* note 1, at 562.

305. *Id.* at 564.

306. *Id.*



These proceedings and recommendations were praised in Congress as consistent with congressional policies.<sup>307</sup> General Washington wrote that they were “the most likely Means that could be adopted to rescue our Affairs from the complicated and dreadful Embarrassments under which they labor, and will do infinite Honor to those with whom they originate.”<sup>308</sup> The Massachusetts legislature took note of the recommendations that all states adhere to the Articles of Confederation and that the confederation government be organized on a regular basis. The Massachusetts legislature signaled its willingness to overlook the unanimity rule and “to confederate with such other nine, or more, of the United States, as will accede to the Confederation.”<sup>309</sup>

#### K. *The Hartford Convention of 1780*

The Boston Convention’s call to Hartford was conditional in form. It read as follows:

And it is further recommended, that in case the war continues and Congress should not take measures for the purpose and notify the States aforesaid by the first of November next, that the said States do at all events furnish their quota of men and provisions, and charge the same to the United States; and to procure uniformity in the measures that may be necessary to be taken by these States in common with each other, this Convention recommend a meeting of Commissioners from the several States to be held at Hartford on the 2d Wednesday of November next, and invite the State of New York and others to join them that shall think proper.<sup>310</sup>

Pursuant to this call, nine of the eleven commissioners elected by the legislatures of New York and the four New England states gathered on November 8, 1780.<sup>311</sup> Among them was Rhode Island’s William Bradford who also had been elected to the Boston Convention, but had been unable to attend.<sup>312</sup> The convention elected Bradford as its

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307. See Letter from the Connecticut Delegates to the Governor of Connecticut (Sept. 1, 1780), in 5 LETTERS, *supra* note 1, at 351–52.

308. BOSTON PROCEEDINGS, *supra* note 1, at xxxii–xxxiii.

309. 21 MASS. RECORDS, *supra* note 1, at 640; cf. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

310. 3 CONN. RECORDS, *supra* note 1, at 563–64.

311. *Id.* at 564 (setting forth commissions and attendance list). Connecticut had elected as a third member of its committee Andrew Adams, Jr., *Id.* at 179, but he withdrew for several reasons. *Id.* at 237; 9 R.I. RECORDS, *supra* note 1, at 258–59 (reproducing legislative resolution).

312. *Supra* note 297 and accompanying text.

president and Hezekiah Wyllys, a non-delegate, as secretary.<sup>313</sup> Wyllys had served as secretary at the Hartford gathering the previous year.<sup>314</sup> During the proceedings, his father George (the Connecticut secretary of state)<sup>315</sup> replaced him for a time,<sup>316</sup> but Hezekiah returned for the end.<sup>317</sup>

Most of the delegates were veterans of previous conventions. Bradford was attending his third convention, Connecticut's Eliphalet Dyer his fifth, and Thomas Cushing of Massachusetts his seventh. Cushing's colleague, Azor Orne, was attending his second convention, and John Sloss Hobart of New York his fourth.

The commissions issued by the New England states all specified military affairs as the topic and limited their delegates to conferring and recommending. New York commissioned its committee to consider "all measures as shall appear calculated to give a vigor to the governing powers equal to the present crises."<sup>318</sup> Accompanying the New York commission were instructions to propose and agree to, in the said Convention, "that Congress should, during the present War, or until a perpetual Confederation shall be completed, be explicitly authorized and empowered, to exercise every Power which they [i.e., Congress] may deem necessary for an effectual Prosecution of the War . . . ."<sup>319</sup> In other words, the New York delegates had been instructed to seek a grant of plenary power to Congress.

Nothing of the debates survives except for formal recommendations, a letter to Congress, and a letter to the non-participating states. The recommendations were sweeping, but all were connected with the war and with issues of military funding and supply.<sup>320</sup> New York's proposal to grant broad powers to Congress was not acted on.

Some of the recommendations were noteworthy. The convention asserted that "the Commander-in-Chief ought to have the sole discretion of the military operations, and an individual should have the charge of each department."<sup>321</sup> Congress adopted the department proposal rather

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313. 3 CONN. RECORDS, *supra* note 1, at 564.

314. *Supra* note 243 and accompanying text.

315. 3 CONN. RECORDS, *supra* note 1, at 6.

316. *Id.* at 569. For the relationship, see Portal for Online Museum Catalog, CONN. HIST. SOC'Y MUSEUM & LIBR., <http://emuseum.chs.org:8080/emuseum/> (search for "Hezekiah Wyllys"; then follow second "Hezekiah Wyllys" hyperlink) (last visited Apr. 19, 2012).

317. 3 CONN. RECORDS, *supra* note 1, at 574. The transition from son to father and back to father was not surprising. Three generations of Wyllyses held the office of secretary of Connecticut continuously from 1712 to 1810. 3 DOCUMENTARY HISTORY, *supra* note 1, at 317 (editor's note).

318. 3 CONN. RECORDS, *supra* note 1, at 566.

319. THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW YORK AT THE FIRST MEETING OF THE FOURTH SESSION BEGUN AND HOLDEN AT POUGHKEEPSIE IN DUTCHESS COUNTY ON THURSDAY, SEPTEMBER 7TH, 1780 58–59 (Munsell & Rowland reprint, 1859)

320. 3 CONN. RECORDS, *supra* note 1, at 570–72.

321. *Id.* at 573.

quickly.<sup>322</sup> The convention further recommended that states “pledge their faith” to legally enforce congressional fund-raising decisions.<sup>323</sup> This proposal became law, at least in theory, a few months later, when the thirteenth state (Maryland) ratified the Articles of Confederation.

Frustrated by the failure of states to meet their fund-raising quotas, the convention also recommended

the several states represented in this Convention, to instruct their respective Delegates to use their influence in Congress that the Commander-in-Chief . . . be authorized and empowered to take such measures as he may deem proper and the publick [*sic*] service may render necessary, to induce the several States to a punctual compliance with the requisitions which have been made or may be made by Congress for supplies for the year 1780 and 1781.<sup>324</sup>

This proposed grant of near dictatorial authority to George Washington proved controversial,<sup>325</sup> and Congress never approved it.

The gathering apparently dissolved on November 22. That, at least, was the date of the convention’s letter to the other states.<sup>326</sup>

#### L. *The Abortive and Successful Providence Conventions of 1781*

At the 1780 Hartford Convention the participating states called for yet another meeting at an early date.<sup>327</sup> The subject would be military affairs, and the gathering would include representatives of the French military stationed in Providence.<sup>328</sup> On February 21, the Connecticut general assembly asked that the call be expanded to include the request of Vermont to be admitted to the union.<sup>329</sup> Governor Trumbull accordingly wrote to the other states announcing the expanded subject matter.<sup>330</sup> In the same letter, he fixed a meeting date of April 12,

322. See 19 J. CONT. CONG., *supra* note 1, at ix (editor’s prefatory note); *id.* at 124–26 (Feb. 7, 1781); *id.* at 155–57 (Feb. 16, 1781). The convention’s recommendations were first noted in Congress on December 12, 1780. 18 *id.* at 1141 (Dec. 12, 1780).

323. 3 CONN. RECORDS, *supra* note 1, at 571.

324. *Id.*

325. See, e.g., Letter from John Witherspoon to William Livingston, Governor of New Jersey (Dec. 16, 1780), in 5 LETTERS, *supra* note 1 at 487; Letter from James Warren to Samuel Adams (Dec. 4, 1780), in *id.* at 488 n.8.

326. 3 CONN. RECORDS, *supra* note 1, at 573.

327. See Letter from Connecticut Governor Trumbull to Governor of Rhode Island (Mar. 9, 1781), in 9 R.I. RECORDS, *supra* note 1, at 378.

328. 3 CONN. RECORDS, *supra* note 1, at 575–76.

329. *Id.* at 316–17 (Feb. 21, 1781); see also 9 R.I. RECORDS, *supra* note 1, at 343 (reproducing resolution).

330. E.g., Letter from Connecticut Governor Trumbull to Governor of Rhode Island (Mar. 9, 1781), in 9 R.I. RECORDS, *supra* note 1, at 378 (reproducing Trumbull’s circular letter).

1781.<sup>331</sup>

At the appointed time, only five delegates had arrived: Thomas Cushing from Massachusetts, Jonathan Trumbull, Jr. from Connecticut, and three Rhode Island commissioners. New York, New Hampshire, and the French all failed to appear. Those present tarried until April 17, then returned home. Before leaving, they agreed to "represent with much regret to the several States, that the seeming neglect on this occasion could not but give them a painful prospect . . . of any future proposed meeting of the States," and that "the interests of the States might be subjected to very substantial detriment."<sup>332</sup>

On June 12, 1781, the Massachusetts legislature issued a resolution calling for the New England states to meet at Providence on June 25, and appointing two Massachusetts commissioners.<sup>333</sup> The call described as the purpose of the gathering "to agree upon some regular method of sending on supplies of beef, &c. to the army, during the present year."<sup>334</sup> Only five delegates convened on June 26, but they represented all four New England states. Two delegates were convention veterans: Jabez Bowen of Rhode Island, who had been at New Haven, and John Taylor Gilman of New Hampshire, a commissioner the preceding year at Hartford. The little group chose Bowen as president and, contrary to usual practice, one of its own members, Justin Ely of Massachusetts, as clerk.<sup>335</sup>

This second Providence Convention made several supply recommendations, and disbanded after its second day.<sup>336</sup>

M. *On the Road to Annapolis: Abortive Conventions and the First State Legislative "Application"*

As noted earlier, the New York commissioners to the 1780 Hartford Convention had been instructed to promote a grant of greater powers to Congress.<sup>337</sup> On July 21, 1782, that state's legislature followed up with a resolution concluding as follows:

It appears to this Legislature, that the foregoing important Ends, can never be attained by partial

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331. *Id.*; 3 CONN. RECORDS, *supra* note 1, at 574.

332. 3 CONN. RECORDS, *supra* note 1, at 575.

333. 1780–1781 MASS. RECORDS, *supra* note 1, at 614.

334. *Id.* at 614.

335. 3 CONN. RECORDS, *supra* note 1, at 575.

336. *Id.* at 575–76. At least one state, Rhode Island, proceeded to put some of the recommendations into effect. 9 R.I. RECORDS, *supra* note 1, at 439–40 (reproducing legislative resolution); Letter from Governor Greene to General Washington (July 11, 1781), *in* 9 R.I. RECORDS, *supra* note 1, at 453–54 (outlining state's compliance). The state paid Bowen £2/5s for his service as commissioner. 9 R.I. RECORDS, *supra* note 1, at 453.

337. *Supra* Part III.K.

Deliberations of the States, separately, but that it is essential to the Common Welfare, that there should be as soon as possible a Conference of the Whole on the Subject; and that it would be advisable for this Purpose, to propose to Congress to recommend, and to each State to adopt, the Measure of assembling a General Convention of the States, specially authorised to revise and amend the Confederation, reserving a Right to the respective Legislatures, to ratify their Determinations.<sup>338</sup>

Similarly, on February 13, 1783, the Massachusetts legislature called a more modest convention: a meeting of New York and the New England states to be held at Hartford

to confer . . . on the necessity of adopting within the said States, for their respective uses, such general and uniform system of taxation by impost and excise, as may be thought advantageous to the said States, which system being agreed on by the majority of the delegates so to be convened, shall be recommended to the legislatures of the said States. . . .<sup>339</sup>

John Hancock, now occupying the newly-created office of governor, extended the formal invitation to the other states.<sup>340</sup>

The Massachusetts call was extraordinary for the suggestion that delegates vote as individuals rather than as states. None of the other calls had attempted to specify voting rules for a proposed convention, and all previous multi-government gatherings apparently had operated on a one-state/one vote principle.<sup>341</sup> This may explain the subsequent response: Although in recess of the legislature, the governor and council of safety of Connecticut appointed three commissioners,<sup>342</sup> New Hampshire and Rhode Island simply refused to do so. Massachusetts rescinded the call the following month.<sup>343</sup>

Undaunted, on May 31, 1785, Massachusetts Governor James Bowdoin addressed the state's lawmakers, urging them to promote a

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338. 5 DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, No. 11, Pt. 2, 28–29 (1904).

339. 1782–1783 MASS. RECORDS, *supra* note 1, at 382.

340. Letter from William Greene, Governor of Rhode Island, to John Hancock, Governor of Massachusetts (Feb. 28, 1783), in 9 R.I. RECORDS, *supra* note 1, at 685 (stating, “I am favored with your Excellency’s letter respecting the proposed convention of the five Eastern states, which is now before our General Assembly”).

341. *See generally* Part III.

342. 5 CONN. RECORDS, *supra* note 1, at 101–02.

343. 1782–1783 MASS. RECORDS, *supra* note 1, at 482–83 (Mar. 26, 1783) (rescinding call due to two states “having refused to choose delegates to meet”).

"Convention or Congress" of "special delegates from the States" to amend the Articles of Confederation and grant the Confederation Congress more authority.<sup>344</sup> The legislature responded on July 1 by adopting the New York formula in a resolution asking Congress for a general convention to revise the Articles.<sup>345</sup> In its accompanying circular letter to the other states, the legislature designated this action as "[making] *application to the United States in Congress assembled*."<sup>346</sup> This pre-constitutional use of the word "application" is almost identical to the use of that word in Article V. Previous discourse sometimes referred to the call as an "application."<sup>347</sup>

In addition to its "application" and circular letter, the Massachusetts legislature issued a letter to the president of Congress. This asked Congress "to recommend a Convention of the States at some convenient

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344. See 1784–1785 MASS. RECORDS, *supra* note 1, at 709–10 (speech of May 31, 1785); see also *id.* at 708.

345. The full text is as follows:

RESOLVE RECOMMENDING A CONVENTION OF DELEGATES FROM  
ALL THE STATES, FOR THE PURPOSE MENTIONED.

*As the prosperity and happiness of a nation, cannot be secured without a due proportion of power lodged in the hands of the Supreme Rulers of the State, the present embarrassed situation of our public affairs, must lead the mind of the most inattentive observer to realize the necessity of a revision of the powers vested in the Congress of the United States, by the Articles of Confederation:*

*And as we conceive it to be equally the duty and the privilege of every State in the Union, freely to communicate their sentiments to the rest on every subject relating to their common interest, and to solicit their concurrence in such measures as the exigency of their public affairs may require:*

*Therefore Resolved*, That it is the opinion of this Court, that the present powers of the Congress of the *United States*, as contained in the Articles of Confederation, are not fully adequate to the great purposes they were originally designed to effect.

*Resolved*, That it is the opinion of this Court, that it is highly expedient, if not indispensably necessary, that there should be a Convention of Delegates from all the States in the Union, at some convenient place, as soon as may be, for the sole purpose of revising the confederation, and reporting to Congress how far it may be necessary to alter or enlarge the same.

*Resolved*, That Congress be, and they are hereby requested to recommend a Convention of Delegates from all the States, at such time and place as they may think convenient, to revise the confederation, and report to Congress how far it may be necessary, in their opinion, to alter or enlarge the same, in order to secure and perpetuate the primary objects of the Union.

1784–1785 MASS. RECORDS, *supra* note 1, at 666 (July 1, 1785).

346. Circular Letter of the Massachusetts General Court to the Supreme Executive of Each State (July 1, 1785), in 1784–1785 MASS. RECORDS, *supra* note 1, at 667.

347. *E.g.*, 1 CONN. RECORDS, *supra* note 1, at 589.

place, on an early day, [so] that the evils so severely experienced from the want of adequate powers in the foederal [*sic*] Government, may find a remedy as soon as possible.”<sup>348</sup> The legislature issued formal instructions to Massachusetts’ congressional delegates to promote the application.<sup>349</sup>

Yet Congress failed to act.

While New York and Massachusetts were promoting a general convention, Pennsylvania decided to seek another regional one. Pennsylvanians wished to improve the navigability of the Susquehanna and Schuylkill Rivers,<sup>350</sup> and Marylanders wished to improve the navigability of the Susquehanna.<sup>351</sup> Pennsylvanians also discussed connecting Susquehanna and Schuylkill River navigation by digging a canal across what is now called the Delmarva Peninsula,<sup>352</sup> a project that would require cooperation from Maryland and Delaware. The latter state was, however, upset with both of its neighbors because of the tariffs imposed on Delawareans when they imported goods through Baltimore and Philadelphia.<sup>353</sup>

Pennsylvania political leaders suggested a tri-state convention to foster a comprehensive settlement. On November 18, 1785, a committee of Pennsylvania’s unicameral General Assembly proposed

that a negotiation [*sic*] be entered into with the States of Maryland and Delaware upon the ground of reciprocal advantages to be derived, to all the States concerned, from a communication between the said two Bays as well as from an effectual improvement of the navigation of the river Susquehanna and its streams.<sup>354</sup>

On November 23, the assembly authorized the Supreme Executive Council to open negotiations.<sup>355</sup> On November 25, the council president, Benjamin Franklin, sent a letter of invitation to the governor of Maryland.<sup>356</sup> The next day, the council vice president, Charles Biddle (who seems to have been carrying much of the burden for the aged

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348. 1784–1785 MASS. RECORDS, *supra* note 1, at 667 (italics omitted) (July 1, 1785).

349. *Id.* at 668 (July 1, 1785).

350. See Lillard, *supra* note 1, at 10–11; 10 PA. ARCHIVES, *supra* note 1, at 128–30 (1783 legislative committee report); *id.* at 312 (election of replacement commissioner on subject); *id.* at 315 (committee report received).

351. See Lillard, *supra* note 1, at 11.

352. See *id.* at 16; see also MINUTES, PA. ASSEMBLY, *supra* note 1, at 29 (proposed bill from 1st session, November 8, 1785).

353. Lillard, *supra* note 1, at 12.

354. 10 PA. ARCHIVES, *supra* note 1, at 538 (Nov. 18, 1786).

355. 14 MINUTES, PA. COUNCIL, *supra* note 1, at 582.

356. *Id.* at 585; see also 10 PA. ARCHIVES, *supra* note 1, at 540 (containing the text of the letter).

Franklin), dispatched a similar invitation to Delaware.<sup>357</sup> The negotiations were to be "for the purpose of opening 'a navigable communication between the Bays of Chesepeak [*sic*] and Delaware, and for an effectual improvement of the river Susquehanna, and its streams.'" <sup>358</sup> Consistently with the wording of these letters, the proposed meeting came to be referred to as the "Navigation Convention," to distinguish it from the more general "Commercial Convention" then being planned for Annapolis.

Commissioners at the navigation conclave would negotiate, but any results were to constitute proposals only. There was no suggestion that the convention would bind the participating states.

Delaware's initial reaction was negative. In January, 1786, a committee of that state's legislature recommended against participating. The reason cited was that the proposed canal would devalue Delaware's carrying trade. The committee recommended instead that the legislature concentrate on improving the roads spanning the peninsula.<sup>359</sup>

Maryland was willing to meet, provided the agenda be expanded beyond improvements on the Susquehanna and the projected canal. On February 20, Maryland lawmakers approved participation if the meeting included "other subjects which may tend to promote the commerce, and mutual convenience of the said states."<sup>360</sup> On the same day, a joint legislative session elected its commissioners: Samuel Chase, Samuel Hughes, Peregrine Lethbury, William Smith, and William Hemsley.<sup>361</sup>

A few days later, Vice President Biddle wrote to the Pennsylvania legislature celebrating this progress, and advocating that his state also participate in Virginia's proposed "Commercial Convention" at Annapolis. Biddle added that Navigation Convention negotiations had begun, but failed to mention when or where.<sup>362</sup>

In March, 1786, the Maryland legislature authorized its Navigation Convention delegates to discuss interstate tariffs.<sup>363</sup> The following month, the Pennsylvania assembly authorized payment for its delegates and selected its committee: Francis Hopkinson (who had signed the Declaration of Independence), John Ewing, David Rittenhouse (the famous astronomer), Robert Milligan and George Lattimer.<sup>364</sup>

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357. 10 PA. ARCHIVES, *supra* note 1, at 540–41.

358. *Id.* at 540.

359. Report upon the President's Message, Jan. 11, 1786 (read, Jan. 16, 1786) (on file with Delaware State Archives).

360. See generally PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 149–50 (Feb. 20, 1786); *id.* at 199 (Mar. 12, 1786).

361. PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 150 (Feb. 20, 1786).

362. See 14 MINUTES, PA. COUNCIL, *supra* note 1, at 644–45 (Feb. 22, 1786).

363. PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 199 (Mar. 12, 1786).

364. 10 PA. ARCHIVES, *supra* note 1, at 755; 15 MINUTES, PA. COUNCIL, *supra* note 1, at 2 (Apr. 5, 1786). There were some delays in selecting the Pennsylvania commissioners. 14



Delaware finally responded positively in June, approving participation in both the Navigation Convention and the more general Annapolis Commercial Convention.<sup>365</sup> As its Navigation Convention committee, Delaware lawmakers chose William Killen; Gunning Bedford, Jr.; John Jones; Robert Armstrong, and Eleazar McComb.<sup>366</sup> Authority was limited to proposing only, but encompassed not only the Susquehanna and the canal, but “any other subject that may tend to promote the commerce and the mutual convenience of the said states.”<sup>367</sup>

It is doubtful whether the three state committees ever met or even corresponded. In August, 1786, President Benjamin Franklin reported to the Pennsylvania assembly that “[s]ome farther progress has been made in the negotiation [sic] with the States of Delaware and Maryland since your last session: Commissioners have been appointed, an interview proposed, and every inclination to meet this Commonwealth on the ground of reciprocal advantage discovered [revealed].”<sup>368</sup> This statement of “progress” rather more suggests a lack of substantive discussion than its occurrence.

The reasons the Navigation Convention proved abortive are not fully understood. One reason may have been that the invitations issued by President Franklin and Vice President Biddle (essentially, the convention “call”) were radically defective: Unlike all successful calls, they failed to specify a time and place of meeting. Also, the project may have been lost amid the more momentous bustle in Annapolis and Philadelphia. Once the Navigation Convention’s scope was extended beyond two specific projects to include commerce in general, it overlapped the topics on the agenda in Annapolis and Philadelphia. Not surprisingly, therefore, both contemporaneous accounts and subsequent generations sometimes mistook Navigation Convention records for those pertaining to Annapolis.<sup>369</sup>

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MINUTES, PA. COUNCIL, *supra* note 1, at 669 (assigning a future date for the election); *id.* at 672 (postponing the date and erroneously stating the date of the original resolution as March 21 instead of March 23).

365. See MINUTES, DELAWARE COUNCIL, *supra* note 1, at 970–72; PROCEEDINGS, DELAWARE ASSEMBLY, *supra* note 1, at 375–76 (June 15, 1786).

366. MINUTES, DELAWARE COUNCIL, *supra* note 1, at 971. For the commissions’ backgrounds, see *id.* at 25 (editors’ introduction).

367. PROCEEDINGS, DELAWARE ASSEMBLY, *supra* note 1, at 376.

368. 15 MINUTES, PA. COUNCIL, *supra* note 1, at 70 (Aug. 25, 1786).

369. See, e.g., 14 MINUTES, PA. COUNCIL, *supra* note 1, at 672 (erroneously identifying the resolution authorizing the Navigation Convention, adopted March 23, 1786, with the Annapolis Convention resolution adopted on March 21, 1786); see also MINUTES, PA. ASSEMBLY, *supra* note 1, at 227 (2d Session, Mar. 21, 1786) (regarding the Annapolis resolution); *id.* at 230 (Mar. 23, 1786) (regarding the National Convention resolution).

A Delaware archivist has informed me that records in his office pertaining to the Navigation Convention were erroneously filed in the location for the Annapolis Convention. E-mail from

### N. *The Annapolis Commercial Convention of 1786*

More concrete progress toward another multi-state convention came from Virginia. Successful negotiations with Maryland in March, 1785 over Potomac and Chesapeake navigation rights encouraged Virginia political leaders to seek further inter-governmental cooperation.<sup>370</sup> On January 21, 1786, the state legislature adopted a resolution calling a convention

to take into consideration the trade of the United States; to examine the relative situations and trade of the States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same.<sup>371</sup>

This call was for a general, not a mere regional, convention. Its subject matter was commerce. Thus, in the contemporaneous records, the Annapolis conclave often is referred to as a "commercial convention."<sup>372</sup>

The Virginia legislature followed up this resolution with a circular letter inviting the other states to meet on "the first Monday in September next," September 4, 1786.<sup>373</sup> In March, Governor Bowdoin excitedly relayed the news to Massachusetts lawmakers,<sup>374</sup> and three months later those lawmakers elected four delegates<sup>375</sup> and fixed their compensation.<sup>376</sup> Shortly thereafter, they empowered the governor and council to fill any vacancies.<sup>377</sup>

Yet a full week after the convention was to have met, the Massachusetts delegates were still absent. So also were the appointed commissioners from Rhode Island. Only five states were in attendance, represented collectively by 12 commissioners. The states were New

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Bruce H. Haase to Robert G. Natelson (Aug. 13, 2012) (on file with author).

370. CAPLAN, *supra* note 1, at 22.

371. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 15 (2d ed. 1937) (internal quotation marks omitted) (quoting *HOUSE OF DELEGATE OF THE COMMONWEALTH OF VIRGINIA*, 1786, 153 (Thomas W. White ed. 1828)).

372. *See, e.g.*, 14 *MINUTES, PA. COUNCIL*, *supra* note 1, at 645 (Feb. 23, 1785); 15 *MINUTES, PA. COUNCIL*, *supra* note 1, at 82, 86 (Sept. 20, 1786).

373. CAPLAN, *supra* note 1, at 23 (quoting 1 *DOCUMENTARY HISTORY*, *supra* note 1, at 180).

374. *See* 1784–85 *MASS. RECORDS*, *supra* note 1, at 915 (communication of March 20, 1786).

375. 1786–87 *MASS. RECORDS*, *supra* note 1, at 286–87.

376. *Id.* at 304.

377. *Id.* at 312.

York, New Jersey, Delaware, Pennsylvania, and Virginia. The commissioners from Massachusetts and Rhode Island were to learn in mid-journey that the meeting already had adjourned.<sup>378</sup>

The delegates present included several convention alumni. John Dickinson of Pennsylvania and served in the Stamp Act Congress, and also in the First Continental Congress with his colleague, George Read.<sup>379</sup> New York's Egbert Benson had been at Hartford in 1780.<sup>380</sup> There also were notable newcomers: James Madison and Edmund Randolph of Virginia, Alexander Hamilton of New York, William Houston of New Jersey, and Richard Bassett of Delaware. All these newcomers were to represent their states in Philadelphia the following year—as would Dickinson and Read. Also present were Tench Coxe of Pennsylvania and St. George Tucker of Virginia, both of whom became highly influential in molding the public's perception of the Constitution.<sup>381</sup>

The delegates' credentials closely tracked the call,<sup>382</sup> except that those of Delaware stipulated that any convention proposal had to be reported “to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State.”<sup>383</sup>

The commissioners unanimously elected Dickinson, then the most distinguished of their number, as Chairman. The proceedings do not disclose a secretary.

Although other multi-state conventions had succeeded with a representation from only five states, the delegates did not believe that number was sufficient for crafting a trade regime national in scope.<sup>384</sup> They therefore took the same course the commissioners at the abortive 1781 Providence convention had taken—they issued a statement and adjourned. The statement read in part as follows:

Your Commissioners, with the most respectful deference,  
beg leave to suggest their unanimous conviction, that it  
may essentially tend to advance the interests of the union, *if*

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378. CAPLAN, *supra* note 1, at 24. Caplan blames the tardiness of their appointment, but the Massachusetts legislature had appointed its commissioners on June 17. *See* 1786–87 MASS. RECORDS, *supra* note 1, at 286–87.

379. 1 J. CONT. CONG., *supra* note 1, at 13–14, 74.

380. 2 CONN. RECORDS, *supra* note 1, at 565.

381. Coxe was among the most influential Federalist essayists during the ratification fight. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978) (describing Coxe's influence). Tucker wrote the first formal legal commentary on the Constitution, THE VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803).

382. Proceedings, *available at* [http://avalon.law.yale.edu/18th\\_century/annapoli.asp](http://avalon.law.yale.edu/18th_century/annapoli.asp) (last visited Apr. 21, 2013).

383. *Id.* (internal quotation marks omitted).

384. *Id.* (“Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.”).

*the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours [sic] to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.*<sup>385</sup>

The first italicized passage makes it clear that the Annapolis Convention was directing its resolution to the five states that had sent commissioners—not to other states, and not to Congress.

The second italicized passage contemplated a convention that could do more than merely propose changes in the Articles of Confederation. It contemplated a convention to propose changes “to render the *constitution of the Federal Government* adequate to the exigencies of the Union.” The word “constitution” in this context was *not* limited to the Articles of Confederation, as some modern writers assume. The prevailing political definition of “constitution” at the time was the political structure as a whole—much as we refer today to the British “constitution.” Although Americans had begun to apply the word a few years earlier to specific documents organizing state governments, the usage was not yet dominant, and no contemporaneous dictionary defined “constitution” that way.<sup>386</sup> What we today call a “constitution” was more often called an “instrument,” “frame,” “system,” or “form” of

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385. *Id.* (emphasis added).

386. See, e.g., 1 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775) (“The act of constituting, the state of being, the corporeal frame, the temper of the mind, and established form of government, a particular law.”); NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (25th ed. 1783) (“[A]n ordinance or decree; the state of the body; the form of government used in any place; the law of a kingdom.”); SAMUEL JOHNSON, 1 *A DICTIONARY OF THE ENGLISH LANGUAGE* (1786 ed.) (giving as political meanings “[e]stablished form of government; system of laws and customs” and “[p]articular law; establishment; institution”); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (2d ed. 1789) (similar definitions).

Perhaps the closest analogue in these definitions to the modern use of “constitution” is the phrase “particular law,” a usage deriving from the Roman *constitutio*, which denominated any official ruling by the emperor. WOLFGANG KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 127 (J.M. Kelly trans., 2d ed. 1973).

government.”<sup>387</sup> Thus, the Annapolis report was recommending a convention to consider and propose alterations in the federal *political system*, not merely to the Articles. Subsequent proceedings in Congress confirm that understanding.<sup>388</sup>

The Annapolis Convention adjourned on September 14, and Chairman Dickinson’s letter on its behalf was read in Congress on September 20.<sup>389</sup> On October 11, Congress referred the letter to a committee for consideration.<sup>390</sup> But Congress took no further action for several months.

### O. *The Constitutional Convention of 1787*

It is commonly said that the Constitutional Convention was called by Congress for the sole purpose of recommending changes in the Articles of Confederation, and that by writing an entirely new Constitution the delegates exceeded their authority. The claim was first raised during the ratification debates by opponents of the Constitution—and not always in good faith.<sup>391</sup>

The facts are otherwise: Congress did not call the Constitutional Convention, Congress had no power to limit its scope, and the overwhelming majority of delegates did not exceed their authority.

The commissioners at the Annapolis Convention had recommended to the five states they represented that those states “concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia. . . .”<sup>392</sup> Arguably, this represented the formal call to Philadelphia. If not, the call had come by November 23, 1786 from the Virginia and New Jersey legislatures.<sup>393</sup>

The Virginia resolution of that date was similar to state calls for at least two prior conventions in that the invitation was implied in the

387. Even when states began to entitle their basic laws as “constitutions,” they often included the more established titles as well. *E.g.*, DEL. CONST. of 1776 (“Constitution, or System of Government”); MD. CONST. of 1776 (“Constitution and Form of Government”); MASS. CONST. of 1780, pmbl. (“declaration of rights and frame of government as the constitution”); VA CONST. of 1776 (“Constitution or Form of Government”).

388. *Infra* Part III.N.

389. See 31 J. CONT. CONG., *supra* note 1, at 677–80.

390. *Id.* at 770.

391. See, *e.g.*, *A Georgian*, GAZETTE OF THE STATE OF GEORGIA, Nov. 15, 1787, reprinted in 3 DOCUMENTARY HISTORY, *supra* note 1, at 236–37 (an anti-federalist tract that misrepresents the delegates’ authority by substituting “the articles of confederation” for “the federal constitution” in quoting their commission).

392. Proceedings, *supra* note 385 and accompanying text.

393. 3 FARRAND’S RECORDS, *supra* note 1, at 559, 563.

appointment of commissioners.<sup>394</sup> It read as follows:

Be It Therefore Enacted . . . that seven Commissioners be appointed by joint Ballot of both Houses of Assembly who or any three of them are hereby authorized as Deputies from this Commonwealth to meet such Deputies as may be appointed and authorized by other States to assemble in Convention at Philadelphia as above recommended and to join with them in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress as when agreed to by them and duly confirmed by the several States will effectually provide for the same.<sup>395</sup>

This resolution followed the Annapolis formula in suggesting that the convention propose any "Alterations and farther Provisions as may be necessary to render the Foederal [sic] Constitution [i.e., the political system]<sup>396</sup> adequate." Perhaps significantly, the language provided not for approval by *every* state (as had the Annapolis recommendation), but by the "several [individual] States"—leaving open the possibility that changes could bind the assenting states even in the absence of unanimous approval. This was a formula for a convention with plenipotentiary, rather than limited, proposal power.<sup>397</sup>

On November 23, 1786, the same day Virginia acted, New Jersey commissioned several delegates "for the purpose of taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof."<sup>398</sup> New Jersey made no mention of consent by Congress or the other states.

On December 30, the Pennsylvania legislature also decided to send commissioners to Philadelphia, reciting as a reason the prior resolution of Virginia and empowering its delegates according to the Virginia

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394. *E.g.*, AMERICAN ARCHIVES, *supra* note 138 and accompanying text (quoting the call for the 1776–77 Providence Convention); Proceedings, *supra* note 333 and accompanying text (discussing the call for the 1781 Providence Convention).

395. 3 FARRAND'S RECORDS, *supra* note 1, at 559–60.

396. *Supra* Part III.M.

397. *Cf.* Letter from James Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 297, 299 (distinguishing between a convention recurring to "first principles," which depends on the unanimous consent of the parties who are to be bound by it and a convention for proposing amendments under "the forms of the Constitution," binding even non-consenting states).

398. 3 FARRAND'S RECORDS, *supra* note 1, at 563.

formula.<sup>399</sup> By mid-February of the following year, North Carolina, New Hampshire, Delaware, and Georgia (in that order) also had selected commissioners, or authorized the selection of commissioners.<sup>400</sup> All granted them broad power to propose reform, and none limited them to merely proposing changes in the Articles.<sup>401</sup> Thus, seven states already had enlisted in the cause, and none had restricted its delegates to revising the Articles.

On February 21, 1787, the congressional committee to which Dickinson's Annapolis letter had been entrusted moved that Congress "strongly recommend" to the states that they send delegates to a convention that would devise "such farther provisions as shall render the same adequate to the exigencies of the Union."<sup>402</sup> At that point, the New York congressional delegates, citing their instructions, objected. They moved to postpone the committee report, and they offered a resolution by which Congress would recommend to the states a convention only "for the purpose of revising the Articles of Confederation."<sup>403</sup> Their insistence on that wording confirms that people understood that the convention recommended by the delegates at Annapolis, endorsed by seven states, and promoted by the congressional committee was *not* limited to proposing changes in the Articles.

399. *Id.* at 565–66 (directing commissioners "to meet such Deputies as may be appointed and authorized by the other States, to assemble in the said Convention at the City aforesaid, and to join with them in devising, deliberating on, and discussing, all such alterations and further Provisions, as may be necessary to render the foederal [sic] Constitution fully adequate to the exigencies of the Union").

400. 3 *id.* at 567–77.

401. *E.g., id.* at 568 (showing that North Carolina elected its delegates in January 1787); *id.* at 571–72 (showing the New Hampshire resolution passing on January 17, 1787); *id.* at 574 (showing the Delaware authorization as passing on February 3, 1787); *id.* at 576–77 (reproducing the Georgia ordinance, adopted February 10, 1787).

The wording of each commission varied somewhat, with some phrases repeating themselves:

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

*New Hampshire*: "devising & discussing all such alterations & further provisions as to render the federal Constitution adequate to the Exigencies of the Union." *Id.* at 572.

*Delaware*: "deliberating on, and discussing, such Alterations and further Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union." *Id.* at 574.

*Georgia*: "devising and discussing all such Alterations and farther Provisions as may be necessary to render the *Federal Constitution* adequate to the exigencies of the Union." *Id.* at 56–77.

402. 32 J. CONT. CONG., *supra* note 1, at 71–72 (Feb. 21, 1787).

403. *Id.* at 72.

New York's motion to postpone was defeated, with only three states voting in favor.<sup>404</sup> However, Massachusetts then successfully obtained a postponement, and offered a substitute resolution.<sup>405</sup> This resolution was adopted.<sup>406</sup>

Notably, the successful resolution neither "called" a convention nor made a recommendation. In fact, it omitted the language of recommendation in the committee proposal and in the New York motion. The adopted resolution merely asserted that "in the opinion of Congress it is expedient" that a convention be

held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.<sup>407</sup>

It is, perhaps, truly extraordinary that so many writers have repeated the claim that Congress called the Constitutional Convention and legally limited its scope. First, the Confederation Congress had no power to issue a legally-binding call.<sup>408</sup> If the states decided to convene, as a matter of law they—not Congress—fixed the scope of their delegates' authority.<sup>409</sup> Second, the Articles gave Congress no power to limit that scope. To be sure, Congress, like any agent, could recommend to its principals a course of action outside congressional authority. But this is not the same as legally restricting the scope of a convention. Third, by its specific wording the congressional resolution was not even a *recommendatory* call or restriction. As shown above, Congress *dropped* the formal term "recommend" in favor of expressing "the opinion of Congress."

Despite Congress's expression of its "opinion," none of the seven states that had decided to participate in the convention narrowed their commissions. On the contrary, the list of states favoring a plenipotentiary proposing convention continued to grow. Connecticut, Maryland, and South Carolina all gave their delegates broad authority to

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404. *Id.* at 73.

405. *Id.* at 73–74.

406. *Id.* at 73.

407. *Id.* at 74 (internal footnote omitted).

408. ARTICLES OF CONFEDERATION of 1778, art. II ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.").

409. See CAPLAN, *supra* note 1, at 97; see also THE FEDERALIST NO. 40, *supra* note 1, at 199 (James Madison).



propose.<sup>410</sup> Only Massachusetts and New York restricted their commissions to amending the Articles.<sup>411</sup> This is why, during the convention proceedings it was a Massachusetts delegate, Elbridge Gerry, who questioned to that assembly's authority venture beyond changes in the Articles,<sup>412</sup> and why two of the three New York delegates left early.<sup>413</sup> Of the 39 delegates who signed the Constitution, only three—Rufus King and Nathaniel Gorham of Massachusetts and Alexander Hamilton of New York<sup>414</sup>—could be charged credibly with exceeding their powers.

The credentials of the Delaware commissioners, while broad enough to authorize scrapping most of the Articles, did impose an important limitation: they were not to agree to any changes that altered the rule that “in the United States in Congress Assembled each State shall have one Vote.”<sup>415</sup> However, the Constitution's bicameral Federal Congress was a very different entity with very different powers than the Confederation's “United States, in Congress Assembled,”<sup>416</sup> so the Delaware delegates could maintain that they had stayed within their commissions. Moreover, any convention delegate could point out that the law permitted an agent to recommend to his principals a course of action outside the agent's sphere of authority; such recommendations merely had no legal effect.<sup>417</sup> As James Wilson summed up the delegates' position, they were “authorized to conclude nothing,

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410. Connecticut resolved that

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

3 FARRAND'S RECORDS, *supra* note 1, at 585 (emphasis added). Maryland gave its delegates authority to “consider[] such Alterations and further Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union.” *Id.* at 586. Finally, South Carolina granted authority for “devising and discussing all such Alterations, Clauses, Articles and Provisions, as may be thought necessary to render the Foederal [sic] Constitution entirely adequate to the actual Situation and future good Government of the confederated States.” *Id.* at 581.

411. *Id.* at 584–85 (reproducing Massachusetts credentials); *id.* at 579–80 (reproducing New York credentials).

412. *See* 2 *id.* at 42–43.

413. *See* 1 *id.* at xiv (editor's comments).

414. The charge is less credible with respect to Hamilton than with respect to King and Gorham. Because the majority of his delegation had gone home, arguably Hamilton no longer could act as a commissioner from New York and signed, therefore, only as an individual.

415. 3 FARRAND'S RECORDS, *supra* note 1, at 574–75 (internal quotation marks omitted).

416. ARTICLES OF CONFEDERATION of 1778, art. II.

417. Natelson, *Rules*, *supra* note 1, at 723.

but . . . at liberty to propose any thing.”<sup>418</sup>

The Philadelphia Convention of 1787 was the largest meeting its kind since the First Continental Congress, including 55 commissioners from 12 states.<sup>419</sup> It also lasted more than three and a half months, longer than any other American eighteenth century multi-government convention.<sup>420</sup> Because of the quality of its deliberation, the completeness of its record, and the quality of its product, it deservedly has become the most famous meeting of its kind.

Yet in other ways it was unremarkable. The composition, protocols, rules, and prerogatives of the convention were well within the pattern set by prior multi-colonial and multi-state gatherings. This was to be expected, since at least 17 commissioners in Philadelphia had attended prior multi-government conventions. Some particularly influential delegates, such as John Dickinson, Roger Sherman, and Oliver Ellsworth, were veterans of several.

As was true of prior assemblies of this kind, the overwhelming majority of delegates at Philadelphia were selected by the state legislatures.<sup>421</sup> The only exception occurred when Governor Edmund Randolph of Virginia selected James McClurg to replace Patrick Henry (who had refused to serve), in accordance with a legislative authorization to the governor to fill vacancies.<sup>422</sup> As at prior conventions, the delegates all were empowered through commissions issued by their respective states, and were subject to additional state instructions. All but a handful of delegates remained within the scope of their authority or, if that was no longer possible, returned home.<sup>423</sup>

As in prior multi-government conventions, the rule of suffrage was one vote per state committee. As at previous conventions, the journal listed states from north to south, and they voted in that order. As in all the previous conventions discussed in this Part III other than the Albany Congress, the assembly elected its own president from among the commissioners present—in this case, George Washington.<sup>424</sup> In accordance with established custom also, the Constitutional Convention

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418. 1 FARRAND'S RECORDS, *supra* note 1, at 253. Wilson's use of "proposed" here means "recommend." This should not be confused with the technical term employed in Article V. See Natelson, *Rules*, *supra* note 1, Part XI.A.

419. 3 FARRAND'S RECORDS, *supra* note 1, at 557–59.

420. 1 *id.* at xi (introductory notes).

421. 3 *id.* at 559–86 (reproducing credentials).

422. 2 *id.* at 562–63.

423. Thus, Robert Yates and Robert Lansing, two of the three commissioners from New York (which had granted them only limited authority) returned home early. ROSSITER, *supra* note 1, at 252. Caleb Strong from Massachusetts, another state granting only limited authority, also left early. *Id.* at 211

424. 1 FARRAND'S RECORDS, *supra* note 1, at 1–2.

elected its own secretary, William Jackson, and other officers.<sup>425</sup> In choosing a secretary, it followed the usual practice of selecting a non-delegate.

As previous gatherings had done, the Constitutional Convention adopted its own rules,<sup>426</sup> kept its own journal, established and staffed its own committees,<sup>427</sup> and fixed its periods of recess and adjournment. In fundamental structure, protocol, and practices, there were few, if any, innovations.

#### IV. DID PRIOR MULTI-GOVERNMENT CONVENTIONS FORM THE CONSTITUTIONAL MODEL FOR THE AMENDMENTS CONVENTION?

The legal force of the Constitution's words and phrases depends, at least in part (and some would argue "entirely"), on the meaning of the words communicated to the ratifiers when they approved the document.<sup>428</sup> What the words communicated included not only their strict meaning, but the attributes and incidents implied by them. Hence the modern observer needs to consult contemporaneous customs and usages to understand the words fully.

The phrase "Convention for proposing Amendments" denoted a *general convention*.<sup>429</sup> To be "general" it was not necessary that every state participate, or even that every state be invited. The founding generation had experienced four gatherings then called general conventions—the Stamp Act Congress, the First Continental Congress, the Constitutional Convention, and the Philadelphia Price Convention, and none included every British colony in North America nor every state. The criterion that rendered a convention "general" rather than "partial" was not that every colony or state participated, but that the convention was not limited by region (at least not entirely)<sup>430</sup>—and that most colonies or states did take part.

This renders it easier to understand that in all attributes other than inclusivity, a general convention was the same creature as a regional or "partial" convention. The critical line of distinction was not between

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425. *Id.* at 2. As befits the relatively large size and long duration of the convention, the delegates also selected a doorkeeper and messenger. 15 PA. RECORDS, *supra* note 1, at 351.

426. *See generally* 1 FARRAND'S RECORDS, *supra* note 1, at 8–13, 15–16 (listing rules and James Madison recounting rulemaking proceedings).

427. *E.g., id.* at 16 (resolving into committee of the whole).

428. *See generally* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (arguing that standard Founding-Era methods of interpretation would require that the Constitution be interpreted according to the understating or the ratifiers, if coherent and available; and if not according to the original public meaning of the document).

429. *Supra* note 63 and accompanying text (defining "general convention").

430. The call to the Philadelphia Price Convention included the southern states of Maryland and Virginia, but excluded the Carolinas and Georgia. *Supra* Part III.H.

general and partial, but between multi-government and intra-governmental. Multi-government conventions were diplomatic meetings of commissioners empowered by their respective governments, and they had common characteristics (such as "one committee/one vote") that distinguished them from intrastate meetings.

Whether those common characteristics were incorporated into the Constitution's phrase "Convention for proposing Amendments" depends on whether the "Convention for proposing Amendments" was based on its multi-government predecessors. Put another way, was the amendments convention to be same sort of entity that prior multi-government conventions had been? Or did the Framers and Ratifiers contemplate that the phrase "Convention for proposing Amendments" might permit procedures and protocols entirely new?

The historical record on this point is nearly as clear as historical records ever are: The Founders contemplated an amendments convention fitting the universally-established model.

The first reason for believing this is the fact that there *was* a universally-established model. The diplomatic meeting among committees commissioned by their respective governments was the only sort of multi-jurisdictional convention—general or partial—known to the Founders. This model was not only universal but very well ingrained. As noted throughout Part III, the attendance rosters of these meetings show considerable overlap, and included many leading Founders. Among the Framers at the Constitutional Convention, Roger Sherman of Connecticut was attending his fifth multi-government convention. Delaware's John Dickinson was attending his fourth. Sherman's Connecticut colleague Oliver Ellsworth, Dickinson's colleague George Read, South Carolina's John Rutledge, and Nathaniel Gorham of Massachusetts all were attending their third. At least eleven other Framers were serving at their second: Madison, Franklin, Washington, Richard Bassett, Elbridge Gerry, Alexander Hamilton, William C. Houston, William Livingston, Thomas Mifflin, Edmund Randolph, and William Samuel Johnson. These veterans influenced the Constitution to a degree disproportionate to their numbers,<sup>431</sup> and most were leaders in the ratification debates.

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431. Madison is usually accounted the delegate with the most impact. Among other convention alumni, Washington served as convention president; Gorham chaired the committee of the whole and was one of five members of the Committee of Detail, which prepared the Constitution's first draft; Randolph presented the Virginia Plan and served on the Committee of Detail; Rutledge chaired that committee; Johnson was on the Committee of Style, which prepared the final version of the Constitution; Franklin kept the gathering humane and civil; and Dickinson, Ellsworth, Johnson, and Sherman were all key convention moderates who negotiated crucial settlements such as the Connecticut ["Great"] Compromise.

Many other leaders in the ratification debates were veterans of multi-government conventions as well. Jabez Bowen, a prominent Federalist, had represented Rhode Island in the New Haven and second Providence conventions, and he chaired the latter meeting. William Paca of Maryland, a moderate Anti-Federalist and central figure in the fight for amendments, had attended the First Continental Congress and the Philadelphia Price Convention. Thomas McKean, second only to James Wilson as a Federalist spokesman at the Pennsylvania ratifying convention, had served in the Stamp Act Congress and with Paca at the New Haven and second Providence conclaves. Azor Orne (first Providence and second Hartford conventions) and Tristram Dalton (first Providence) served as delegates to the Massachusetts ratifying convention.<sup>432</sup> Finally, ratifiers who had not attended multi-government gatherings but had served in Congress, in state legislatures, or in state executive office had been involved in convention selection procedures or had read convention reports.

Thus the Founders, either by personal experience or second-hand communication, all were familiar with a single multi-government model, and knew no other.

Nor did anything in the Constitution suggest that a “Convention for proposing Amendments” would follow any other than the universally-established pattern. The Constitution says nothing to indicate that an amendments convention would be popularly elected like the House of Representatives, for example; or that Congress could set the rules or supervise its composition. On the contrary, where the Constitution does provide rules it does so *precisely* in those few areas where existing practice had permitted variations. This point is explored further below in the Conclusion.

Those facts should be sufficient to close the question, but there are still more indicators pointing in the same direction. One of these is the fundamental reason the convention-proposal method was included in Article V: as a way of proposing amendments without congressional interference. If an amendments convention were to follow any model other than that established by precedent, the model likely would have to be specified by Congress, presumably as part of the congressional call. But allowing Congress to determine the composition and rules of the convention would cede to Congress significant power over the convention-proposal method, thereby frustrating its central purpose. Departing from the Founding-Era model, therefore, makes no sense as a matter of constitutional interpretation.

That Congress would have only a ministerial role in the process was

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432. 6 DOCUMENTARY HISTORY, *supra* note 1, at 1155 (listing Massachusetts ratifying convention delegates).

confirmed during the ratification debates by the influential Federalist Tench Coxe. Through the state application and convention procedure, he wrote, the states could obtain amendments "although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them."<sup>433</sup> This representation was flatly inconsistent with a power in Congress to manipulate convention composition or rules.

Madison's *Federalist* No. 43 contains a comment also inconsistent with any but the traditional model. This is the observation that the Constitution "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."<sup>434</sup> Of course, the only way for the state governments to be "equally enable[d]" with Congress in the proposal process is if the convention is a meeting of representatives from those state governments. Mere power to apply for a convention outside state control would not fit Madison's criterion.

That the states in convention assembled were the true proposers is assumed in other ratification-era writings as well. A Federalist writing as "Cassius" asserted that "*the states may propose any alterations which they see fit*, and that Congress shall take measures for having them

433. Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 284 (emphasis in original).

434. THE FEDERALIST NO. 43, *supra* note 1, at 275 (James Madison). Similarly, at the North Carolina ratifying convention, the following colloquy took place:

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

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

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

During the debates in New York, John Lansing, Jr., a former delegate to the federal convention, gave additional reasons for the alternative routes to amendment:

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

23 DOCUMENTARY HISTORY, *supra* note 1, at 2522–24.

carried into effect.”<sup>435</sup> Again, for the states to “propose,” the convention must be their instrumentality. Similarly, Samuel Jones, a supporter of the Constitution, explained Article V this way:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which *Congress might procure more*, if in the operation of the government it was found necessary; and they prescribed *for the states a mode of restraining* the powers of the government, if upon trial it should be found they had given too much.<sup>436</sup>

Jones thus tells us that the procedure gives the states a “mode of restraining the powers of government.” The states do not share that mode with others; the Constitution “prescribe[s]” that they have it. This can be true only if the convention is their assembly.

Further evidence on the point comes from the spring of 1789, when the First Federal Congress had assembled, eleven of the original thirteen states had ratified, but North Carolina and Rhode Island had not yet done so. Those two states, as well as Virginia and New York, were still unsatisfied with the Constitution as written, and wanted early action on amendments, particularly a Bill of Rights. Virginia and New York both applied for a convention to propose amendments.<sup>437</sup> The Virginia application 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>438</sup>

The italicized language reveals the assumption that an amendments convention was state-based, and was similar to language that long had

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

436. 23 DOCUMENTARY HISTORY, *supra* note 1, at 2520–22 (Feb. 4, 1789) (emphasis added).

437. See CAPLAN, *supra* note 1, at 35–39.

438. H.R. JOURNAL, 1st Cong., 1st Sess. 28–29 (1789) (emphasis added) (internal quotation marks omitted).

been used to denominate an interstate convention.<sup>439</sup> It paralleled the language of the Massachusetts application and accompanying letter sent to Congress in 1785 ("Convention of Delegates from all the States" and "Convention of the States").<sup>440</sup> Thus, in the view of the Virginia legislature, the Constitution had not changed the nature of a multi-government convention.

The New York application similarly asked

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>441</sup>

One might, perhaps, argue that the view of Virginia and New York were atypical, but in fact they were not. Already quoted have been several corroborative comments from the ratification debates. The legislature of Federalist Pennsylvania declined to join the applications of Virginia and New York, but in its resolution doing so it also assumed the pre-constitutional model, referring to the proposed gathering as *a convention of the states*.<sup>442</sup> This remained for many years a common method of designating an amendments convention.<sup>443</sup> Over four decades later, the Supreme Court still referred to such a gathering as a "convention of the states."<sup>444</sup>

I have been able to find no Founding-Era evidence suggesting that a convention for proposing amendments was anything else.

439. *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 578 (reproducing a resolution of the 1780 Philadelphia Price Convention, referring to it as a "meeting of the several States").

440. 1784–1785 MASS. RECORDS, *supra* note 1, at 666 (July 1, 1785) ("Convention of Delegates from all the States"); *id.* at 667 (accompanying letter to president of Congress describing the meeting as a "Convention of the States").

441. H.R. JOURNAL, 1st Cong., 1st Sess. 29–30 (1789) (emphasis added).

442. William Russell Pullen, *The Application Clause of the Amending Provision of the Constitution* 23 (1951) (unpublished dissertation, University of North Carolina) (on file with University Library, University of North Carolina and with author) ("[T]he calling of a convention of the states for amending the foederal [*sic*] constitution." (quoting MINUTES OF THE GEN. ASSEMBLY OF PA., 58–61, (1789))). 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).

443. Pullen, *supra* note 372, at 528; *see also* Natelson, *First Century*, *supra* note 1, at 5, 7, 12 (providing other examples).

444. *Smith v. Union Bank of Georgetown*, 30 U.S. (1 Pet.) 518, 528 (1831).



### CONCLUSION: WHAT PRIOR CONVENTIONS TELL US ABOUT THE CONVENTION FOR PROPOSING AMENDMENTS

As noted above, Founding-Era customs assist us in understanding the attributes and procedures inherent in a “convention for proposing amendments,” and the powers and prerogatives of the actors in the process.<sup>445</sup> This Conclusion draws on the historical material collected above, together with the brief constitutional text, to outline those attributes and procedures.

The previous record of American conventions made it clear that a convention for proposing amendments was to be, like its immediate predecessors, an inter-governmental diplomatic gathering—a “convention of the states” or “convention of committees.” It was to be a forum in which state delegations could meet on the basis of sovereign equality. Its purpose is to put the “states in convention assembled” on equal footing with Congress in proposing amendments.<sup>446</sup>

Founding-Era practice informs us that Article V applications and calls may ask for either a plenipotentiary convention or one limited to pre-defined subjects. Most American multi-government gatherings had been limited to one or more subjects, and the ratification-era record shows affirmatively that the Founders expected that most conventions for proposing amendments would be similarly limited.<sup>447</sup> Founding-Era practice informs us also that commissioners at an amendments convention were to operate under agency law and remain within the limits of their commissions.<sup>448</sup> Neither the record of Founding Era conventions nor the ratification debates offer significant support for the modern claim<sup>449</sup> that a convention cannot be limited.

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445. *Supra* notes 15 and 16 and accompanying text.

446. The modern perception that the Constitution does not give the states parity with Congress in the amendment process has induced some commentators to propose abolishing the convention system in favor of a system in which a certain number of states directly propose an amendment by agreeing on its precise language. *See, e.g., Why the Madison Amendment?*, THE MADISON AMENDMENT, <http://www.madisonamendment.org> (last visited Jan. 25, 2013). A correct understanding of the convention process makes clear that the states already occupy an equal position.

447. *See* Natelson, *Rules*, *supra* note 1, at 727–30.

448. *Supra* note 79 and accompanying text.

449. Those pressing this claim invariably do so with little or no consideration of either the prior history of multi-government conventions or the ratification record. *See, e.g.,* Bruce M. Van Sickle & Lynn M. Boughley, *A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLINE L. REV. 1 (1990). This article does not discuss, or even reference, eighteenth century convention practice, and its treatment of the “limitability” issue in the ratification record is limited to a single quotation by Alexander Hamilton. *Id.* at 32–33 & 45–46. Its principal argument is that the applying states cannot limit a convention to one subject because the Constitution provides for the convention to propose “amendments” (plural). *Id.* at 28, 45. This is like saying that when a speaker seeks

The only Founding Era efforts to insert in a convention call prescriptions other than time, place, and subject-matter were abortive. When Massachusetts presumed to set the voting rules while calling a third Hartford convention, two of the four states invited refused to participate.<sup>450</sup> In the few instances in which convention calls suggested how sovereign governments should select their commissioners, some of those governments disregarded the suggestions, but their commissioners were seated anyway.<sup>451</sup> This record therefore suggests that a convention call, as the Constitution uses the term, may not include legally-binding terms other than time, place, and subject. However, the occasional Founding-Era practice of making calls and applications conditional and of rescinding them<sup>452</sup> suggests that Article V applications and calls also may be made conditional or rescinded.<sup>453</sup> In accordance with Founding-Era practice, states are free to honor or reject calls, as they choose.

Universal pre-constitutional practice tells us that states may select, commission, instruct, and pay their delegates as they wish, and may alter their instructions and recall them. Although the states may define the subject and instruct their commissioners to vote in a certain way, the convention as a whole makes its own rules, elects its own officers, establishes and staffs its own committees, and sets its own time of adjournment.

All Founding-Era conventions were deliberative bodies. This was true to a certain extent even of conventions whose formal power was limited to an up-or-down vote. When Rhode Island lawmakers submitted the Constitution to a statewide referendum in town meetings rather than to a ratifying convention, a principal criticism was that the referendum lacked the deliberative qualities of the convention.<sup>454</sup> Critics contended that a ratifying convention, unlike a referendum, provided a central forum for a full hearing and debate and exchange of information among people from different locales.<sup>455</sup> They further contended that the

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"questions" from the audience, if those in the audience have only one question they may not ask it.

450. *Supra* Part III.M.

451. *Supra* Parts III.B (Stamp Act Congress) & III.J (Boston Convention).

452. *Supra* notes 136, 305, & 310 (conditional calls) and 342 (rescinded call), and accompanying text.

453. *Cf.* Natelson, *Rules*, *supra* note 1, at 712 (conditions and rescissions probably permitted).

454. *E.g.*, Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 131–32; *A Freeman*, PROVIDENCE GAZETTE, Mar. 15, 1788, *reprinted in id.* at 137; *A Freeman*, NEWPORT HERALD, Apr. 3, 1788, *reprinted in id.* at 220–22; *A Rhode Island Landholder*, PROVIDENCE U. S. CHRON., Mar. 20, 1788, *reprinted in id.*, at 146–47; Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193–98.

455. Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 131 (stating that the referendum, "though it gave

convention offered a way to supplement the affirmative or negative vote with non-binding recommendations for amendments.<sup>456</sup>

Before and during the Founding Era, American multi-government conventions enjoyed even more deliberative freedom than ratifying conventions—as, indeed, befits the dignity of a diplomatic gathering of sovereignties. No multi-government convention was limited to an up-or-down vote. Each was assigned discrete problems to work on, but within that sphere each enjoyed freedom to deliberate, advise, consult, confer, recommend, and propose. Multi-government conventions also could refuse to propose.<sup>457</sup> Essentially, they served as task forces where delegates from different states could share information, debate, compare notes, and try to hammer out creative solutions to the problems posed to them.

History and the constitutional text inform us that a convention for proposing amendments is, like its direct predecessors, a multi-government proposing convention. This suggests that an amendments convention is deliberative in much the same way its predecessors were.<sup>458</sup> This suggests further that when a legislature attempts in its

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every person an opportunity to enter his assent or dissent, precluded all the before-mentioned advantages arising from a general Convention, and excluded the light and information which one part of the State could afford to the other by means thereof”); Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193, 196.

456. Letter from James Madison to George Nicholas (Apr. 8, 1788), *in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 226 (criticizing the referendum because it “precludes every result but that of a total adoption or rejection”); Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in id.* at 132 (stating that Rhode Island lost the opportunity to deliberate at the Constitutional Convention, and also lost the opportunity to deliberate over amendments at a ratifying convention); *A Rhode Island Landholder*, PROVIDENCE U. S. CHRON., Mar. 20, 1788, *reprinted in id.* at 146–50; Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193, 97; *see Amendment*, PROVIDENCE GAZETTE, Mar. 29, 1788, *reprinted in id.* at 218.

457. *Supra* notes 221 and accompanying text *See also supra* notes 181 & 182 and accompanying text (relating the York Town convention’s failure to propose). Madison explicitly recognized an amendments convention’s prerogative not to propose. Letter from James Madison to Philip Mazzei, Dec. 10, 1788, 11 THE PAPERS OF JAMES MADISON 388, 389 (Robert A. Rutland & Charles F. Hobson, eds. 1977).

458. Modern case law is consistent in requiring that legislatures and conventions operating under Article V have some deliberative freedom. *See, e.g.,* Hawke v. Smith, 253 U.S. 221, 226–27 (1920); Miller v. Moore, 169 F.3d 1119, 1123 (8th Cir. 1999); Gralike v. Cook, 191 F.3d 911, 924–25 (8th Cir. 1999), *aff’d on other grounds*, 531 U.S. 510, 527 (2001); Barker v. Hazetine, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998) (“Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota’s congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost.”); League of Women Voters v. Gwadosky, 966 F. Supp. 52, 58 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 119, 127 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997) (requiring an assembly that can engage in “intellectual debate, deliberation, or consideration”); AFL-CIO v. Eu, 686 P.2d 609, 621–22 (Cal. 1984), *stay denied sub nom.* Uhler v. AFL-CIO, 468 U.S. 1310

application to compel the convention to merely vote up-or-down on prescribed language,<sup>459</sup> it is not utilizing the application power in a valid way.

Prevailing convention practice during the Founding Era permitted a few procedural variations, and it is precisely in these areas that the text of Article V prescribes procedure. Specifically:

- During the Founding Era, multi-state conventions could be authorized merely to *propose* solutions for state approval, or, less commonly, to *resolve* issues; in the latter case each state “pledged its faith” to comply with the outcome. Article V clarifies that an amendments convention only may propose. At the Constitutional Convention, the Framers rejected proffered language to create an amendments convention that could resolve.<sup>460</sup>
- During the Founding Era, a proposing convention could be plenipotentiary or limited. Article V clarifies that neither the states nor Congress may call plenipotentiary conventions under Article V, because that Article authorizes only amendments to “this Constitution,” and, further, it proscribes certain amendments.<sup>461</sup>
- During the Founding Era, an “application” for a multi-government convention could refer either to (1) a request from a state to Congress to call, or (2) the call itself. Article V clarifies that an application has only the former meaning.<sup>462</sup>
- During the Founding Era a call could come from one or more states, from Congress, or from another convention. Article V prescribes that the call for an amendments convention comes only from Congress, but is mandatory when two thirds of the states have submitted similar applications.<sup>463</sup>

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(1984); *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829–30 (Mont. 1984); *In re Opinion of the Justices*, 167 A. 176, 180 (Me. 1933); cf. *Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (1978) (Rehnquist, J.), *dismissing appeal from* 439 U.S. 1041 (upholding a referendum on an Article V question because it was advisory rather than mandatory); *Dyer v. Blair*, 390 F. Supp. 1291, 1308–09 (N.D. Ill. 1975) (Stevens, J.) (upholding a rule of state law on an Article V assembly, but only because the assembly voluntarily adopted it).

459. *E.g.*, 133 CONG. REC. S4183 (daily ed. Mar. 30, 1987) (reproducing Utah application specifying precise text of amendment).

460. Natelson, *Founders' Plan*, *supra* note 1, at 9.

461. U.S. CONST. art. V (“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.”).

462. U.S. CONST. art. V (“[O]n the Application of the Legislatures of two thirds of the several States, [Congress] shall call.”).

463. U.S. CONST. art. V (“or, on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments”).

- During the Founding Era, one proposing convention (that of 1787) had attempted to specify how the states were to review its recommendations. Article V clarifies that an amendments convention does not have this power.<sup>464</sup>

Thus do text and history fit together to guide us in the use of Article V.

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464. U.S. CONST. art. V (“[Congress’s call for a convention], 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.”).

## Appendix A

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 1776/ 77	York- town	Spring- field	New Haven	Hart- ford	1779	1780	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774		1777	1777	1778	1780	1781	1786	1787					
Adams, John	MA			X													
Adams, Samuel	MA			X													
Adams, Thomas	VA				X												
Alsop, John	NY			X													
Atkinson, Theodore	NH	X															
Baldwin, Abraham	GA																X
Barnes, Abraham	MD	X															
Bartlett, Josiah	NH				X		X										
Bassett, Richard	DL															X	X
Bayard, William	NY		X														
Bedford, Gunning, Jr.	DL													X			X
Benson, Egbert	NY															X	
Biddle, Edw.	PA			X													
Blair, John	VA																X
Blanchard, Jonathan	NH							X									
Bland, Richard	VA			X													
Blount, Wm.	NC																X
Boernum, Simon	NY			X													
Borden, Joseph	NJ		X														
Bowen, Jabez	RI							X							X		
Bowler, Metcalf	RI		X														
Braceo, John	MD					X											
Bradford, Wm	RI				X		X							X			

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 1776/ 77	York- town	Spring- field	New Haven	Hart- ford	Phila 1780	Bos- ton 1780	Hart- ford 1780	Provi- dence 1781	Anna- polis 1786	Phila 1787
Bready, David	NJ														X
Broom, Jacob	DL														X
Bruce, Norman	MD					X									
Bryan, George	PA		X												
Bull, John	PA									X					
Burwell, Lewis	VA					X									
Butler, Pierce	SC														X
Carroll, Daniel	MD														X
Caswell, Richard	NC			X											
Chambers, John	NY	X													
Champion, Henry	CN											X			
Chandler, John	MA	X													
Chase, Samuel	MD		X												
Clap, Supply	NH				X										
Clark, Abraham	NJ													X	
Clymer, George	PA														X
Collins, Thomas	DL					X									
Conduitt, Silas	NJ									X					
Coxe, Tench	PA													X	
Crane, Stephen	NJ			X											
Cruzer, John	NY		X												
Cunningham, Jas.	PA							X							
Curtenius, Peter T.	NY							X							

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 1776/77	York- town 1777	Spring- field 1777	New Haven 1778	Hart- ford 1779	Phila 1780	Bos- ton 1780	Hart- ford 1780	Provi- dence 1781	Anna- polis 1786	Phila 1787
Cushing, Thomas	MA	1754	1765	1774	X	X	X	X	X		X	X			
Dalton, Tristram	MA				X										
Davie, William R.	NC														X
Dayton, Jonathan	NJ														X
Deane, Silas	CN			X											
DeHart, John	NJ			X											
DeLancy, James	NY	X													
Denning, Wm.	NY							X							
Dickinson, John	PA/ DL		X	X										X	X
Duane, James	NY			X											
Dyer, Eliphalet	CN		X	X	X				X			X			
Ellery, Wm	RI									X					
Ellsworth, Oliver	CN								X	X					X
Elmer, Theophilus	NJ					X									
Ely, Justin	MA												X		
Fennimore, Thomas	NJ									X					
Few, Wm	GA														X
Fisher, Hendrick	NJ		X												
Fitzsimons, Thomas	PA														X
Floyd, Wm.	NY			X				X	X						
Folsom, Nath	NH			X	X					X					
Franklin, Benjamin	PA	X													X



Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 1776/ 77	York- town	Spring- field	New Haven	Hart- ford	Phila 1780	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila 1787
Gadsden, Christopher	SC		X	X											
Galbreath, Bertram	PA					X									
Galloway, Joseph	PA			X											
Gerry, Elbridge	MA									X					X
Gilman, John Taylor	NH											X	X		
Gilman, Nicholas	NH														X
Gilpin, Joseph	MD									X					
Goldsbrough, Robt	MD			X											
Gorham, Nathaniel	MA								X		X				X
Green, William	RI							X							
Griffith, Henry	MD					X									
Hamilton, Alexander	NY													X	X
Haring, John	NY			X											
Harrison, Benjamin	VA			X											
Henry, George	PA					X									
Henry, John	MD									X					
Henry, Patrick	VA			X											
Henry, Wm	PA									X					
Hewes, Jos	NC			X											
Hilhouse, Wm	CN							X							
Hobart, John Sloss	NY					X	X					X			
Holden, Chas	RI												X		
Holmes, Jos.	NJ					X									

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Hooper, Wm	NC			X											
Hopkins, Stephen	RI	X		X	X		X		X						
Hosmer, Titus	CN				X		X								
Houston, Wm.	GA														X
Houston, Wm. C.	NJ													X	X
Howard, Martin	RI	X													
Humphreys, Charles	PA			X											
Huntington, Benj	CN							X	X						
Huntington, Samuel	CN					X				X					
Hutchinson, Thomas	MA	X													
Ingersoll, Jared	NJ														X
Jay, John	NY			X											
Johnson, Thos	MD			X											
Johnson, William	NY	X													
Johnson, Wm															
Samuel	CN		X												X
King, Rufus	MA														X
Kinsey, James	NJ			X											
Langdon, John	NH										X				X
Lansing, John, Jr.	NY														X
Latimore, George	DL									X					
Lattermore, Jas	DL					X									
Law, Richard	CN				X										

Name	State	Albany Cong.	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 1776/77	York- town 1777	Spring- field 1777	New Haven 1778	Hart- ford 1779	Phila 1780	Bos- ton 1780	Hart- ford 1780	Provi- dence 1781	Anna- polis 1786	Phila 1787
Lee, Richard H	VA	1754	1765	1774	X										
L'Honniedien, Ezra	NY								X						
Lispenard, Leonard	NY		X												
Livingston, Philip	NY		X	X											
Livingston, Robert R.	NY		X												
Livingston, Wm	NJ			X											X
Low, Isaac	NY			X											
Lowell, John	MA										X				
Lynch, Thos. Jr.	SC		X	X											
Madison, James	VA													X	X
Martin, Alexander	NC														X
Martin, Luther	MD														X
Mason, Geo	VA														X
McClurg, Jas.	VA														X
McConaughy, David	PA					X									
McDowell, James	PA							X							
McHenry, James	MD														X
McKean, Thos	DL		X	X						X					
Mercer, John F.	MD														X
Middleton, Henry	SC			X											
Mifflin, Thos	PA			X											X
Moore, Wm	PA									X					

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence 77	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Morris, Gouverneur	PA	1754	1765	1774	1776/77	1777		1778	1779	1780	1780	1780	1781	1786	1787
Morris, Robt	PA														X
Morton, John	PA		X	X											X
Mumford, Paul	RI						X								
Murlock, William	MD		X												
Murray, Joseph	NY	X													
Neilson, John	NJ							X							
Norris, Isaac	PA	X													
Ogden, Robert	NY		X												
Oma, Azor	MA				X							X			
Osgood, Samuel	MA									X					
Otis, James	MA		X												
Paca, Wm	MD			X						X					
Pauna, Robt Treat	MA			X			X	X							
Partridge, Geo	MA											X			
Partridge, Oliver	MA	X	X												
Paterson, Wm.	NJ														X
Peabody, Nathaniel	NH						X	X		X					
Pendleton, Edm	VA			X											
Penn, John	PA	X													
Peters, Richard	PA	X													
Phelps, Oliver	MA												X		
Pierce, William L.	GA														X

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Annz- polis	Phila
Pinckney, Chas	SC	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Pinckney, Chas C	SC														X
Pitkin, William	CN	X													X
Potter, Elisha	MA							X							
Randolph, Edmund	VA													X	X
Randolph, Peyton	VA			X											
Read, Geo	DL			X										X	X
Rhoads, Sam	PA			X											
Ringgold, Thomas	MD		X												
Rodney, Caesar	DL		X	X		X									
Root, Jesse	CN									X	X				
Ross, Geo	PA			X											
Rowland, David	CN		X												
Ruggles, Timothy	MA		X												
Rutledge, Edw	SC			X											
Rutledge, John	SC		X	X											X
Sands, Comfort	NY							X							
Schuarman, Jas	NJ													X	
Sherburne, Henry, Jr	NH	X													
Sherman, Roger	CN			X			X	X		X					X
Sim, Jos	MD					X									
Smith, Richard	NJ			X											
Smith, William	NY	X													

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Spaight, Richard Dobbs	NC	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
St. Thos Jenifer, Daniel	MD														X
Strong, Caleb	MA														X
Sullivan, John	NH			X											X
Symmes, John Cleves	NJ							X							
Tasker, Benjamin	MD	X													
Thomas, Richard	PA					X									
Tilghman, Edward	MD		X												
Tilghman, Matthew	MD			X											
Tucker, St. George	VA													X	
VanDyke, Nicholas	DL									X					
VanRensselaer, Robt	NY					X									
Wadsworth, James	CN								X						
Wales, Nathaniel, Jr	CN				X										
Ward, Henry	RI		X		X										
Ward, Samuel	RI			X											
Washington, Geo	VA			X											X
Weave, Meshee	NH	X													
Wells, Samuel	MA	X													
Wantworth, Joshua	NH								X						
Whitehill, John	PA					X									
Wibbird, Richard	NH	X													

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Williams, Elisha	CN	X													
Williams, Wm	CN											X			
Williamson, Hugh	NC														X
Wilson, Jas.	PA														X
Wisner, Henry	NY			X											
Wolcott, Roger	CN	X													
Worthington, John	MA	X													
Wythe, Geo	VA														X
Yates, Robert	NY														X
		25		56	13	18	11	18	13	20	5	9	5	12	55
		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787

## Appendix B

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Champion, Henry	CN												X		
Deane, Silas	CN			X											
Dyer, Eliphalet	CN		X	X	X				X			X			
Ellsworth, Oliver	CN								X	X					X
Hillhouse, Wm	CN							X							
Hosmer, Titus	CN				X		X								
Huntington, Benj	CN							X	X						
Huntington, Samuel	CN						X			X					
Johnson, Wm	CN		X												X
Samuel	CN														
Law, Richard	CN				X										
Pitkin, William	CN	X													
Root, Jesse	CN									X	X				
Rowland, David	CN		X												
Sherman, Roger	CN			X			X	X		X					X
Wadsworth, James	CN								X						
Wales, Nathaniel, Jr	CN				X										
Williams, Elisha	CN	X													
Williams, Wm	CN											X			
Welcott, Roger	CN	X													
Bassett, Richard	DL													X	X
Bedford, Gunning, Jr.	DL														X
Broom, Jacob	DL														X



		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Collins, Thomas	DL					X									
Latimore, George	DL									X					
Lattemore, Jas	DL					X									
McKean, Thos	DL		X	X						X				X	
Read, Geo	DL			X											
Rodney, Caesar	DL		X	X		X									
VanDyke, Nicholas	DL									X					X
Baldwin, Abraham	GA														X
Few, Wm	GA														X
Houston, Wm.	GA														X
Pierce, William L.	GA														X
Adams, John	MA			X											
Adams, Samuel	MA			X											
Chandler, John	MA	X													
Cushing, Thomas	MA			X	X		X	X	X		X	X			
Dalton, Tristram	MA				X								X		
Ely, Justin	MA														
Garry, Elbridge	MA									X					X
Gorham, Nathaniel	MA								X		X				X
Hutchinson, Thomas	MA	X													
King, Rufus	MA														X
Lowell, John	MA										X				
Orna, Azor	MA				X							X			

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Osgood, Samuel	MA	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Otis, James	MA		X							X					
Paine, Robt Treat	MA			X			X	X							
Partridge, Geo	MA											X			
Partridge, Oliver	MA	X	X										X		
Phelps, Oliver	MA														
Potter, Elisha	MA							X							
Ruggles, Timothy	MA		X												
Strong, Caleb	MA														X
Wells, Samuel	MA	X													
Worthington, John	MA	X													
Barnes, Abraham	MD	X													
Braceo, John	MD					X									
Bruce, Norman	MD					X									
Carroll, Daniel	MD														X
Chase, Samuel	MD			X											
Gilpin, Joseph	MD									X					
Goldaborough, Robt	MD			X											
Griffith, Henry	MD					X									
Henry, John	MD									X					
Johnson, Thos	MD			X											
Martin, Luther	MD														X
McHenry, James	MD														X

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Mercer, John F.	MD														X
Murdoch, William	MD		X												
Paca, Wm	MD			X						X					
Ringgold, Thomas	MD		X												
Sim, Jos	MD					X									
Daniel	MD														X
Tasker, Benjamin	MD	X													
Tilghman, Edward	MD		X												
Tilghman, Matthew	MD			X											
Blount, Wm.	NC														X
Caswell, Richard	NC			X											
Davie, William R.	NC														X
Hewes, Jos	NC			X											
Hooper, Wm	NC			X											
Martin, Alexander	NC														X
Spaight, Richard															
Dobbs	NC														X
Williamson, Hugh	NC														X
Atkinson, Theodore	NH	X													
Bartlett, Josiah	NH				X		X		X						
Blanchard, Jonathan	NH							X							
Clap, Supply	NH				X										
Folsom, Nath	NH			X	X					X					

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Gilman, John Taylor	NH											X	X		
Gilman, Nicholas	NH														X
Langdon, John	NH										X				X
Peabody, Nathaniel	NH						X	X		X					
Sherburne, Henry, Jr	NH	X													
Sullivan, John	NH			X											
Waave, Meshee	NH	X													
Wentworth, Joshua	NH								X						
Wibbird, Richard	NH	X													
Borden, Joseph	NJ		X												
Brearly, David	NJ														X
Clark, Abraham	NJ													X	
Conduitt, Silas	NJ									X					
Crane, Stephen	NJ			X											
Dayton, Jonathan	NJ														X
DeHart, John	NJ			X											
Elmer, Theophilus	NJ					X									
Fennimore, Thomas	NJ									X					
Fisher, Hendrick	NJ		X												
Holmes, Jos.	NJ					X									
Houston, Wm. C.	NJ													X	X
Ingersoll, Jared	NJ														X

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Kinsay, James	NJ			X											
Livingston, Wm	NJ			X											X
Neilson, John	NJ							X							
Paterson, Wm.	NJ														X
Schuarman, Jas	NJ													X	
Smith, Richard	NJ			X											
Symmes, John Claves	NJ							X							
Alsop, John	NY			X											
Bayard, William	NY		X												
Benson, Egbert	NY											X		X	
Boernum, Simon	NY			X											
Chambers, John	NY	X													
Cruger, John	NY		X												
Curtin, Peter T.	NY							X							
DeLancy, James	NY	X													
Denning, Wm.	NY							X							
Duane, James	NY			X											
Floyd, Wm.	NY			X				X	X						
Hamilton, Alexander	NY													X	X
Haring, John	NY			X											
Hobart, John Sloss	NY					X	X		X			X			
Jay, John	NY			X											

		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Johnson, William	NY	X													
Lansing, John, Jr.	NY														X
L'Hommedieu, Ezra	NY								X						
Lispenard, Leonard	NY		X												
Livingston, Philip	NY		X	X											
Robert R.	NY		X												
Low, Isaac	NY			X											
Murray, Joseph	NY	X													
Ogden, Robert	NY		X												
Sandé, Comfort	NY							X							
Smith, William	NY	X													
VanRensselaer, Robt	NY					X									
Wisner, Henry	NY			X											
Yates, Robert	NY														X
Biddle, Edw	PA			X											
Bryan, George	PA		X												
Bull, John	PA									X					
Clymer, George	PA														X
Coxe, Trench	PA													X	
Cunningham, Jas.	PA							X							
Fitzsimons, Thomas	PA														X
Franklin, Benjamin	PA	X													X
Galbreath, Bertram	PA					X									

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Galloway, Joseph	PA	1754	1765	1774	X					1780	1780	1780	1781	1786	1787
Henry, George	PA					X									
Henry, Wm	PA									X					
Humphreys, Charles	PA			X											
McConaughy, David	PA					X									
McDowell, James	PA							X							
Mifflin, Thos	PA			X											X
Moore, Wm	PA									X					
Morris, Gouverneur	PA														X
Morris, Robt	PA														X
Morton, John	PA		X	X											
Norris, Isaac	PA	X													
Penn, John	PA	X													
Peters, Richard	PA	X													
Rhoads, Sam	PA			X											
Ross, Geo	PA			X											
Thomas, Richard	PA					X									
Whitehill, John	PA					X									
Wilson, Jas.	PA														X
Dickinson, John	DL		X	X										X	X
Bowen, Jabez	RI							X					X		
Bowler, Metcalf	RI		X												
Bradford, Wm	RI				X		X					X			

Name	State	Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Ellery, Wm	RI	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Green, William	RI							X		X					
Holden, Chas	RI								X						
Hopkins, Stephen	RI	X		X	X		X		X						
Howard, Martin	RI	X													
Mumford, Paul	RI						X								
Ward, Henry	RI		X		X										
Ward, Samuel	RI			X											
Butler, Pierce	SC														X
Gadsden,															
Christopher	SC		X	X											
Lynch, Thos, Jr.	SC		X	X											
Middleton, Henry	SC			X											
Pinckney, Chas	SC														X
Pinckney, Chas C	SC														X
Rutledge, Edw	SC			X											
Rutledge, John	SC		X	X											X
Adams, Thomas	VA					X									
Blair, John	VA														X
Bland, Richard	VA			X											
Burwell, Lewis	VA					X									
Harrison, Benjamin	VA			X											
Henry, Patrick	VA			X											



		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila
Name	State	1754	1765	1774	77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Lee, Richard H	VA			X										X	
Madison, James	VA														X
Mason, Geo	VA														X
McChrg. Jas.	VA														X
Pendleton, Edm	VA			X											
Randolph, Edmund	VA													X	X
Randolph, Peyton	VA			X											
Tucker, St. George	VA													X	
Washington, Geo	VA			X											X
Wythe, Geo	VA														X
		25		56	13	18	11	18	13	20	5	9	4	12	55
		Albany Cong	Stamp Act Cong.	1st Cont. Cong.	Provi- dence	York- town	Spring- field	New Haven	Hart- ford	Phila	Bos- ton	Hart- ford	Provi- dence	Anna- polis	Phila

**§ 5.2. *Robert Natelson, Rules Governing the Process***

**Proposing Constitutional Amendments by Convention:  
Rules Governing the Process**

Robert G. Natelson

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# PROPOSING CONSTITUTIONAL AMENDMENTS BY CONVENTION: RULES GOVERNING THE PROCESS

ROBERT G. NATELSON\*

## ABSTRACT

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

ABSTRACT .....	693
I. INTRODUCTION .....	696
II. FOUNDING-ERA TERMINOLOGY .....	698
III. THE PURPOSE OF THE STATE-APPLICATION-AND-CONVENTION PROCESS .....	699
IV. THE ESSENCE OF ARTICLE V: GRANTS OF POWER TO DESIGNATED ASSEMBLIES .....	702
V. READING CONSTITUTIONAL GRANTS OF POWER: THE FIDUCIARY CONTEXT .....	703
A. <i>The Centrality of Fiduciary Rules</i> .....	703
B. <i>The Doctrine of Incidental Authority</i> .....	704
VI. OVERVIEW OF FOUNDING-ERA CONVENTIONS .....	706
VII. OTHER EVIDENCE—FOUNDING AND POST-FOUNDING .....	708
VIII. THE NATURE OF APPLICATIONS AND THE RULES GOVERNING THEM .....	709
A. <i>The Nature of an Application</i> .....	709
B. <i>The Application Process is Not Subject to Normal Legislative         Limitations, Such as Presentment to the Governor</i> .....	710

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C. <i>States May Rescind Applications</i> .....	712
D. <i>Applications Do Not Grow "Stale" with the Passage of Time</i> .....	712
IX. DEFINING THE SCOPE OF THE CONVENTION .....	715
A. <i>Founding-Era Convention Practice Before the 1787 Convention</i> .....	715
B. <i>Was the 1787 Federal Convention a "Runaway?"</i> .....	719
C. <i>Other Evidence that Applications Can Limit the Convention's Agenda</i> .....	723
X. THE CONVENTION CALL AND SELECTION OF DELEGATES .....	732
A. <i>Congress as a (Limited) Agent of the States</i> .....	732
B. <i>Congress's Role in Calling the Convention</i> .....	733
C. <i>Other Formalities in the Call</i> .....	737
D. <i>Enforcing the Duty to Call</i> .....	737
E. <i>The Composition of the Convention</i> .....	738
F. <i>Convention Discretion: The Rules</i> .....	740
G. <i>Convention Discretion: An Application May Not Limit the Convention to Specific Rules or Language</i> .....	742
H. <i>State Legislative Instructions</i> .....	747
XI. RULES GOVERNING TRANSMITTAL OF PROPOSALS TO THE STATES .....	748
A. <i>What Happens if the Convention "Proposes" an Amendment Outside the Subject Assigned by the Applications?</i> .....	748
B. <i>Choosing a Mode of Ratification</i> .....	748
XII. CONCLUSION <sup>1</sup> .....	750

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

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## I. INTRODUCTION

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

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a *Convention for proposing Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .<sup>2</sup>

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

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

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

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

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

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

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

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

4. See *infra* Part IX.A.

5. See *infra* Part X.B.

6. See *infra* Part III.

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

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

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

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

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

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

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

11. *Id.*

12. CAPLAN, *supra* note 1, at vii–viii, 146–47 (quoting various public figures, mostly on the political left); Art Thompson, *Help Stop the New Drive for a Constitutional Convention*, YOUTUBE (Oct. 18, 2010), <http://www.youtube.com/watch?v=ggepQ6DtjP4> (presenting a video message from Art Thompson, president of the deeply conservative John Birch Society).

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

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

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

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

## II. FOUNDING-ERA TERMINOLOGY

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will show this to be a groundless remark. It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures; and all amendments proposed by such convention, are to be *valid* when approved by the conventions or legislatures of three fourths of the states. It must therefore be evident to every candid man, that two thirds of the states can *always* procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them. Congress therefore cannot hold *any power*, which three fourths of the states shall not approve, on *experience*.<sup>25</sup>

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

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

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

*Id.* at 2523.

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

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

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

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

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

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

At the ratification stage, Article V:

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

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

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

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

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

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

28. *Id.*

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

## V. READING CONSTITUTIONAL GRANTS OF POWER: THE FIDUCIARY CONTEXT

### A. The Centrality of Fiduciary Rules

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

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

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

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

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

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

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

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

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

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

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

### B. The Doctrine of Incidental Authority

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

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

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

36. See sources cited *supra* note 31.

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

38. *Id.* at 255–57.

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

40. *Id.* at 262–67.

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

42. *Id.* at 82–83.

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

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

The Necessary and Proper Clause expressly acknowledged the grant of incidental powers to Congress.<sup>50</sup> In fact, the word “necessary” was a legal term of art meaning “incidental.”<sup>51</sup> However, as leading Federalists explained during the ratification debates, the Clause actually bestowed no authority. Rather, it was an acknowledgment or recital<sup>52</sup> that the Constitution—like most other power-granting documents, but unlike the Articles of Confederation—incorporated the incidental authority doctrine. The doctrine would have applied even in absence of the Clause.<sup>53</sup>

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

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1781, art. II (emphasis added).

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

45. *Id.* at 61–62.

46. *Id.* at 65.

47. *Id.* at 65.

48. *Id.* at 64–66.

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

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

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

52. *See id.* at 97–108.

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

proper” language, but the President enjoys incidental authority.<sup>54</sup> Similarly, the grants in Article V to conventions and state legislatures<sup>55</sup> carry incidental powers with them.<sup>56</sup>

What is the scope of those incidents? The answer to that rests largely in Founding-Era custom<sup>57</sup>—specifically the convention practices of the time. As the next Part shows, conventions were common enough for their practices to have become standardized.

## VI. OVERVIEW OF FOUNDING-ERA CONVENTIONS

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

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

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

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

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

57. See *infra* Part VI.

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

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

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

61. *Id.* at 7–9.



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

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

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

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

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

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

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

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

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

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

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

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

## VII. OTHER EVIDENCE—FOUNDING AND POST-FOUNDING

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

69. See sources cited *supra* note 68.

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

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

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

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

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

75. *Id.*

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

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

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

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

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

## VIII. THE NATURE OF APPLICATIONS AND THE RULES GOVERNING THEM

### *A. The Nature of an Application*

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

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

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

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

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

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

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

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

84. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For the same reason, state constitutional provisions governing the *legislative* process do not apply to Article V applications. The courts have invalidated state constitutional rules mandating legislative supermajorities<sup>102</sup> and binding referenda<sup>103</sup> when such rules would apply to Article V resolutions. Restrictions on an Article V assembly's procedure

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

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

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

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

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

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

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

101. *See supra* notes 99–100.

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

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

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

### *C. States May Rescind Applications*

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

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

### *D. Applications Do Not Grow "Stale" with the Passage of Time*

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

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

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

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

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

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

108. *Id.* at 19.

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

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

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

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

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

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

during the constitutional debates, participants frequently noted with approval the Constitution's general lack of time requirements in the amendment process.<sup>115</sup> Moreover, the ministerial nature of the congressional duty to call a convention<sup>116</sup> and Congress's role as the agent for those legislatures in this process,<sup>117</sup> suggests the opposite. Time limits are for principals, not agents, to impose. Therefore, if a state legislature believes its application to be stale, that legislature may rescind it.<sup>118</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## IX. DEFINING THE SCOPE OF THE CONVENTION

*A. Founding-Era Convention Practice Before the 1787 Convention*

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

It is uncontroverted that state legislative applications may request a convention *unlimited* as to subject<sup>130</sup>—the sort of assembly the Founders, in imitation of international practice, called a plenipotentiary convention.<sup>131</sup> Many, however, have contended that the applying states do not have the complementary power of limiting the scope.<sup>132</sup> People so arguing deem an amendments convention a “constitutional convention,”<sup>133</sup> an inherently plenipotentiary body, enjoying power to propose any changes it wishes.<sup>134</sup> Others have asserted that it might be more than a proposing body: It could constitute itself a junta that could repeal the Bill of Rights, restore slavery, or otherwise radically alter our system of government.<sup>135</sup> How the convention could do these things without control of the military is never made clear.

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

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

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

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

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

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

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

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

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

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

138. *Id.*

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

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139. *Id.*

140. PA. CONST. of 1776, § 47:

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

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

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

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

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

*Id.*

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

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

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

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

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

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the counties as aforesaid.

*Id.*

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

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

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

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

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

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

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

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

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

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

153. *See id.*

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

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

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

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

Interstate meetings at New Haven (1778) and Philadelphia (1780) also dealt only with price regulation.<sup>160</sup> The first Hartford Convention (1779) was empowered to address currency and trade,<sup>161</sup> 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.”<sup>162</sup> The second Providence Convention (1781) was entrusted only with recommending how to provide supplies to the army for a single year.<sup>163</sup>

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

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

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

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

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

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

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

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

163. *Id.* at 575–76.

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

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

166. See *id.* at 16–26.

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

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

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

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

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

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

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

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

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

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

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

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

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

174. See *supra* Part V.A.

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

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

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

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

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

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

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

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

178. *Id.*

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

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

181. *Id.* at 72.

182. *Id.* at 73-74.

183. *Id.*

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

Six more states remained to be heard from. Rhode Island elected not to participate.<sup>189</sup> South Carolina, Connecticut, and Maryland stuck to the broader formula adopted by the initial seven.<sup>190</sup> Only Massachusetts<sup>191</sup> and New York<sup>192</sup> adopted the narrower congressional approach. But in Philadelphia, they were outnumbered ten states to two.<sup>193</sup>

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184. ARTICLES OF CONFEDERATION OF 1781.

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

186. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Pennsylvania:

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

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

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

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

196. *Id.* at 588, 590.

197. *Id.* at 574–75.

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

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



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

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

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

### *C. Other Evidence that Applications Can Limit the Convention's Agenda*

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

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

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

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

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

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

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

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

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

The second kind of evidence is the treatment of conventions in the constitutional text. The text authorizes state conventions for ratifying the Constitution,<sup>206</sup> state conventions for ratifying amendments,<sup>207</sup> and federal conventions for proposing amendments.<sup>208</sup> Both of the first two were clearly limited in nature: No sane person would suggest that a state ratifying convention, for example, also has inherent authority unilaterally to re-write the state constitution. As for the convention for proposing amendments, the text placed certain topics outside the amendment process<sup>209</sup> and therefore outside its competence, thereby affirming its limited nature.<sup>210</sup>

The third kind of evidence consists of the records of the 1787 drafting convention. Although other writers seem to have overlooked this point,<sup>211</sup> the fact is that the Philadelphia delegates actively considered providing for amendment by plenipotentiary conventions, but rejected that approach. Edmund Randolph's initial sketch in the Committee of Detail<sup>212</sup> and the first draft of the eventual Constitution by that committee<sup>213</sup> both contemplated plenipotentiary conventions that would prepare and adopt amendments. During the proceedings, the delegates opted instead for an assembly that would merely propose.<sup>214</sup> Later on, Roger Sherman moved to revert to a plenipotentiary formula, but his motion was soundly rejected.<sup>215</sup>

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

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

208. *Id.*

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

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

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

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

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

214. *Id.* at 558.

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

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

On this motion

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

*Id.*

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

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216. *Id.* at 557–58.

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

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

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

*Id.*

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

On the motion of Mr. Gerry to reconsider

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

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

Mr. Gerry 2ded. the motion

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

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

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

*Id.*

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

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

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

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

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

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

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

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

Mr. Hamilton 2ded. the motion.

....

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

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

*Id.*

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

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

224. *Id.* at 689.

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

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

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

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

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

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

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

228. *Id.*

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

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

231. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

241. *Id.*

242. *Id.*

243. *Id.* at 102.

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

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

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

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244. *Id.* (emphasis added).

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

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

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

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

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



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

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

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

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

The next applications arose out of the nullification crisis of the early 1830s. They were the 1832 applications from South Carolina and Georgia and the 1833 application from Alabama. Those of both South Carolina<sup>255</sup> and Alabama<sup>256</sup> called for a convention to address particular subjects. So

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

251. *Id.* at 124.

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

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

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

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

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

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

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

## X. THE CONVENTION CALL AND SELECTION OF DELEGATES

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

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

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

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

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

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

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

261. See *supra* Part V.A.

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

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

264. See *infra* Part X.B.

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

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

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

### *B. Congress's Role in Calling the Convention*

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

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

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

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

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

*Id.* at 629.

268. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will shew this to be a groundless remark. It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures. . . .<sup>280</sup>

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

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

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

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

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

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

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

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

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

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

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unanimously opposed to each and all of them.

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

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

282. See *supra* Part IX.

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

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

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

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

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

### *C. Other Formalities in the Call*

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

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

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

### *D. Enforcing the Duty to Call*

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

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

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

288. *Id.*

289. *Id.*

290. *Supra* Part X.A.

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

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

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

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

295. *Id.*, art. I, § 3, cl. 6.

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

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

### *E. The Composition of the Convention*

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

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

296. *Id.*, art. II, § 2, cl. 2.

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

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

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

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

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

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

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

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



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

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

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

The 1789 New York application sent the same message:

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

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

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

306. *Id.*

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

308. *Id.*

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

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

311. *Id.*

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

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

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

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

#### *F. Convention Discretion: The Rules*

Under the incidental powers conferred by Article V, an amendments convention adopts its own rules and elects its own officers.<sup>320</sup> This follows from Founding-Era custom: All conventions, inter- or intra-state, established their own rules, judged their own credentials, carried out their own housekeeping, and elected their own officers.<sup>321</sup> Thus, the fixing of rules is not a matter either for Congress<sup>322</sup> or the applying states. More

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

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

316. *Id.*

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

318. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *legal* difficulties arise because the courts are likely to reject any effort by state legislatures to impose rules or specific language on the convention. The universal prerogative of conventions during the Founding Era<sup>335</sup> and after<sup>336</sup> has been to make their own rules, and in modern times

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

348. *See* Hawke, 253 U.S. at 226–27.

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

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

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

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

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

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

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

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

Even before that case, the Supreme Court had decided that a ratifying assembly could not be displaced by a referendum<sup>365</sup> and that an assembly's discretion could not be compromised by extraneous rules.<sup>366</sup> In the same year as *In re Opinion of the Justices*, the Supreme Court of Maine ruled that a referendum cannot bind a ratifying convention because "[t]he convention must be free to exercise the essential and characteristic function of rational deliberation."<sup>367</sup>

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

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354. *See id.*

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

356. *Id.* at 111.

357. *See id.* at 108.

358. *Id.*

359. *Id.*

360. *Id.* at 110.

361. *See generally id.* at 110–11.

362. *See id.*

363. *See id.*

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

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

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

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

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

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

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

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

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

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

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

372. *Id.* at 613.

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

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

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

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

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



aggressive advice rather than actual coercion, the courts consistently invalidated them.<sup>378</sup>

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

#### *H. State Legislative Instructions*

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

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

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

378. See *supra* note 373.

379. See Black, *supra* note 1.

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

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

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

383. HOAR, *supra* note 1, at 127–29.

384. See *id.*

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

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

## XI. RULES GOVERNING TRANSMITTAL OF PROPOSALS TO THE STATES

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

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

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

*B. Choosing a Mode of Ratification*

Although a convention's proposal does not technically pass through Congress to the states, the Constitution does require and empower Congress to select one of two "Modes of Ratification."<sup>392</sup> Congress's power in this regard is the same as if it had proposed the amendment.<sup>393</sup> Article V alters the normally subservient position to the states that Congress usually occupies in the state-application-and-convention process<sup>394</sup> by prescribing

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

388. See *id.*

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

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

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

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

393. See *id.*

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

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

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

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

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

On this motion

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

Mr. Sherman then moved to strike out art V altogether

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

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

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

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

396. See *id.*

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

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

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

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

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

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

## XII. CONCLUSION

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

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

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

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

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402. Rees, *supra* note 1, at 93–94.

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

**§ 5.3. *Michael Rappaport, The Constitutionality of a Limited Convention***

**The Constitutionality of a Limited Convention:  
An Originalist Analysis**

Michael B. Rappaport

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# THE CONSTITUTIONALITY OF A LIMITED CONVENTION: AN ORIGINALIST ANALYSIS

*Michael. B. Rappaport\**

- I. Article V
  - A. The Constitution's Amendment Provisions
  - B. The Convention Method
- II. The Contending Views: Limited and Unlimited Conventions
- III. The Limited Convention View: Text
  - A. A Convention for Proposing Amendments
    - 1. The Proposal Power as the Power to Offer for Adoption
    - 2. A Convention Limited to a Specifically Worded Amendment
    - 3. Charles Black's Arguments for the Unlimited Convention View
  - B. The Applications of the State Legislatures for a Convention
    - 1. State Legislative Application for a Limited Convention
    - 2. Congress's Obligation to Call a Limited Convention
  - C. The Obligation of the Convention to Follow the Limits Set by the States and Congress
- IV. Evidence From Early Interpretations

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- A Interpretation of the Prior Version of Article V
- B Interpretations from the Ratification Period
- V. The Limited Convention View: Purpose and Structure
- VI. Weaknesses of the Arguments for the Unlimited Convention View
  - A. A Convention Is Not an Unlimited Assembly of the People
    - 1. Text
    - 2. History
  - B. The Runaway Philadelphia Convention
  - C. The Supposed Intent to Avoid Reliance on Both Congress and the State Legislatures
    - 1. The States' Alleged Excessive Power
    - 2. Congress's Alleged Excessive Power
- VII. Conclusion

The United States Constitution employs two basic methods for proposing constitutional amendments.<sup>1</sup> Under the congressional proposal method, two thirds of each house of Congress can propose a constitutional amendment. Under the convention method, the state legislatures can apply for a national convention that would then decide whether to propose a constitutional amendment. The amendments proposed under either of these two methods are then subject to ratification by the state legislatures or state conventions, as Congress determines.

These amendment methods were designed to operate together to ensure that no one entity could prevent the enactment of an amendment. Thus, if Congress seeks an amendment that the state legislatures oppose, Congress can propose the amendment and task state conventions with the ratification decision. Similarly, if the state legislatures seek an amendment that Congress opposes, the state legislatures can apply for a convention that could propose the amendment,

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1. U.S. CONST. art. V.

which would then be subject to ratification either by the states legislatures or state conventions.

Unfortunately, one of these two amendment methods is broken. The convention method simply does not work. Not only has it never been used to enact an amendment, but no convention has ever been called.<sup>2</sup> This lack of use, moreover, cannot be attributed to a lack of political interest in enacting amendments that Congress opposes. In recent years, there has been strong political support for at least three proposed amendments that would reduce congressional power—a Balanced Budget Amendment, a Line Item Veto Amendment, and a Congressional Term Limits Amendment—but unsurprisingly, Congress has refused to propose any of these. Yet, the convention method has not been employed either to enact these amendments or even to call a convention.<sup>3</sup> That the convention method is broken suggests that the Constitution now operates in a unbalanced way, allowing only amendments that promote congressional power, but not permitting amendments that constrain it.<sup>4</sup>

The most important reason why the convention method does not work is the fear of a runaway convention. To understand this fear, imagine that two thirds of the state legislatures were to apply for a convention on a specific subject, such as restraining the federal government's power to pass unbalanced budgets, and Congress were to call for a convention on that subject. The problem, however, is that the convention might choose to ignore this subject matter limitation and propose a different amendment—perhaps an amendment to authorize a constitutional right to same sex marriage or to prayer in the public schools. And that amendment might then be ratified by the three quarters of the states. A state legislator that sought a balanced budget amendment might, then, end up instead with an

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2. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 734 (1993).

3. An effort has been made in the last several decades to apply for a convention to propose a Balanced Budget Amendment, with 32 of the requisite 34 states legislatures having applied at some time for a convention. But the state legislatures have never been willing to take the next step of satisfying the two thirds constitutional requirement for a convention, even though concerns about federal deficits have been great at various times in the last several decades. The fear of a runaway convention has simply been too great. See RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 161 (1988); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1533 n.47 (2010).

4. See Rappaport, *supra* note 3, at 1526–55.



amendment providing either a constitutional right to same sex marriage or to prayer in the public schools—something that he or she might strongly oppose. The fear of such a runaway convention has led many to oppose use of the convention method.<sup>5</sup>

While the failure of the convention method represents a significant constitutional defect, in this Article I argue that the defect results from the failure to follow the Constitution's original meaning. I contend that the original meaning of the Constitution allows for limited conventions—conventions that are limited only to proposing amendments on specific subjects. Therefore, if the state legislatures apply for a convention limited solely to proposing an amendment that restrains the federal government's power to pass unbalanced budgets, the convention would not be permitted to propose an amendment on other subjects. The Constitution therefore forbids runaway conventions.

To elaborate on my argument, I maintain that, once two thirds of the states apply for the same limited convention, Congress is obligated to call that limited convention. Moreover, the convention is required to conform to the limits in Congress's call. If the convention were to violate the limitations in the call—if it were to propose an amendment that was not within the scope of its authority—then that proposal would be unconstitutional. It would not represent the type of proposal that is allowed by the Constitution and could not be legally ratified by the states. I also argue that the limitations on the convention can be quite strict. The Constitution allows the state legislatures to apply not merely for a convention limited to a specific subject matter. It also allows the state legislatures to draft a specially worded amendment and then to apply for a convention limited to deciding only whether to propose that amendment.

Readers familiar with the literature on the convention method of constitutional amendment may be surprised by my conclusions. In the past, several leading constitutional scholars have argued that the Constitution does not permit the states or Congress to impose limits on a convention.<sup>6</sup> And virtually no constitutional scholar has argued that a convention limited to a specifically worded amendment is constitutional. Yet, I argue that these past scholars have been mistaken. In part, the differences between my view and theirs turn on the fact that I

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5. See CAPLAN, *supra* note 3, at 161; Rappaport, *supra* note 3, at 1533 n.47.

6. See *infra* Part III.

seek to apply a rigorous original meaning analysis, whereas they have either invoked their own normative commitments or applied different or looser versions of originalism. But, in part, the differences are due to what I believe are mistaken inferences and interpretations of evidence. Finally, the differences may also be due to the fact that my analysis provides what is, to my knowledge, the first rigorous textual derivation of the right of the states to apply for a limited convention.

Of course, showing that the Constitution's original meaning authorizes limited conventions will not solve the defect in the convention method. To eliminate the possibility of a runaway convention, it is necessary that other constitutional actors, such as the Congress, the convention, and the courts, also conclude that the Constitution authorizes limited conventions. Without such agreement, these other constitutional actors might engage in or support a runaway convention. While showing that the original meaning authorizes limited conventions is therefore insufficient to eliminating the defect in the convention method, it is a first step in that direction. It is also important for assigning responsibility for this defect. This defect is not, as some would have it, the responsibility of the constitutional enactors who decided to employ an illimitable convention. Rather, the defect is the result of both nonoriginalists and originalists who have misread or ignored the original meaning.

The Article proceeds in five parts. Part I describes the Constitution's two methods of proposing constitutional amendments: the congressional proposal method and the convention method. Part II then explains the two interpretations of the convention method: the limited convention view, which reads the Constitution as authorizing both limited and unlimited conventions, and the unlimited convention view, which interprets it only to allow unlimited conventions.

Part III then undertakes the task of deriving the limited convention view from the constitutional text. It argues, based on evidence from contemporary dictionaries, from other parts of the Constitution, from conventions existing at the time, and from other evidence of word usage, that the original meaning of the Constitution's phrase a "Convention for proposing Amendments" includes both limited and unlimited conventions. It also shows that the Constitution's authorization of state legislatures to apply for a "Convention for proposing Amendments" allows them to apply for limited conventions. Part IV then explores arguments based on structure and purpose, concluding that they

also support the limited convention view. Finally, Part V addresses three arguments against the limited convention view—that a convention was historically understood as illimitable, that the runaway Philadelphia Convention shows that the Framers believed that conventions were not subject to limitations, and that the debates at the Philadelphia Convention indicate that the Framers would have opposed limited conventions. This part rebuts each of these arguments, showing that none of them calls the limited convention view into question.

## I. ARTICLE V

### A. THE CONSTITUTION'S AMENDMENT PROVISIONS

Article V of the Constitution describes in a single paragraph the various methods for amending the Constitution. It provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>7</sup>

Article V thus establishes a two step process for enacting an amendment: first an amendment is proposed and then it is ratified. There are also two ways of completing each step. An amendment can be proposed either by two thirds of each house of Congress or by two thirds of the state legislatures applying for Congress to call a convention that would draft an amendment. Similarly, an amendment can be ratified by three quarters of the states, either through their legislatures or through state conventions. Finally, Article V is modular: either of the proposal methods can be paired with either of the ratification methods.

Article V's purpose in providing alternative amendment methods is evident: to prevent a single government entity from

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7. U.S. CONST. art. V.

having a veto over the passage of an amendment. While Congress is given the authority to propose amendments, the convention method allows the nation to bypass Congress and propose amendments that constrain Congress's powers. Similarly, while the state legislatures can ratify amendments, they might choose to reject amendments that constrain their powers. Therefore, the Constitution allows ratification by state conventions, which have different interests than the state legislatures.<sup>8</sup>

This understanding of the congressional amendment process is supported by various statements made at the time of the founding. Thus, George Mason, in the Philadelphia Convention, argued that "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."<sup>9</sup> Similarly, James Madison wrote in Federalist No. 43, Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."<sup>10</sup> In the New York legislature, Samuel Jones explained that the Framers "prescribed a mode by which Congress might procure more [power], 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 [federal] government, if upon trial it should be found they had given too much."<sup>11</sup> Finally, at the North Carolina Ratifying Convention, in response to the claim that the introduction of amendments "depended altogether on Congress," James Iredell replied "that it did not depend on the will of Congress; for the legislatures of two thirds of the states were authorized to make application for calling a convention for proposing amendments, and on such application, it is provided that Congress shall call such convention, so that they will have no option."<sup>12</sup>

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8. Article VII of the Constitution was adopted in part for a similar reason. Article VII, which provided that the Constitution would take effect when nine of the thirteen states, acting through state conventions, ratified it, used state conventions rather than state legislatures in part because it was believed that the state legislatures had interests that would lead them to oppose the new Constitution.

9. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 104-05 (W.H. Norton ed. 1987).

10. THE FEDERALIST NO. 43, AT 315 (James Madison) (Benjamin Fletcher Wright ed., 1961).

11. See 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2522 (John P. Kaminski et al. eds., 2009) [hereinafter DOCUMENTARY HISTORY].

12. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF

Although Article V thus purposefully provides four paths to amending the Constitution,<sup>13</sup> the nation has almost always relied on only one of them: Congress proposes an amendment and the state legislatures ratify it. One time, for the 21st Amendment, Congress proposed the amendment but state conventions were used to ratify it.<sup>14</sup> The one method that has never been employed is having a convention propose a constitutional amendment.<sup>15</sup>

### B. THE CONVENTION METHOD

The convention method works quite differently than the congressional proposal method. Under the convention method, the state legislatures must apply for a convention. When two thirds of the states have applied, Congress must call a convention. The convention, then, must determine whether to propose a constitutional amendment. If it does propose an amendment, Congress must determine whether ratification should occur by state legislatures or state conventions.

In part because the convention method has never been used, there are various questions about the constitutional rules that govern this amendment method, including questions as to who selects the convention delegates and the content and origin of the rules that govern the convention.<sup>16</sup> But the most important question about the convention method for our purposes is whether the Constitution authorizes limited conventions.

An unlimited convention is a convention that has no limits placed on it by the state legislatures.<sup>17</sup> The convention can

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THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 178 (Jonathan Elliot ed. 1891) [hereinafter ELLIOT'S DEBATES].

13. For additional statements expressing similar concerns, see *An Old Whig*, 13 DOCUMENTARY HIST. 316, 377 (“We shall never find two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance.”); *A Plebeian, An Address to the People of the State of New York*, Apr. 17, 1788, *reprinted in* 20 DOCUMENTARY HIST. 942, 944 (arguing that “those who enjoy these powers” are unlikely “to surrender” them).

14. See CAPLAN, *supra* note 3, at 126.

15. See Paulsen, *supra* note 2, at 734.

16. See Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 696–97 (2011).

17. A convention that was limited by Congress would also be a limited convention. But a convention limited by Congress alone, without a limitation sought in the prior applications of the state legislatures, would be clearly unconstitutional. See *infra* notes 63–66 and accompanying text (discussing limitations on Congress’s powers). Therefore, when I discuss limited conventions, I will mean a convention where the limitations are initially contained in the state applications and only then placed in the call of the convention by Congress.

propose an amendment on any subject it desires, subject to constitutional constraints. In contrast, a limited convention is a convention that is limited as to scope by applications from the state legislatures. One can distinguish between the two types of limited conventions. First, one can imagine a convention limited to a subject, such as to financial matters. While this convention is allowed discretion to decide what amendments to propose in the financial area, it is not allowed to propose amendments that are non-financial. Second, one can imagine a convention that is limited to a specifically worded amendment. In this situation, the state legislatures would have specified a particular amendment in their applications and the convention's duties would be limited to deciding whether or not to propose that amendment. We can call these two types of limited conventions, respectively, "a convention limited as to subject" and "a convention limited to a specifically worded amendment."

## II. THE CONTENDING VIEWS: LIMITED AND UNLIMITED CONVENTIONS

There are two basic views about whether the Constitution allows limited conventions. One position holds that limited conventions are constitutional. Under this limited convention view, if the states apply for a limited convention, then Congress is required to call for such a convention and the convention is permitted to propose only amendments within the scope authorized by the applications of the state legislatures. Any proposals that the convention makes on other matters are illegal. One can further divide this basic limited convention view based on the type of limited convention. Thus, one might hold the limited convention view only for conventions limited to a subject.<sup>18</sup> Or one might go further and also hold the limited convention view as to conventions limited to a specifically worded amendment.<sup>19</sup> Under this latter view, if the states seek a convention limited not merely to a particular subject but to a

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18. See Philip B. Kurland, *A Bill to Provide Procedures for Calling Constitutional Conventions for Proposing Amendments to the Constitution of the United States, on Application of the Legislatures of Two-Thirds of the States, Pursuant to Article V of the Constitution*, 90th Cong. 233–34 (1967) [hereinafter *1967 Hearings*] (memorandum from Philip Kurland to Senator Sam J. Ervin); Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 953–57 (1968); Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 884 (1968).

19. See William W. Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985, 990–91 (1979).

specifically worded amendment, the convention is limited to deciding whether to propose that specific amendment.

The alternative position holds that the Constitution does not recognize limited conventions. Under this unlimited convention view, a convention can never be limited as to the amendments it can propose.<sup>20</sup> Thus, if the states apply for a limited convention, Congress would not even be authorized to call a convention, because there would be no applications for the only constitutional type of convention—an unlimited convention.<sup>21</sup>

This unlimited convention view has been held by many of the leading scholars of constitutional law over the last 40 years, including Bruce Ackerman, Charles Black, Walter Dellinger, Gerald Gunther, and Michael Paulsen.<sup>22</sup> Despite the illustrious reputations of these scholars, I do not believe their arguments are persuasive from an original meaning perspective. The problem is in part that their methodology does not track that of modern originalism, but it is also the nature of their arguments.

In the next two Parts, I argue in favor of the strongest version of the limited convention view—that states may seek either a convention limited to a subject or a convention limited to a specially worded amendment.<sup>23</sup> In making my argument, I focus on the original public meaning of Article V. I leave aside, for the most part, arguments based on alternative interpretive

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20. See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972) [hereinafter Black 1972]; Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 6–11 (1979); Paulsen, *supra* note 2, at 738 (“[T]here can be no such thing as a ‘limited’ constitutional convention.”); Bruce Ackerman, *Unconstitutional Convention*, *The New Republic*, Mar. 3, 1979, at 8.

21. Some advocates of the unlimited convention view take a flexible view about the meaning of state applications. According to this approach, some state applications that appear to be applying for a limited convention are reasonably interpreted as also applying for an unlimited convention, if Congress concludes that a limited convention is not legal. If two-thirds of the state legislatures made such an application, then this approach would require that Congress call an unlimited convention. See Paulsen, *supra* note 2, at 738.

22. See *supra* notes 2, 20.

23. It is worth noting that the name “limited convention view” is a bit misleading. There is nothing under this view that requires that a limited convention be called. If the state legislatures decide that the circumstances warrant it, they can apply for Congress to call an unlimited convention. In this sense, one might call the limited convention view the state legislative discretion view, since it allows the state legislatures to decide on the type of convention. But I shall stick to the terminology of “the limited convention view” and “the unlimited convention view” because of its greater transparency.

theories, although I do rebut a few influential arguments based on original intent.<sup>24</sup>

While not all constitutional interpreters are originalists, this paper nonetheless is of more general interest than it might at first seem. First, many scholars who do not regard themselves as originalists still believe the Constitution's original meaning is relevant to the Constitution's proper interpretation, even if it is not determinative. Second, original meaning analysis tends to be most influential in areas where long standing precedents do not exist. This is the case regarding the convention method.

### III. THE LIMITED CONVENTION VIEW: TEXT

The limited convention view derives supports from several types of evidence—evidence of text, historical usage, and structure and purpose. It also gains power from weaknesses in the unlimited convention view. This Part focuses on text and historical usage.

The initial challenge is to show that the limited convention view can be derived from the constitutional text. The text of Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.”<sup>25</sup> The limited convention view must derive three conclusions from the text: it must show that two thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call.

The unlimited convention view is obviously skeptical about this possibility. In fact, that view claims to read the text as straightforwardly precluding limited conventions. Under the unlimited convention view, it is thought that the language “a Convention for proposing Amendments” suggests a convention that can propose whatever amendments it likes.<sup>26</sup> Consequently, the view maintains that there is no textual basis for inferring power in the state legislatures or Congress to limit what the convention may consider.

Despite these arguments, I maintain that, once one examines the text, one can see that the elements of the limited

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24. See *infra* Part V.C.

25. U.S. CONST. art. V.

26. See Paulsen, *supra* note 2, at 738.



convention view can be derived from it and, in fact, that the text represents a brief and elegant way of communicating these elements. Advocates of the limited convention view have not previously derived these conclusions from the text, but I undertake that task here.

In particular, I argue that the three elements of the limited convention view—that two thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call—can be derived from the text in three steps. First, “a Convention for proposing Amendments” is broad enough to cover not merely unlimited conventions but also limited conventions. Put differently, a limited convention is one type of “Convention for proposing Amendments.” Second, if Congress can call a limited convention, then the language certainly suggests that the convention should conform to the limitations of that call. Because the convention derives its authority to meet from the call, it must respect the limitations in that call as well. Third, the language allowing the states to apply for Congress to call a convention also obligates Congress to call a limited convention. When two thirds of the states submit applications for an unlimited convention, that obligates Congress to call that convention. Similarly, when two thirds of the states submit applications for a limited convention, that also obligates Congress to call that limited convention.

I shall discuss each of these three steps in turn. I begin with the meaning of a “Convention for proposing Amendments.”

#### A. A CONVENTION FOR PROPOSING AMENDMENTS.

The Constitution provides that upon the application of two thirds of the state legislature, the Congress shall call a “Convention for proposing Amendments.” The question here is what the Constitution means by the phrase a “Convention for proposing Amendments” and in particular whether such a convention includes a limited convention. Here, I argue that the evidence bearing on the original meaning of the phrase strongly suggests that a limited convention is such a “Convention for proposing Amendments.”

The unlimited convention view argues that the term “propose” suggests that a convention for proposing amendments is unlimited. But I show that the term “propose” did not imply an unlimited power of the convention to endorse any constitu-

tional provision of its choosing. First, I show, based on evidence from contemporary dictionaries and other usages in the Constitution, that the term merely meant the power to authorize an amendment to be sent to the states. Second, I then focus on a convention limited to a specifically worded amendment, showing that nothing about a convention suggests the power to consider alternatives. Finally, I discuss the contrary arguments of Charles Black, perhaps the leading scholar of the unlimited convention view, arguing that they cannot be reconciled with the evidence of the original meaning.

### 1. The Proposal Power as the Power to Offer for Adoption

The meaning of the phrase a “Convention for proposing Amendments” is best understood as referring to a convention that has the power to formally propose amendments that are then eligible to be ratified by the states. Under the Constitution’s two amendment methods—the congressional proposal method and the convention method—the Constitution provides for two essential steps. One entity formally proposes an amendment. A second entity then formally decides whether to ratify that amendment. The entity with the power to propose is the only entity that can take the first essential step of proposing the amendment. And only an amendment that has been formally proposed can be sent to the states for the second essential step of ratification. Thus, the power possessed by the proposing convention is the power to approve an amendment that can then be sent to the states for ratification.

This understanding of propose is supported by the ordinary meaning of the term when the Constitution was enacted. The first edition of Webster’s Dictionary, for example, has as its first definition, “To offer for consideration, discussion, acceptance or adoption; as, to propose a bill or resolve to a legislative body.”<sup>27</sup> The meaning that I employ accords with this definition: to offer for adoption. The proposing convention has the formal power to offer an amendment for adoption by the ratifiers. The ratifiers, then, have the power to adopt the amendment.

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27. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828). Johnson’s Dictionary of 1755 defines “propose” as “[t]o offer to the consideration” and as a “[s]cheme or design propounded to consideration or acceptance.” 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

This meaning of propose is also followed in other parts of the Constitution. Article V provides that “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .”<sup>28</sup> This meaning of propose is exactly the same as that used for the proposing convention. If two thirds of both houses approve an amendment, it is formally proposed and can then be sent to the states for ratification.

Similarly, the Constitution provides in Article I, section 7, clause 1, that “All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”<sup>29</sup> The term “propose” here once again involves the formal power to offer for adoption. Suppose the Senate receives a revenue bill from the House and then decides to amend it. The Senate then will pass the amended revenue bill and send it back to the house. This revenue bill is then formally proposed by the Senate. If the House passes the exact revenue bill proposed by the Senate, then it is enacted by the Congress and sent to the President. Thus, the Senate’s power to propose revenue bills is similar to the powers of Congress and the convention to propose amendments. In these cases, the power is to offer a specific measure for adoption by another body.

This understanding of the proposing convention also makes perfect sense if we understand the historical context when the Constitution was written. As I show below in my review of the history of conventions,<sup>30</sup> when the Constitution was enacted many different types of conventions existed. Some conventions were enacting conventions—they had the power to draft and enact a constitution or constitutional provision on their own. Other conventions were ratifying conventions, ratifying a constitution or constitutional provision drafted by another entity. Still other conventions were proposing conventions that recommended provisions that another entity had to enact. Given the variety of conventions, it was important for the Constitution to clearly indicate the type of conventions that were being employed. The language of Article V does that well. Thus, the constitutional language clearly speaks of state conventions that only ratify amendments. And, most importantly for our

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28. U.S. CONST. art. V.

29. U.S. CONST. art. I, § 7, cl. 1.

30. See *infra* Part V.A.

purposes, the language, “a convention for proposing amendments,” clearly indicates that the proposing convention only has the power to propose and cannot enact anything on its own.<sup>31</sup> Thus, one need not reach for other possible meanings of a proposing convention (such as the power to exercise discretion over what amendments to propose) to find a purpose for the language. Its primary purpose is to clarify that the convention has only the power to offer an amendment for adoption by the states.

To move now to the key issue, this meaning of “propose” indicates that a convention for proposing amendments can be either a limited or unlimited convention. Certainly, an unlimited convention would be a convention for proposing amendments. Such a convention could decide on what amendment to pass and that amendment would be formally proposed. It could then be sent to the states for ratification.

But both types of limited conventions would also be conventions for proposing amendments. Even in the case of a convention limited to a specifically worded amendment, the convention would make the decision whether to propose that amendment. If it passes that amendment, then the amendment is formally proposed and can be sent to the states for ratification. If the convention does not pass the amendment, then it is not proposed and cannot be sent to the states for ratification. The convention limited to a specifically worded amendment thus has the power to offer an amendment for adoption by the ratifiers and is therefore a proposing convention.

Finally, this definition of a proposing convention is also supported by the fact that limited conventions were well known to the Constitution’s enactors. Perhaps, the most obvious limited proposing convention was the Philadelphia Convention itself. The Congress under the Articles had called for the Philadelphia Convention “for the sole and express purpose of revising the Articles of Confederation” and “when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation

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31. Not only is it forbidden from enacting constitutional amendments, it also cannot enact legislation, as some conventions of various kinds had done or sought to do. See JOHN ALEXANDER JAMESON, *A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION: THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODES OF PROCEEDING* §§ 123–38 (Chicago, E.B. Meyers 2d ed. 1869) (discussing the general legislative powers of individual state conventions at the time of the framing).

of the Union.”<sup>32</sup> This call was limited, because it was intended for the convention to propose revisions that would employ the amendment procedure in the Articles, a procedure which required approval by the Congress and the state legislatures.<sup>33</sup> The Annapolis Convention, which had preceded the Philadelphia Convention, was also a limited convention. The call for the Annapolis Convention, circulated by Virginia, had stated that the convention would propose measures relating to commerce.<sup>34</sup>

State constitutions also appear to have authorized limited conventions. In particular, the Georgia Constitution of 1777 provided:

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 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.<sup>35</sup>

Although there are other possible interpretations,<sup>36</sup> the most obvious and, in my view, the best interpretation of this provision is that it limits conventions to deciding whether to adopt the alterations recommended by the petitioning counties.<sup>37</sup> After all, the provision states that the “assembly shall *order* a convention to be called . . . *specifying* the alterations *to be made* according to the petitions.” Other state constitutions also employed conventions limited to ratifying the decisions proposed by

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32. 1 ELLIOT’S DEBATES, *supra* note 12, at 480 (letter from the Hon. Robert Yates and the Hon. John Lansing).

33. The Philadelphia Convention, however, became a runaway convention when it proposed a Constitution that adopted a different ratification procedure. For discussion of why this does not count against the limited convention view, see *infra* Part V.B.

34. Journal of the House of Delegates of the Commonwealth of Virginia 153 (Jan. 21, 1786); CAPLAN, *supra* note 3, at 22–23.

35. GA. CONST. of 1777, art. LXIII.

36. It might be argued that the provision merely required the convention to receive the proposed alterations from the majority of the counties, but allowed the convention to ignore them and enact others. But this seems to conflict with the language of the provision, which states that the “assembly shall *order* a convention to be called . . . *specifying* the alterations *to be made* according to the petitions.” The language does not say, “specifying some of the alterations that should be considered by the convention.”

37. Interestingly, this provision of the Georgia Constitution was never used. On its own authority, the Georgia legislature called a convention to draft a new constitution in 1788. CAPLAN, *supra* note 3, at 15. For a discussion of how this authority might be understood, see *infra* notes 87–99 and accompanying text.

others.<sup>38</sup> Finally, there were also numerous limited interstate conventions held in the period between Independence and the Constitution.<sup>39</sup> Although these conventions were directed towards interstate relations such as trade and the war rather than constitutions, they were nonetheless referred to as conventions and had much in common with the Philadelphia Convention.<sup>40</sup>

Finally, if the constitutional enactors allowed limited conventions, one might wonder why they did not indicate more specifically that a convention could be limited. But this question is easily answered. The constitutional language needed to be broad enough to extend to applications not merely for limited conventions but also for unlimited ones. After all, the Framers would certainly have desired that unlimited conventions be permitted, since there is no reason to believe that the states always would have been able to agree on a subject or amendment, especially given the limited deliberation among states in a world with poor communication technology. But the fact that the states might not always be able to agree on a subject or amendment does not mean that they never could have. Thus, to permit state legislative requests both for limited and unlimited conventions, the Constitution speaks in neutral terms of a convention for proposing amendments and of a process whereby the states apply for, and Congress calls, such a convention. Given the Constitution's brevity, the language here of a "Convention for proposing Amendments" makes sense as a simple and straightforward way of expressing a more complicated idea.

If, then, the phrase a "Convention for proposing Amendments" has a general meaning that includes any type of convention that can propose an amendment, one should understand that phrase as the equivalent of what might be communicated in longer and more specific language. The language here should be understood as shorthand for a provision stating that "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention" either for proposing amendments of its own

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38. See, e.g., PA. CONST. of 1776, § 47; VT. CONST. of 1786, § XL.

39. See CAPLAN, *supra* note 3, at 17–19; Natelson, *supra* note 16, at 717–19 (discussing these conventions).

40. These conventions were similar to the Philadelphia Convention most importantly in that they were conventions of multiple states that were tasked with proposing new arrangements that would affect those states and their proposals would only go into effect if approved by those states.

choosing, for proposing amendments regarding a subject, or for proposing a specific amendment.<sup>41</sup>

## 2. A Convention Limited to a Specifically Worded Amendment

Although I have argued in favor of the limited convention view generally, the issue of conventions limited to a specifically worded amendment requires additional attention, since such conventions are more controversial. Several commentators have argued in favor of the constitutionality of conventions limited to a subject, but against the constitutionality of conventions limited to a specifically worded amendment.<sup>42</sup>

The principal argument used against the constitutionality of conventions limited to a specifically worded amendment is that they would deprive the convention of its opportunity to exercise discretion over what specific amendment to pass. This limitation on the convention's discretion is said to be inconsistent with it being a convention for proposing amendments.<sup>43</sup> It is also argued that limiting the convention to a specifically worded amendment would turn it into a ratification convention.<sup>44</sup>

Although these arguments have been persuasive to some advocates of the limited convention view, they have little basis in the Constitution's original meaning. There is nothing in the meaning of the constitutional terms "convention" or "a convention for proposing amendments" that requires a convention to have a choice between different specific amendments. Put differently, a convention can be limited as to whether or not to propose a specific amendment and still be a convention.

It is true that certain conventions at the time of the Constitution were given significant discretion as to what

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41. That Article V speaks of a convention for proposing "Amendments" rather than "an Amendment" surely does not affect the correctness of this interpretation. A limited convention could be restricted to two (or more) subjects or two (or more) specific amendments. Moreover, the enactors needed to use language broad enough to cover conventions that proposed either one or multiple amendments, and the plural was more suited to that task. A convention for proposing amendments would be permitted to propose a single amendment; a convention for proposing an amendment might not be allowed to propose multiple amendments.

42. See, e.g., 1967 *Hearings*, *supra* note 18, at 233–34; Bonfield, *supra* note 18, at 953–57; Ervin, *supra* note 18, at 884; Natelson, *supra* note 16, at 732. The main commentator I am aware of who endorses conventions limited to a specific subject is William Van Alstyne. See Van Alstyne, *supra* note 19, at 990–91; Gunther, *supra* note 20, at 6 n.15 (noting Van Alstyne's view).

43. See, e.g., Bonfield, *supra* note 18, at 953–54.

44. Bonfield, *supra* note 18, at 955.

constitutional provisions to propose or enact. But the question is not whether some conventions had discretion. Rather, it is whether all conventions must have discretion and, most importantly, whether a proposing convention must have discretion. The answer to these questions is no.

It is clear from the Constitution itself that conventions need not possess such discretion. The Constitution employs two type of conventions that were given no discretion: state conventions that may be employed to ratify amendments and the original state conventions called to ratify the original Constitution. Clearly, ratification conventions do not have discretion over what measures to enact. They are required to make a single yes-or-no decision. Of course, that does not make them unimportant, since they decide whether a proposed amendment will be enacted.

If conventions generally do not necessarily need to confer discretion, then what about proposing conventions? Is there something about the proposing power that requires such conventions to possess discretion? The commentators discussed above assume that the activity of proposing a constitutional amendment requires that conventions have discretion. After all, they might ask, what is it that a proposing convention does other than deciding what amendment to propose?

But this argument is mistaken. Although the proposing convention contemplated by Article V will sometimes have discretion (such as when the states apply for an unlimited convention or a convention limited to a subject), there is nothing about the concept of a proposing convention in Article V that requires discretion. As we have seen, the Constitution's use of the phrase a "Convention for proposing Amendments" refers merely to a convention that has the authority to offer an amendment for adoption by the states through ratification. There is nothing in the phrase that requires discretion.

The other argument against the constitutionality of a convention limited to a specifically worded amendment—that it is the equivalent of a ratification convention—is also not persuasive. It is true that such a limited proposing convention will be restricted to an up-or-down vote on an amendment, just like a ratification convention is. But that the two conventions share a common attribute does not mean they are identical for constitutional purposes. The question is whether a convention limited to a specifically worded amendment meets the



constitutional definition of a proposing or a ratification convention. As I have been arguing, such a convention meets the definition of a proposing convention, because it has the power to offer an amendment for adoption by the states. By contrast, it does not meet the definition of a ratification convention, which is a convention that has the authority to ratify or enact an amendment proposed by another body.

### 3. Charles Black's Arguments for the Unlimited Convention View

Given these strong arguments for interpreting a proposing convention to allow for limited conventions, what then are the arguments against this conclusion? The principal textual and structural arguments have been made by Charles Black. Black argues that a "Convention for proposing Amendments" means a "a convention for proposing such amendments as to that convention seem suitable for being proposed."<sup>45</sup> I discuss Black's principal textual and structural arguments in turn.

#### a. Text

Black's textual argument derives from the meaning of Congress's power to propose amendments in Article V. Article V authorizes "The Congress, whenever two thirds of both Houses shall deem it necessary, [to] propose Amendments."<sup>46</sup> Black claims that this power is essentially unlimited, entailing "choice among the whole range of alternatives, as to substance and wording."<sup>47</sup> He then claims that "[i]t is very doubtful whether the same word two lines later [referring to "a convention for proposing amendments"] . . . ought to be taken to denote a mechanical take-it-or-leave-it process."<sup>48</sup> Thus, Black's argues that "a convention for proposing amendments" allows the convention essentially unlimited authority to propose amendments because Congress enjoys that same authority under its authority to propose amendments.<sup>49</sup>

Black's argument about the meaning of propose, however, cannot bear the weight that he places on it. It is true that

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45. Black 1972, *supra* note 20, at 196.

46. U.S. CONST. art. V.

47. Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962 (1963) [hereinafter Black 1963].

48. *Id.*

49. See Charles L. Black, Jr., *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626, 630 (1979) [hereinafter Black 1979].

Congress has great discretion to decide what amendments to propose, but that does not indicate that this discretion derives from the power to propose. There is an obvious alternative explanation for this result. Article V gives to Congress the power to propose amendments without involving any other entity. Thus, the Constitution does not authorize any significant limits on Congress's proposing power. By contrast, the proposing convention is given the power to propose amendments only if the states apply for a convention and Congress calls it. If one assumes, as I argue in the next section, that the states can apply for a limited convention, then that explains why the Congress has great discretion to propose what amendments it likes and the proposing convention might be limited as to what it can propose: the Constitution gives the state legislatures the power to limit the scope of the convention's proposing power, but it does not give anyone the power to limit Congress's proposing power.

Although Congress's proposing power can easily be explained by the limited convention view, Black's unlimited convention view has great difficulty with the evidence of the original meaning that I have supplied. Black's view cannot account for the ordinary meaning of "propose" at the time of the Constitution, which did not indicate that the power was unlimited. He also has a hard time accounting for the limited proposing conventions that were known to the Framers.

Moreover, Black's interpretation of a "Convention for proposing Amendments" does not even appear consistent with the remainder of Article V. A few lines later in Article V, it provides that after an amendment is proposed, the amendment shall be a valid part of the Constitution when ratified by three quarters of the state legislatures or state conventions, "as the one or the other Mode of Ratification may be *proposed* by the Congress."<sup>50</sup> This use of "propose" is clearly inconsistent with an unlimited discretion to make choices. Rather, Congress is limited to a choice between two alternatives: ratification by state legislatures or state conventions. Clearly, the constitutional authors did not understand the term "propose" to imply unlimited discretion.<sup>51</sup>

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

51. It should be noted that this usage of "propose" may not be the same one that is employed in the earlier part of Article V (where "propose" meant "the power to offer for adoption"). This usage of "propose" allows Congress to make an authoritative choice as to which ratification method to use, whereas the usage of "propose" employed earlier in Article V allows Congress and the convention merely to approve an amendment for

But there is even clearer evidence that Black's understanding of propose is mistaken. In the next section, I discuss a prior version of Article V offered by James Madison. That version provided that "Congress . . . on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution."<sup>52</sup> As I will show, it is plain that, if two thirds of the state legislatures applied for a specifically worded amendment, Congress was required to propose that amendment. Thus, the provision shows clearly that the word "propose" did not mean an unlimited or discretionary power to draft a provision. Instead, its meaning cohered perfectly with the ordinary language meaning I have supplied here: to offer a provision or matter for adoption.<sup>53</sup>

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someone else to ratify. Here, Congress is not offering for adoption, but instead making a decision.

It is not clear why the Philadelphia Convention used this language differently. There are two possibilities. First, the drafters might have been focused on the question whether the amendment would be ratified, which was uncertain, rather than on the ratification method, which Congress could decide. One might think of this as a case of the drafters using language imprecisely. Yet, it is also possible to argue that the drafters were not being sloppy. Instead, one might say that a mode of ratification was successful only if the ratification actually occurred. In that event, the proposed mode of ratification was adopted only if the ratification was successful. Second, it is possible that the Framers were using another sense of "propose," which meant "to lay schemes." See WEBSTER, *supra* note 27 (offering one definition of "propose" as "to lay schemes"). But this usage would be a bit awkward. A scheme or intent is not something that is necessarily realized in the real world; it is not an authorized choice. But even if this usage of "propose" is being employed here, it may still have relevance for understanding the earlier usage in Article V. After all, a scheme or plan might be deemed, based on the analysis employed by Black, to be unlimited. Normally, one has discretion to devise any scheme. That Congress is limited to choosing between two alternatives suggests that "propose" in this related sense can be limited. Thus, neither of the senses of "propose" would necessarily involve unlimited choice, even though often one has discretion as to what matters to propose.

52. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 602 (Max Farrand ed. 1911) [hereinafter RECORDS].

53. Charles Black also offers another textual argument. He imagines that a state legislature submits an application that simply requests "that Congress call a convention for proposing amendments—the exact language of Article V." Black, 1979, *supra* note 49, at 629–31. He then argues that this application is for an unlimited convention and concludes that the constitutional language therefore appears to refer only to such a convention. But Black's argument does not show that the constitutional language is referring only to an unlimited convention. It is true that a state legislature's application for "a convention for proposing amendments" is properly interpreted as applying for an unlimited convention. But that is not because the phrase has only that meaning. Rather, because the state legislature has not specified a subject for the convention, it is reasonably interpreted as seeking an unlimited convention. But if the state legislature had applied for a convention for proposing amendments regarding debt limitation, that would have been a perfectly grammatical and sensible way of seeking a limited convention. Thus, Black's argument, when properly pursued, leads to the conclusion that a convention for proposing amendments can be either a limited or unlimited convention.

Black's mistake here appears to involve confusing an accidental attribute of the power to propose with an essential attribute. It is true that the act of proposing often involves significant discretion, but that is because in most circumstances proposals are not limited by rules. That the power to propose often includes such discretion does not mean that it always does.<sup>54</sup>

#### b. Structure and Relation

In addition to his textual argument, Black also makes an argument based on structure and relation. Black contends that if the proposing convention is unlimited, a national institution will be proposing the constitutional amendment.<sup>55</sup> That national institution can treat a "national problem . . . as a *problem*, with a wide range of possible solutions and an opportunity to raise and discuss them all . . . ."<sup>56</sup> In this respect, an unlimited convention would be similar to the congressional proposal method, which allows another national institution the opportunity to propose a solution to a national problem. By contrast, if the convention were a limited convention—especially if it were a convention limited to a specifically worded amendment—then the proposed solution to the national problem would have originated with the state legislatures. Black contends that the unlimited convention view should be preferred because it allows a nationally formulated solution and because it accords with the congressional proposal method.<sup>57</sup>

It is certainly true that limited conventions allow a national institution—the convention—less power to formulate a solution than do unlimited conventions. But that does not suggest that limited conventions were not intended by the constitutional enactors for two reasons. First, while the constitutional enactors would certainly not have wanted the state legislatures to be able

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54. To take an example from modern language, which appears to follow the 18th century usage, suppose that a House Committee Chair is deciding on what legislation to propose. Under the rules of the Committee, he has the power to propose legislation for the committee that a majority of the committee has affirmed. Suppose further that the committee has affirmed bills A and B. Now, if the Chair were to ask his staff whether he should propose A or B, no one would suggest that he is using language incorrectly, even though his choice was limited. Moreover, if he announced to the House, that under the committee rules, he was proposing for the committee bill A, once again, no one would suggest he was misusing the language. The power to propose often includes significant discretion, but it is not required by the language.

55. See Black 1963, *supra* note 47, at 963; Black 1979, *supra* note 49, at 630.

56. See Black 1963, *supra* note 47, at 963.

57. *Id.*; Black 1979, *supra* note 49, at 630.

to amend the Constitution without being checked by a national entity, neither type of limited convention does that. Even if the state legislatures apply for a convention limited to a specifically worded amendment, the national convention would have the power to reject that amendment. Thus, a national entity could block an excessively parochial amendment.<sup>58</sup>

Second, there is no reason to assume that the constitutional enactors would have always preferred a nationally developed solution. They already had such an arrangement from the congressional proposal method. Moreover, the state legislatures would only apply for a limited convention if there were wide agreement, from two thirds of the state legislatures, that a particular solution was required. If the state legislatures could reach such an agreement, it is not clear why it would be necessary to have a national institution formulate a proposal.

Indeed, if the state legislatures could agree on a solution, then the convention method would be very much like a mirror image of the arrangement under the congressional proposal method. Under the congressional proposal method, the national government formulates an amendment and the states decide whether to adopt it. Here, the state legislatures formulate an amendment and the national convention decides whether to approve that amendment (with the states, of course, ratifying it as well).

Although Black assumes that the Framers would have desired that both amendment methods employ a national institution to formulate the amendment, one can just as strongly argue that they would have preferred a more pluralistic system. Just as the Framers enacted two amendment methods—one relying on Congress, the other not—so they might have wanted the power to formulate an amendment to be placed at the national level under one method and at the state level (to the extent feasible) under the other method. This might be more in accord with the constitutional structure as well as being more desirable.

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58. Moreover, even if the national convention did somehow approve a parochial amendment, the Congress, a national entity, could still act against it. It could require that the amendment be ratified by state conventions rather than state legislatures, and therefore ensure that another body that was independent of the state legislatures would make the ratification decision.

## B. THE APPLICATIONS OF THE STATE LEGISLATURES FOR A CONVENTION

This brings us to the second basic question. If a convention for proposing amendments can include a limited convention, can the states apply for one? There are two issues here. First, does the Constitution allow the state legislatures to apply for a limited convention? Second, if the Constitution does allow the state legislatures to make such an application, does it also require Congress to follow that application and call a limited convention?

### 1. State Legislative Application for a Limited Convention

I have argued that a “Convention for proposing Amendments” is a phrase that covers both limited and unlimited conventions. The question now is whether the states have the power to apply for a limited convention. Since the Constitution authorizes two thirds of the state legislatures to apply for a convention for proposing amendments, and a limited convention is one such convention for proposing amendments, the only way that the states would lack the power to apply for a limited convention is if there is something in Article V that would limit their power. But, to the contrary, the language of Article V strongly suggests that the states have this power.

First, the ordinary meaning of the term “application” supports this understanding. At the time of the Constitution, an application was a request made for something, as a request or solicitation to a court.<sup>59</sup> This term, then, did not contain any limitation in it that would suggest that an application for a convention could only be of a certain kind. Instead, an application involved a request by the applicant and presumably the applicant would decide what he wanted to request in the application. Of course, this is not to say that the applicant could apply for something he was not entitled to apply for. For example, the states could not apply for a convention that would enact constitutional amendments on its own authority. But since a limited convention is one type of a convention for proposing amendments, the state legislatures are entitled to apply for such limited conventions. Thus, the ordinary meaning of application suggests that the state legislatures can apply for limited conventions.

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59. WEBSTER, *supra* note 27 (“The act of making request or soliciting; as, he made application to a court of chancery”) (emphasis in original); JOHNSON, *supra* note 27.

Second, this understanding of application also appears to be supported by the only other use of “application” in the Constitution. The Guarantee Clause of the Constitution, which is the constitutional neighbor of Article V, provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>60</sup>

The Clause thus requires the federal government to guarantee each state a republican form of government and to protect each state against invasion. But the federal government is only allowed to protect the states against domestic violence on the application of the legislature (or the executive when the legislature cannot be convened). The evident purpose of this provision reflects two concerns: It allows the states to receive the support of the federal government to protect against domestic violence, but it prevents the federal government from acting without a prior request of the state. It appears that the constitutional enactors believed that domestic violence might give the federal government an excuse to intervene in a state and to act against a group that the federal government disliked.

Despite the Clause’s clear purpose, a question might arise about how the term “application” should be interpreted. There are two possible meanings, corresponding to the two possible meanings of “application” in Article V. On the one hand, a state legislature might have the power make an application for “limited” protection against domestic violence. Alternatively, a state legislature might possess only the power to make an application for protection generally. Suppose, for example, that there is domestic violence in the eastern part of Virginia concerning a tax revolt by debtors. The Virginia Legislature makes an application to the federal government for protection against the tax revolt in its two most eastern counties. Then, while the federal government is subduing the revolt, there is a violent dispute between farmers and ranchers in the western part of the state. The Virginia legislature, however, believes it can address the matter and does not ask for federal assistance. But the federal government believes that Virginia is in danger and seeks to protect them anyway.

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60. U.S. CONST. art. IV, § 4.

Could Virginia apply for limited protection that is restricted to the tax revolt in the eastern counties? Or is Virginia allowed only to apply for protection generally that would allow the federal government to protect it against the western dispute, despite the wishes of the Virginia state legislature? There is a strong case that Virginia can apply for limited protection. The point of the Clause is to give the state the discretion whether or not to seek protection. If the state seeks protection for the eastern uprising, but not the western one, it furthers the underlying purpose to allow the application to apply only to the eastern one. It allows the state to weigh the dangers of federal intervention versus the state uprising, as to each uprising. Moreover, allowing the federal government to act against another uprising without state approval might give it the ability, once federal troops are in the state, to act against political opponents of the federal government. Finally, if the federal government can act without state approval once an application for protection has been made, then this may discourage a state from seeking protection, even though it needs the protection.<sup>61</sup>

Based on this strong evidence from the ordinary meaning of “application” as well as from its use in the Guaranty Clause, I conclude that the state legislatures have the power to apply for limited conventions.<sup>62</sup>

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61. It might be questioned whether my interpretation of the Guarantee Clause has implications for the meaning of Article V, because my interpretation of the Guarantee Clause relies on the purposes underlying that Clause. Since the purposes underlying the Guarantee Clause might have been different (for reasons unrelated to the meaning of Article V), it might seem that my purpose-based interpretation of the Guarantee Clause does not provide independent support for the limited convention view of Article V.

This argument, however, is mistaken. First, the Guarantee Clause interpretation helps to confirm that my understanding of the ordinary meaning of “apply,” as revealed by the dictionary, is correct. If the Guarantee Clause had the alternative meaning, allowing applications only for protection generally, then one might question whether my reading of the dictionary meaning of “apply” was really correct. It would be odd for the Guarantee Clause to have used the word “apply” if the ordinary meaning of that term suggested a meaning contrary to the purposes of the Clause. Second, the Guarantee Clause supports the limited convention view of “apply” because there is a rule of construction that presumes words used in the same document have the same meaning. If “apply” in the Guarantee Clause had the alternative meaning, then that would have counted against the limited convention view of “apply.”

62. One last piece of evidence in favor of this understanding of application comes from an earlier version of Article V offered by James Madison at the Philadelphia Convention, which I discuss in the next section. The meaning of application in this version supports the view that states can choose for what type of convention they seek to apply.



## 2. Congress's Obligation to Call a Limited Convention

Because the state legislatures may apply for a limited convention, this now leads us to the second issue—whether the Constitution requires Congress to follow the state legislatures' applications and call a limited convention. Once again, the Constitution's original meaning supports the limited convention view.

First, the constitutional language allowing the states to apply for Congress to call a convention obligates Congress to call a convention. Putting the question of a limited convention to the side, assume that two thirds of the state legislatures call for an unlimited convention. It is widely accepted that Congress is obligated to call such a convention. As Gerald Gunther put it, this is one of the few issues upon which there is widespread agreement.<sup>63</sup> The language of Article V strongly supports this result. It provides that "The Congress . . . *on* the Application of the Legislatures of two thirds of the several states . . . *shall* call a convention."<sup>64</sup> The "shall" indicates that Congress is obligated to call the convention when the requisite number of applications have been submitted. Moreover, this textual analysis is supported by purposive considerations. One of the main purposes of the convention method is to establish an amendment process that does not require Congress's approval. If Congress can refuse to call a convention, that allows Congress to block amendments. Finally, several statements made when the Constitution was enacted confirm that Congress was understood as being obliged to call a convention.<sup>65</sup>

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63. See Gunther, *supra* note 20, at 5.

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

65. See *A Friend of Society and Liberty*, PA. GAZETTE, Jul. 23, 1788, reprinted in 18 DOCUMENTARY HIST. 277, 283 (statement of Tench Coxe) ("It is provided in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures . . ."); 4 ELLIOT'S DEBATES, *supra* note 12, at 177 (statement of James Iredell at the North Carolina ratifying convention) (arguing that when two thirds of the legislatures of the different states apply for a convention, "Congress are under the *necessity* of convening" a convention) (emphasis added); *id.* at 178 (statement of James Iredell at the North Carolina Ratifying convention) (arguing that the introduction of amendments "did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention for proposing amendments, and on such application, it is provided that Congress shall call such convention, so that they will have no option"); *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, reprinted in 20 DOCUMENTARY HIST. 1139, 1142–43 (statement of Tench Coxe) ("If two thirds of those legislatures require it, Congress *must* call a general convention, even though they dislike the proposed amendments . . .").

But if Congress is obligated to call an unlimited convention when the states apply for one, and if the states are authorized to apply for a limited convention, this strongly suggests that Congress is obligated to call a limited convention when the states apply for one. After all, the *same* constitutional language that obligates Congress to call an unlimited convention would apply to the states' applications for a limited convention.<sup>66</sup> Moreover, if the Constitution authorizes both limited and unlimited conventions, there is no reason to allow Congress to block applications for limited conventions, but not unlimited ones.

C. THE OBLIGATION OF THE CONVENTION TO FOLLOW THE LIMITS SET BY THE STATES AND CONGRESS

This brings us to the final basic question. If Congress calls a limited convention, is the convention required to conform to the limitations in that call? Once again, the answer is yes.

First, the convention derives its authority from Congress's call and therefore is subject to the limitations in that call. Without that call, the convention—at least the one authorized by Article V—could not be lawfully brought into existence. If a convention were to try to form without a call, it would clearly be unconstitutional. It is the call that allows the convention to form. Thus, if the authority for the convention to form itself limits the power of the convention, the only convention that can form would be subject to those limits. The convention would have no more authority to go beyond those limits than a convention would have to form on its own without a call.<sup>67</sup>

Second, that the Constitution recognizes limited conventions suggests that a limited convention called by the

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66. Another way to support the point in the text is to note that the Constitution does not allow Congress to call a limited convention when the states call for an unlimited one. But if that is true, then the Constitution should not allow Congress to call an unlimited convention when a limited convention is called.

67. The interpretations put forth in this article also gain support from the two main interpretive methods employed in the early years of the Constitution—the methods of the Democratic Republicans and the Federalists. Despite their significant differences, the interpretive methods of both of these groups support the positions that I defend in this Article. Thomas Jefferson, for the Democratic Republicans, argued that the Constitution was a compact between the states and should be interpreted in favor of the parties to the compact. In this case, this interpretive principle supports allowing the state legislatures to apply for a limited convention. Chief Justice John Marshall, for the Federalists, contended that words in the Constitution should be given their ordinary meaning and that no preference should be given to the states. Once again, this interpretive principle supports allowing the state legislatures to apply for a limited convention, because the ordinary language of the constitutional text favors this result.

Congress should be followed. It would be odd for the Constitution to authorize a limited convention and then allow the convention itself to ignore the limitations. For example, the Constitution says that each legislative house shall determine its rules of proceedings.<sup>68</sup> No one would interpret that clause to mean that, while a house can determine those rules, those rules cannot be made binding on the individual members of the house. Similarly, one would not interpret Article V to authorize limited conventions, but then to allow the convention to ignore the call. Instead, if the Framers intended to allow the convention to ignore the limitations in the call, it is much more likely that they would not have authorized limited conventions, but instead authorized two thirds of the state legislatures merely to recommend measures to the convention.<sup>69</sup>

#### IV. EVIDENCE FROM EARLY INTERPRETATIONS

The textual arguments presented above derive additional support from interpretations made during the framing and ratification period. It is true that there are few situations where people made statements that have clear implications for whether the Constitution allows limited conventions. But these few situations that have been uncovered provide support for the limited convention view, and in one instance, the support is quite powerful.

The most important evidence comes from the Philadelphia Convention's discussion of the version of Article V that preceded the final version. This evidence, which is of word meaning rather than intent, strongly suggests that the words "propose" and "apply" had the meanings employed by the limited convention view. There is other evidence as well. Both a statement made during the ratification period by a prominent Federalist and an application for a convention provide some support for the limited convention view.

While this Part discusses evidence in favor of the limited convention view, Part VI attempts to show that both the discussions and actions of the Philadelphia Convention, that others have argued support an unlimited convention, do not actually do so.

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68. U.S. CONST. art. I, § 5, cl. 2.

69. Cf. U.S. CONST. art. II, § 3 (the President "shall . . . recommend to [Congress] such Measures as he shall judge necessary and expedient").

## A. INTERPRETATION OF THE PRIOR VERSION OF ARTICLE V

Initially, the Convention considered the amendment provision contained in the Virginia Plan, which stated “that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”<sup>70</sup> A modified version of this provision was submitted to the Committee on Detail, which reported a clause stating, “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.”<sup>71</sup> This clause, however, was controversial, with objections being raised from a variety of perspectives. Elbridge Gerry criticized it on the ground that it appeared to permit a convention to amend the constitution without any further ratification procedure. Alexander Hamilton opposed it also because it allowed only the state legislatures, not the national legislature, to call for a convention.<sup>72</sup>

At this point, James Madison proposed a replacement for the Committee on Detail’s provision. Initially, the replacement met with favor, being approved by a vote of nine states for, one against, and one divided. After being edited for stylistic purposes, Madison’s provision stated:

The Congress, 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 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 1808 shall in any manner affect the 1 & 4 clauses in the 9. Section of article 1.<sup>73</sup>

This provision closely resembles the final Article V language. It was largely the penultimate version of the article, and was changed mainly to employ a convention rather than Congress to draft amendments when the two thirds of the states had applied.

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70. 1 RECORDS, *supra* note 52, at 22.

71. 2 RECORDS, *supra* note 52, at 159.

72. *Id.* at 557–58.

73. *Id.* at 559.

Let us begin by exploring the meaning of this provision. The provision allows amendments to be proposed in two ways. First, it permits two thirds of both houses of Congress to propose amendments. Second, it permits Congress, presumably by majority vote, to propose an amendment upon application of two thirds of the state legislatures.

It seems clear that this provision allows the state legislatures to apply for Congress to propose either an amendment relating to a subject or a specifically worded amendment. In both cases, the provision would require Congress to follow the terms of the applications.

The strength of this interpretation derives from the fact that the provision requires a two thirds vote when Congress acts on its own, but allows Congress to use majority rule when it acts on the applications of the state legislatures. If Congress was not bound by the state legislatures' instructions, it is hard to understand why Congress was required to secure two thirds when acting on its own, but only a majority when acting pursuant to state applications. Thus, when the state legislatures require that Congress propose an amendment concerning a specific subject, Congress would be obligated to pass an amendment and could use majority rule. Similarly, when the state legislatures required that Congress propose a specific amendment, Congress would also be obligated to pass that amendment and could use majority rule. The alternative interpretation of Madison's proposal—that the state legislatures' applications were not binding on the Congress—cannot account for the way that the provision uses majority and supermajority rules and is therefore extremely weak.

This straightforward reading of the provision that I offer also appears to be James Madison's interpretation of it, which can be seen by his response to a proposal to amend the provision. George Mason had argued that Madison's proposal gave Congress too great a role in the amendment process. Mason stated, "As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive . . . ."<sup>74</sup> As a result, Gouverneur Morris and Elbridge Gerry moved to amend the article "so as to require a

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74. *Id.* at 629.

Convention on application of 2/3 of the States,” which eventually became the final version of Article V.<sup>75</sup> Madison objected to the Morris/Gerry proposal on the ground that he “did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.”<sup>76</sup>

Madison’s response reveals his support for the above interpretation in two ways. First, the language of his response suggests that the state legislatures would be applying for *amendments* to be proposed. There is not the slightest suggestion that the state applications would merely allow Congress to decide on its own what amendments to propose. Second, that Madison thought his provision would bind Congress as much as the final Article V also suggests that the states would be proposing amendments in some form. If Congress were given discretion as to what amendments to propose, Madison would not have spoken of it as being bound to the same extent as Congress is to call a convention.

Moreover, that Mason and the other delegates objected to Madison’s proposal does not suggest that they disagreed with Madison’s interpretation of it. Rather, they may have objected to Congress’s additional role under Madison’s version for other reasons. First, if the states sought an amendment on a subject, such as controlling federal debt, Madison’s proposal would give Congress more ability to block the amendment than the final Article V did, even though Congress was obligated under Article V to call the limited convention. While there may be some discretion involved in deciding whether to call a convention, there is considerably more discretion involved in drafting an amendment applied for by the states. Under Madison’s proposal, Congress could use its role to draft a bad provision or to pass nothing at all, claiming it could not agree on a specific proposal. Second, if the states could not agree on either a specifically worded amendment or a general idea for an amendment, the power to propose an amendment then would be possessed entirely by Congress. By contrast, under the final Article V, if the states could not agree on a specifically worded amendment or a general idea for an amendment, they could still apply for an unlimited convention. This would be far preferable from

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75. *Id.*

76. *Id.* at 629–30.

Mason's perspective, because the convention would be independent of Congress.

The meaning of Madison's proposal helps to clarify the meaning of the actual Article V in several important respects. First, the meaning of Madison's proposal confirms the analysis of propose that I offered in Section IIIA above. Under Madison's proposal, when two thirds of the state legislatures applied to Congress for an amendment, Congress was required to propose that amendment, not just any amendment. But if "propose" meant unlimited discretion to recommend a measure, as the unlimited convention view holds, then Madison's provision would not have this meaning. By contrast, if "propose" simply meant "to offer for adoption," then the provision has exactly the meaning that Madison and others believed it had. When the state legislatures apply for an amendment, Congress is required to offer it for adoption by the ratifiers—to propose it.

Second, the meaning of Madison's provision is also revealing as to the language concerning state applications. Both Madison's proposal and Article V contain virtually the same language as to applications—"on the application of two thirds" of the state legislatures. Under Madison's proposal, this language clearly contemplates that the applications can apply for particular amendments (either in general terms or in specific language) and that Congress will be bound to follow these applications. That the actual Article V uses the same language strongly suggests that application has the same meaning and therefore adopts the limited convention view on this issue.

Finally, if one does not merely focus on the individual words "propose" or "apply," but instead looks at the phrases in the clauses, this perspective also supports the limited convention view. Commentators who favor the unlimited convention view interpret the language in the actual Article V, "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments," as not allowing the states to place limits on what the convention can propose. Part of the argument seems to be that there is nothing explicit allowing the states to limit the convention and no implicit authority is implied. But the very similar language in Madison's proposal, "The Congress . . . on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution," clearly allows the states to place limits on what Congress can propose, even though there is nothing explicit allowing the states to do so.

It is hard to see the basis of the distinction between Article V and Madison's proposal.

Thus, the language in Madison's proposal strongly suggests that the final version of Article V adopts the limited convention view as to the meaning of both state legislative applications and the convention's proposing power.

#### B. INTERPRETATIONS FROM THE RATIFICATION PERIOD

It is not merely the actions of the Philadelphia Convention that support a limited convention. At least two pieces of evidence from the period immediately after the Constitution was written also support the limited convention view.

First, Trench Coxe, who was assistant Secretary of State under Alexander Hamilton, wrote a letter to the New York Ratification Convention, urging ratification of the Constitution. In the letter, Coxe wrote<sup>77</sup>:

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

This quote suggests that Coxe interpreted the Constitution to allow limited conventions.<sup>78</sup> His claim that Congress must call a

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77. *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, reprinted in 20 DOCUMENTARY HIST. 1139, 1142–43 (italics omitted).

78. Coxe here refers to a general convention. While some commentators appear to believe that the term refers to an unlimited convention, Dellinger, *supra* note 20, at 1634 n.47, at the time of the Framing a general convention did not mean an unlimited convention. See CAPLAN, *supra* note 3, at xx–xxi, 23.

A general convention was a convention of all the states, in contrast to a partial convention, which was a convention of a subset of the states. See 6 MADISON'S PAPERS at 425 (noting that Madison and Hamilton, referring to a convention to be held among the New England states, "disapproved of these partial conventions." Rather, Madison "wished instead of them to see a general Convention take place.") When the Framers' generation sought to describe an unlimited convention, they used the terms plenary or plenipotentiary. See James Madison to James Monroe, March 19, 1786, in 8 MADISON'S PAPERS at 505 (contrasting the limited Annapolis Convention with a hypothetical unlimited convention which would have involved "a plenipotentiary commission to their deputies for the convention"); Alexander Hamilton to James Duane, Sept. 3, 1780, in 2 HAMILTON PAPERS at 407–08 (recommending the "calling immediately [of] a convention of all the states . . . vested with plenipotentiary authority" to bring about "a solid coercive union.").

This understanding of general and plenipotentiary is also supported by the meanings of these terms when not used in relation to conventions. For example, Webster's dictionary defines general as "common to many or the greatest number; as a general



convention, even though it dislikes the proposed amendments, suggests that the applications are seeking a convention limited to proposing certain amendments. Of course, the quote is not entirely free of ambiguity. It is possible that Coxe is referring to a situation where the applications were not seeking a convention limited to a specific amendment, but it was known that the state legislators intended the convention to propose those amendments. Still, the wording of the quote suggests that the applications were seeking a convention limited to proposing specific amendments and therefore the quote supports the limited convention view.

Second, one of the first two applications for a convention under the new Constitution also supports the limited convention view. After the Constitution was put into effect, two states made applications for a convention. The movement for a second convention stalled, however, after James Madison led the Congress to propose a bill of rights. While New York's applications sought a plenary or unlimited convention, Virginia's application may have sought a limited convention. The application asked that "a convention be immediately called . . . with full power to take into their consideration the defects of the Constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind."<sup>79</sup> It is possible that this application sought a convention limited to proposing amendments on problems identified by the ratification debates. This would prevent federalists from controlling the convention and proposing provisions that would make the Constitution even more nationalist. Of course, the language here is pretty vague and seems to allow the convention wide discretion. But even if it is not read as establishing a limited convention, the phrasing of the application still supports a limited convention. It asks for a convention "with full power to take into their consideration" the

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opinion; a general custom." Similarly, the Constitution's preamble states as a purpose to "promote the general welfare." Further, in Federalist No. 43, James Madison states the Constitution "equally enables the general and the State governments to originate the amendment of errors." THE FEDERALIST NO. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961). Clearly, the reference to the federal government as the general government suggests that it is the common government of all the people (in contrast to particular state governments). It would not indicate a government of unlimited powers, since the Federalist strongly argued the general government had limited powers.

79. 1 House Journal, 1st Cong., 1st Sess. 28 (1789).

defects in the Constitution suggested by the state conventions. That the application asked for a convention with “full power” suggests that it believed that conventions with less power were possible. Thus, whether or not this is read as seeking a limited convention, it provides some support for the limited convention view.

## V. THE LIMITED CONVENTION VIEW: PURPOSE AND STRUCTURE

These largely textual arguments in favor of the limited convention view are also supported by two arguments based on purpose and structure. These three arguments suggest that the constitutional enactors would have had strong reasons to allow limited conventions. First, if limited conventions were not recognized by the Constitution, then the constitutional enactors’ decision to have the states determine whether to hold a convention would seem peculiar. Why would the Constitution allow the states to decide on whether to have a convention, but not allow them to specify what subjects the convention should discuss? Put differently, why would the constitutional enactors allow the states to decide not to hold any convention—and thereby to determine that none of the current problems warrant a convention—but not allow them the lesser power of determining that only certain problems warrant a convention?

A second purpose and structure argument for the limited convention view is that allowing the state legislatures to apply for a limited convention permits a more effective amendment procedure. While the state legislatures may desire an unlimited convention to make broad constitutional changes, they might instead seek a limited convention to address smaller problems. The state legislatures might believe that a narrower constitutional change is all that is needed and fear the uncertainty of an unlimited convention.<sup>80</sup> By denying the state legislatures the ability to apply for limited conventions, the unlimited convention view imposes an uncertainty tax on the convention method and makes it less likely that state legislatures will apply for a convention. This is especially problematic since the Constitution views the congressional proposal method and the convention method as alternative procedures useful to

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80. See Van Alstyne, *supra* note 19, at 990 (arguing that a convention is most likely to be called in response to some “*particular* usurpations” by Congress and that a limited convention would be the appropriate way to address a specific concern).

preventing any one entity from blocking amendments. Thus, the limited convention view will further the constitutional purpose of permitting the convention method to be an effective alternative to the congressional proposal method.<sup>81</sup>

Third, the limited convention view employs a more effective mechanism for adopting amendments when there is reason to believe that the Constitution has a defect that requires a specific remedy. When two thirds of the state legislatures have concluded that a specific subject or amendment needs to be considered, there are significant advantages to limiting the convention to addressing that subject rather than allowing it to propose amendments on any subject. To begin with, limiting the convention to a specific area allows for delegates to be selected who have expertise in that area. Limiting the convention to a specific area should also operate to make the convention's review of the issue simpler and smoother. A limited convention is likely to reach a quicker resolution, since it only needs to discuss one issue. Moreover, an unlimited convention could easily take actions that would result in the specific amendment not being enacted, even though it would have enacted under a limited convention. For example, the convention might choose to propose one or more amendments on other subjects and then conclude that it should not propose the specific amendment, because that would amount to too significant a change in the Constitution. Alternatively, the convention might end up deadlocking on other amendments, with the resulting discord leading the delegates to dissolve the convention rather than considering the specific amendment.

These three arguments suggest that the constitutional enactors would have had substantial reasons to adopt the limited convention view. Are there reasons for them to have adopted the unlimited convention view? The strongest argument on the other side is the view that the constitutional enactors would not have wanted the states to have too significant a role in the constitutional amendment process. Therefore, they would have allowed the state legislatures to call an unlimited convention—which the states would be unlikely to do often and would have no formal control over—but not a limited convention, which

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81. Moreover, this constitutional purpose is not merely hypothetical. Because of the fear of a runaway convention, the convention method has proven to be an ineffective, broken amendment method. *See supra* notes 2–4 and accompanying text.

would allow them too much ability to influence the amendment proposing process.

The problem with this view is that it requires a hostility towards the states that was not held generally when the Constitution was enacted. Instead, the Constitution was based on the view that both the national government and the state governments had virtues and vices and the constitutional structure should be designed accordingly. In the Article V area, this view suggests that both Congress and the state legislatures should be able to propose (and ultimately enact) amendments without the other entity being able to veto the amendment.<sup>82</sup> Thus, the desire to prevent the state legislatures from having an effective mechanism to amend the Constitution is inconsistent with the overall design of the Constitution and the purposes underlying it.

## VI. WEAKNESSES OF THE ARGUMENTS FOR THE UNLIMITED CONVENTION VIEW

These arguments for the limited convention view are powerful. They both show that the limited convention view derives from the ordinary meaning of the constitutional language and give strong reasons why the constitutional enactors would have wanted the constitution to allow limited conventions. But there are three other arguments that have been made against limited conventions that should be addressed. It turns out, however, that these arguments are ineffective. Thus, the case for the limited convention view also draws strength from the weakness of the arguments made against that view.

### A. A CONVENTION IS NOT AN UNLIMITED ASSEMBLY OF THE PEOPLE

Some commentators have argued that the convention cannot be limited because it is an illimitable assembly of the people.<sup>83</sup> The idea here seems to be that a convention is a special body that represents and exercises the sovereign power of the people. Since the people are the ultimate sovereigns, no limits can be placed on them or the convention. But this argument is mistaken on both textual and historical grounds.

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82. See *supra* text accompanying notes 9–12.

83. See e.g., Paulsen, *supra* note 2, at 738.

### 1. Text

Textually, it seems clear that the national proposing convention (as well as the Constitution's ratification conventions) should not be viewed as exercising the full sovereignty of the people and therefore as illimitable. There are several strong reasons that support this conclusion. First, if the national proposing convention sought to deprive the states, without their consent, of their equal suffrage in the Senate, the convention would be violating a clear textual command and would be acting illegally. Similarly, if the convention's proposed amendment stated that it would be subject to ratification by two thirds of the states (as opposed to the three quarters that the Constitution requires), this action would also be clearly illegal. Thus, it is mistaken to claim that the Constitution cannot limit the convention.

A second reason why the national proposing convention is not illimitable is that it is a mere proposing convention. A convention for proposing amendments does not have the power to enact anything. It merely proposes an amendment that must then be ratified by states. Similarly, the ratification conventions in the Constitution are also limited. They do not have the power to propose amendments. Nor do they have the power to take other actions, such as legislating.

Finally, that the Constitution does not view the conventions as illimitable assertions of the sovereignty of the people is confirmed by the fact that the conventions' roles can also be served by legislatures, which are clearly not exercising sovereign authority. While the national proposing convention has the power to propose an amendment, so does the Congress. Similarly, while state conventions can be used to ratify an amendment, so can state legislatures. Thus, the conventions are unlikely to be exercising sovereign authority if the non-sovereign legislatures can be given the same authority that the conventions exercise. Instead, the conventions are better seen as limited institutions, employed as alternatives to the legislature, to improve the amendment process.

Thus, textually, the Constitution makes it absolutely clear that neither the national proposing convention nor the state ratification conventions are immune from being limited. The Constitution places limits on the provisions that they can propose or ratify; it limits their roles to proposing or ratifying, but not both; and it employs non-sovereign legislatures to perform these same rules. Given that the Constitution does not

treat the conventions as illimitable assertions of sovereign power, there is no reason to infer that the Constitution does not authorize the state legislatures to apply for limited conventions. The Constitution employs conventions as part of a multi-stage process designed to produce desirable amendments. Allowing state legislatures to apply for limits on the national proposing convention is easily seen as a means to that end.

## 2. History

If the fact that a convention can be limited is so textually evident, why does this idea of the convention as an illimitable assembly of the people seem plausible to some commentators? The short answer is that at the time of the Constitution's enactment, conventions had various meanings and had different powers depending on the context. Some conventions exercised quite significant powers, resembling those of a sovereign. But the fact that some conventions had these characteristics does not mean that all or most did. Other conventions exercised much more limited authority. Thus, it is entirely proper to follow the textual and structural cues in the Constitution that suggest the proposing and ratifying conventions were limited, even though some conventions at the time of the Constitution had much broader power.

To understand the meaning of "convention" at the time of the Constitution, it is useful to briefly review the history of conventions. The term "convention" came to prominence in 17th century England. After the revolutions in 1660 and 1689, there was no King in existence to call the Parliament and therefore these Parliaments met on their own authority.<sup>84</sup> These bodies were known as Convention Parliaments. In both cases, the Convention Parliaments legislated fundamental arrangements that were deemed to be part of the English Constitution.<sup>85</sup> Thus, a convention was thought of as a means of enacting a constitution or establishing a government when existing laws did not provide a mechanism for doing so.<sup>86</sup>

It was thus natural that the new states would use conventions when they established their new constitutions and governments after declaring independence from the King. Yet,

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84. CAPLAN, *supra* note 3, at 5; JAMESON, *supra* note 31, at § 8; *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 311 (1969).

85. CAPLAN, *supra* note 3, at 5; JAMESON, *supra* note 31, at § 8.

86. CAPLAN, *supra* note 3, at 7-8; JAMESON, *supra* note 31, at § 8.

the understanding of conventions at the time was still quite undeveloped. Although some states used conventions to write their constitutions, others used legislatures to do so.<sup>87</sup> Moreover, some of these conventions also exercised ordinary legislative powers.<sup>88</sup> Thus, conventions were not yet clearly understood to be entities that had only the power of drafting or enacting a constitution.

The first conventions that only exercised constitutional enactment powers were those of New Hampshire and Massachusetts.<sup>89</sup> In Massachusetts, the legislature had made several unsuccessful attempts to write a constitution that were rejected on the ground that the drafting should occur by an entity limited solely to that task. Finally, in 1779, the legislature accepted the principle and scheduled elections for a constitutional convention that wrote a constitution, which was then approved by the towns.<sup>90</sup> Similarly, the New Hampshire constitution was written by a convention solely limited to that task, and then sent to the people for ratification.<sup>91</sup> Thus, it took several years before two states clearly adopted an approach where constitutions were adopted by conventions that were employed solely for that purpose.

The convention method of enacting constitutional provisions was also developed in other ways. Once a constitution was enacted, the constitution could also authorize its own amendment. This was a very significant development, because it meant that it was no longer necessary to take extra-legal or revolutionary actions when one sought to change the constitution. Given the role of conventions in the writing of constitutions, it was natural for the new constitutions to use conventions as part of their amendment procedures as well.

In an effort to devise desirable amendment procedures, these constitution used conventions in a variety of ways. Some constitutions gave conventions relatively limited powers. As discussed earlier, the 1777 Georgia Constitution, employed a

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87. ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS* 2-4 (1917); *See e.g.*, JAMESON, *supra* note 31, at § 135.

88. *See* HOAR, *supra* note 87, at 4; JAMESON, *supra* note 31, at §§ 136-37 (South Carolina), 139-40 (New Jersey); 193 (Pennsylvania); 145 (Maryland); 146 (North Carolina); 147-49 (Georgia); 150 (New York) (discussing the general legislative powers of individual state conventions).

89. HOAR, *supra* note 87, at 4-5; JAMESON, *supra* note 31, at §§ 118-120.

90. CAPLAN, *supra* note 3, at 13; HOAR, *supra* note 87, at 5-6; JAMESON, *supra* note 31, at §§ 142-143.

91. HOAR, *supra* note 87, at 6; JAMESON, *supra* note 31, at §§ 120-121.

constitutional convention to enact constitutional amendments, but did so only if the convention was called by petitions from the people and only if the convention enacted provisions that had been sought by those petitions.<sup>92</sup> In two other state constitutions, the 1776 Pennsylvania Constitution and the 1784 Vermont Constitution, conventions were employed solely to ratify measures proposed by a council of censors.<sup>93</sup> Further, the 1784 New Hampshire Constitution provided for the legislature, in seven year's time, to have the towns elect delegates to a convention to propose constitutional amendments, which would only take effect if approved by two thirds of the voters collected in the towns.<sup>94</sup>

Other constitutions authorized more powerful conventions. The following three conventions, once called, appeared to have the authority to enact constitutional provisions without further ratification. The 1780 Massachusetts Constitution provided that two thirds of the voters could authorize a constitutional convention in 1795.<sup>95</sup> The 1790 South Carolina Constitution allowed a "convention of the people" to be called upon the vote of two thirds of both branches of the legislature.<sup>96</sup> Finally, the Delaware Constitution of 1792 allowed a majority of the people eligible to vote to authorize the calling of a convention.<sup>97</sup>

Finally, some of these constitutions were amended or replaced through conventions, even though the constitution did not expressly provide for such actions. For example, the Massachusetts Constitution was amended in 1820 by a convention called by the legislature, even though this amendment procedure was not specifically provided for in the constitution.<sup>98</sup> Similarly, the Delaware Constitution of 1776 was replaced in 1792 after the legislature called a convention that the constitution did not specifically authorize.<sup>99</sup> The actions of these types of conventions, which were usually called by the legislature, can be conceptualized in one of three ways. First, they might be categorized as revolutionary actions that violated the previous constitution and therefore were illegal. Second, they

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92. GA. CONST. of 1777, art. LXIII.

93. PA. CONST. of 1776, § 47; VT. CONST. of 1786, § XL.

94. N.H. CONST. of 1784, pt. 2, art. 100.

95. MASS. CONST. of 1780, pt. 2, ch. VI, art. X.

96. S.C. CONST. of 1790, art. XI.

97. DEL. CONST. of 1792 art X..

98. Jameson, *supra* note 31, at § 219.

99. *Id.* at § 223.



might be viewed as actions that were neither authorized nor prohibited by the previous constitution. In this unusual category, the constitution would not authorize the convention, but it would not prohibit it, thereby allowing a convention that represents the people to act on its own authority to frame a new constitution. Finally, the actions of the conventions might be viewed as having been implicitly authorized by the previous constitution. While the constitution did not contain a specific provision that authorized the convention, the constitution's structure and principles were viewed as authorizing the action.

None of these categories, however, provide support for the unlimited convention view. The unlimited convention view argues that the Constitution *authorizes* unlimited conventions. But under the first two categories—revolutionary and unauthorized conventions—the state conventions were *not authorized* by the existing constitution. Thus, these unauthorized state conventions were not precedents for the type of authorized convention that the unlimited convention asserts the Constitution established. If these two type of state conventions were to inform the meaning of the proposing convention, then that convention would not derive its power from the Constitution. It would have extraconstitutional powers. That is simply not the argument made by the unlimited convention view.

Nor does the third category of implicitly authorized conventions provide support for the unlimited convention view. Such implicitly authorized conventions do not comport well with the structure of the Constitution and therefore it is unlikely that the Constitution could be interpreted to implicitly authorize such conventions.<sup>100</sup> Moreover, even if these conventions were

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100. The United States Constitution is not easily interpreted as implicitly authorizing a convention. To be implicitly authorized, such a convention would have to be derived from constitutional structure and general principles rather than from a specific provision. This claim will make most sense in a constitution which has a strong textual commitment to popular sovereignty, vests general legislative powers in the legislature (so that it can call the convention), and does not have ample amendment procedures which appear to "occupy the field" of amendment matters. *See, e.g.,* MASS. CONST. of 1780 pt. 2, ch. VI, art. X. While the U.S. Constitution does endorse popular sovereignty, it confers only enumerated powers on the Congress and also has ample amendment procedures. For an argument in favor of the implicit authorized view (that also allows contrary to text amendments, such as those depriving states of their equal voting rights in the Senate), see generally Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar 1988]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter Amar 1994]; for a critique, see generally Henry Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

implicitly authorized, they would not support the unlimited convention view, since (as discussed in the preceding paragraph) that view makes claims about the explicitly authorized conventions in Article V, not implicitly authorized ones.<sup>101</sup>

We can now turn to the implications of this history for the United States Constitution. First, the history helps to explain why some commentators might regard the proposing convention as an illimitable assertion of the sovereignty of the people, even though the constitutional text so clearly places limits on the convention. At the time of the Constitution, some conventions were seen as specially representing the sovereignty of the people. These conventions had significant power to enact constitutions. But over time, the concept of a convention developed. Conventions also came to be used in more limited ways as part of constitutionally established multi-step processes for constitutional change. These constitutional processes could be used not merely for enacting a new constitution, but also for amending the constitution. Moreover, these constitutional processes placed limits on the powers of conventions. Thus, the commentators who have interpreted the proposing convention as an illimitable convention are making a mistake that is easy to identify. Their mistake is to interpret an ambiguous term to have one meaning when the context makes clear that it has a different meaning.

This analysis also confirms the analysis of the constitutional language that I presented earlier. The Constitution speaks of a “Convention for proposing Amendments.” Why did the enactors

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My own view is that the only area where an implicitly authorized convention might be plausible is a convention that would *replace* the existing constitution with a new constitution. Although there are still strong arguments against it, Article V might be read as “occupying the field” of amendments but not the field of establishing a new constitution. To my mind, an even stronger interpretation is to view such a convention as neither prohibited nor authorized (the second category) rather than as implicitly authorized. Whether or not conventions that seek to establish a new constitution are viewed as in the second or third category, however, they do not support the limited convention view, which views the convention as expressly authorized. *See supra* Part III.

101. The reason these implicitly authorized conventions do not support the unlimited convention view is that these conventions are not Article V conventions. An implicitly authorized convention is one that is implicitly authorized as opposed to the proposing convention in Article V, which is explicitly authorized. The unlimited convention view makes a claim about the power of the Article V convention, not about the power of other conventions. Thus, even if the Constitution does implicitly authorize conventions (and those conventions are unlimited), it does not mean the Article V conventions are unlimited. The Article V convention could be a limited one, while the implicitly authorized one could be unlimited.

use this language? This history makes clear that they needed to indicate that the convention could only propose amendments; it could not enact them on their own authority or exercise other powers, such as passing ordinary laws. The language a “Convention for proposing Amendments” does exactly that. There is no need to search for additional functions of the language to make sense of its inclusion in the Constitution. Moreover, the language becomes even clearer when it is contrasted with the other type of convention in the Constitution—the ratification convention. The proposing convention can only propose amendments; the ratification convention can only ratify them. Neither type of convention has the authority on its own to enact constitutional provisions.

#### B. THE RUNAWAY PHILADELPHIA CONVENTION

Another argument sometimes made against the limited convention view is that the Philadelphia Convention ignored the limits placed on it by both Congress under the Articles of Confederation and the state legislatures and therefore was a runaway convention. Thus, one might conclude that the Philadelphia Convention likewise believed that Congress’s power under the Constitution should not be binding on the national convention. Consequently, it would be constitutional for the convention to ignore the limits on Congress’s call.

The experience of the Philadelphia Convention, however, cannot be applied so quickly to the United States Constitution. Instead, the Convention’s actions are best explained as based either on the view that the Articles were no longer legally binding due to prior infractions or on the belief that revolutionary and therefore illegal action was justified as necessary to save the nation. Neither the Convention delegates nor its defenders argued that limits placed in a call were not legally binding. Instead, they sought to camouflage or minimize the extent of their violation of the limits.<sup>102</sup>

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102. My argument here assumes that the Philadelphia Convention was a runaway convention. Robert Natelson contends, however, that the Philadelphia Convention was not such a convention. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 719–23 (2011). If he is correct, then, this supports my interpretation even more strongly. Unfortunately, I am not at all certain that Natelson is correct. Natelson states that there were two types of limits placed on the convention: limits imposed by the state legislatures on their delegations to the convention and limits established by the Congress, under the Articles of Confederation, in their call for the convention. Natelson acknowledges that the Convention exceeded the limits imposed by Congress, but argues that Congress’s

One way that the Philadelphia Convention might have understood its actions is as proposing a new constitution, not because conventions had inherent authority to do so, but because the Articles of Confederation had been seriously and repeatedly violated and therefore was no longer deemed binding. James Madison made the argument that state violations had rendered the Articles, as a treaty, voidable, and Akhil Amar has argued that the new Constitution therefore could have legally superseded the Articles.<sup>103</sup> If this was the Convention's view of the matter, its actions would not say anything about the power of a proposing convention under the United States Constitution.

The Philadelphia Convention might also have understood its actions as being illegal under existing law, but as justified on policy grounds by the pressing problems that the states and the nation faced under the Articles. In other words, the Convention was understood as proposing a revolutionary action, but one that was necessary to provide the nation with a desirable political order. Madison argues along these lines in *Federalist* No. 40 where he appears to acknowledge that the Convention's proposal departed from Articles' unanimity requirement for amendments that was specifically mentioned in the call for the Convention. Madison justified the departure as necessary, because the smallest state, Rhode Island, would have refused to ratify anything the Convention proposed. He claims that it was

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limitations were not contained in a "legal call," since "Congress had no power to issue such a call." *Id.* at 720. By contrast, Natelson interprets the state legislative authorizations broadly and thereby concludes that the Convention conformed to the instructions in 10 of the 12 states. Thus, Natelson concludes that the Convention did not exceed the only limits that were binding.

Even assuming both that Natelson's interpretation of the state directions is correct and that following 10 of the 12 states is sufficient, there is a strong argument that the Congress did have authority over the Philadelphia Convention. Based on the evidence, one can view the Philadelphia Convention as an advisory or drafting committee established by the Congress to recommend amendments to it. The Articles provided that amendments were first to "be agreed to in" Congress "and be afterwards confirmed by the legislatures of every State." The Congress then called for the Philadelphia Convention with the instruction that the Convention "report . . . to Congress" its proposed revisions to the Articles. These actions are entirely consistent with the view that Congress was using the Philadelphia Convention as an advisory committee. If this was the Convention's role, then the Congress would have had authority over the "committee" and therefore the Convention's failure to follow Congress's directions might very well make it a runaway convention.

103. See Amar 1988, *supra* note 100, at 1048; Amar 1994, *supra* note 100, at 465; THE FEDERALIST NO. 43, at 316 (James Madison) (Benjamin Fletcher Wright ed., 1961).

the Convention's duty to make this departure, because the welfare of the nation was in jeopardy.<sup>104</sup>

These two explanations for the Convention's actions, for which there is significant support, do not suggest that the Convention believed it was not legally bound by the limits in the call. Is there any evidence for the opposite conclusion? The best evidence would be statements, made both at the Convention and in defense of its work, that a proposing convention cannot be limited and therefore that its actions were proper. The defenders of the unlimited convention view, however, have not offered such evidence.

Instead, the defenses of the Convention's actions are framed differently. James Madison, for example, attempted to deny or minimize that the convention was departing from the call.<sup>105</sup> It is only when it becomes clear that the Convention has departed, by changing the ratification method from unanimity of state legislatures to nine-thirteenths of conventions, that Madison grudgingly admits it. This is not how someone would argue who believed they were not bound by the call.<sup>106</sup>

#### C. THE SUPPOSED INTENT TO AVOID RELIANCE ON BOTH CONGRESS AND THE STATE LEGISLATURES

Walter Dellinger has also argued against a limited convention based on his interpretation of the intent of the Framers revealed in the Philadelphia Convention debates. Reviewing the statements made at the convention as well as the evolution of the amendment provisions, Dellinger discerns two "themes" of the debates concerning the amendment provisions: that "state legislatures should not be able to propose and ratify amendments that enhance their power"<sup>107</sup> and that "Congress should not have exclusive power to propose amendments."<sup>108</sup>

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104. See THE FEDERALIST NO. 40, at 290 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth . . .").

105. *Id.*

106. It might also be argued that the Philadelphia Convention believed that there could not be a limited convention at all (as opposed to the claim discussed in the text that it believed that the limits were not binding). But the same evidence that disproves the claim discussed in the text also refutes this claim.

107. Dellinger, *supra* note 20, at 1630. Dellinger's description of the first theme here—that "state legislatures should not be able to propose and ratify amendments that enhance their power"—is problematic for a variety of reasons. To begin with, even under a convention limited to a specifically worded amendment, state legislatures do not propose amendments. As discussed below, the convention must decide to propose the

From these two themes, Dellinger then concludes that the Framers would not have desired the limited convention view. First, he argues that conventions limited to a specifically worded amendment would allow the states more power than the Framers would have desired. If two thirds of the states applied for a convention limited to a specifically worded amendment (or to a very narrowly defined subject), that would give the states too much authority in the proposal process, since they could both propose and ratify the amendment.

Second, he argues that a convention limited to a specific subject would allow Congress more power over the convention than the Framers would have desired. If two thirds of the states applied for a convention on a subject, the limited convention view would require that Congress “define and enforce” the limits on the convention, which would give Congress too much power over the amendment method.<sup>109</sup> In particular, Dellinger believes that Congress would have to determine whether applications that differed slightly or significantly from one another should be counted as applying for the same convention.

It is important to emphasize that the methodology of Dellinger’s paper—like that of many of the other articles about Article V from the same period—has fallen out of fashion, especially among originalists. Rather than seeking the original meaning of the constitutional language, Dellinger seeks to discern the drafters’ intent from statements made, and the evolution of provisions, at the Philadelphia Convention. This approach has been subject to a variety of criticisms, including that it asks what the drafters who merely proposed the Constitution intended rather than what the Constitution meant to the country and the ratifiers who adopted it. But even assuming that one were to engage in this type of inquiry, Dellinger’s argument suffers from serious infirmities. In particular, the intent that Dellinger claims to divine from the

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amendment. In addition, even if the state legislatures did have power to propose an amendment, they would not necessarily have (or even be likely to have) control over the ratification. After all, if the state legislatures apply for an amendment that enhances their own power, and the convention approves it, Congress would then be likely to allocate the ratification decision to state conventions rather than to state legislatures, in the hope that the conventions might refuse to ratify it. Given the problems with Dellinger’s description of the first theme, I will interpret him as making the more plausible claim that the Framers would not have desired the states to have excessive power over the proposal and ratification process. This will allow his argument to be considered in its strongest light.

108. *Id.*

109. *See id.* at 1631.

Philadelphia Convention is unclear and supports the limited convention view at least as much as the unlimited one.

### 1. The States' Alleged Excessive Power

Let's start with Dellinger's claim that a convention limited to a specifically worded amendment would allow the states more power than the Framers would have desired. There are two basic problems with Dellinger's claim here: his inference that the Framers did not want the states to have significant influence over the proposing power and his argument that the Framers would not have desired conventions limited to a specifically worded amendment.

Starting with the first problem, Dellinger's inference that the convention would not have wanted the states to have a significant role over the proposing power is problematic.<sup>110</sup> The strongest evidence that he has here is from one delegate—Alexander Hamilton. Hamilton objected to a proposal that provided, “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.” Hamilton argued:

The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers— The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention.<sup>111</sup>

Thus, Hamilton opposed the provision because it gave the state legislatures power to apply for alterations with a view to increasing their powers. Dellinger infers from this that Hamilton opposed allowing states too much power in the amendment process and eventually uses this purpose to conclude that the Framers would have opposed a convention limited to a specifically worded amendment.

But Dellinger's argument here is doubtful. The best understanding of Hamilton's view is not that he was opposed to states having a significant role in the amendment process. Instead, it is that he was opposed to an amendment process that did not allow Congress to initiate amendments without the prior

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110. *See id.* at 1633.

111. 2 RECORDS, *supra* note 52, at 558.

consent of the states. He did not oppose the states being able to propose amendments; he merely believed that Congress should also be able to propose amendments. Several pieces of evidence support this interpretation. First, the provision Hamilton was criticizing would have given the state legislatures the exclusive power to initiate amendments—a convention could not be called unless the state legislatures applied for one. Hamilton’s words directly address this point. Because the state legislatures are focused on “increas[ing] their own powers,” they ought not to have the *sole* power to propose amendments. Instead, Congress “ought *also* to be empowered” to call a convention.<sup>112</sup>

Second, this interpretation of Hamilton’s position gains support from the fact that once the amendment provision was altered to permit Congress as well as the state legislatures to propose amendments, neither Hamilton nor other nationalists voiced this objection to the amendment provision. In fact, Hamilton was even willing to support a provision that clearly gave the states the power to propose amendments without the consent of the Congress or a national convention. Madison’s proposal discussed above, which Dellinger admits is most plausibly interpreted to require Congress to submit the amendments applied for by the state legislatures, was seconded by Hamilton.<sup>113</sup> This strongly suggests that Hamilton was not opposed to having state legislatures decide on specific proposals, so long as the Congress also had an independent means of proposing amendments.

How, then, can Dellinger interpret Hamilton’s words to suggest that the states should not have the power to apply for specific amendments? One possibility is that Dellinger has misinterpreted the chronology of the convention. In describing the convention’s consideration of these matters, he writes that the convention had agreed on “a concurrent power to Congress and the state legislatures to initiate the amendment process” and had “easily agreed on the method by which Congress would propose amendments.”<sup>114</sup> He then writes that the debate then focused on the alternative amendment method for the states. While “Mason of Virginia objected to congressional control over the proposal” of amendments, “set against his concerns was the threat, perceived by Hamilton, that the states would seek to

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112. *Id.* (emphasis added).

113. 2 RECORDS, *supra* note 52, at 559.

114. Dellinger, *supra* note 20, at 1625.



enhance their power at the expense of the federal government.” He concludes that “the drafters’ answer to this dilemma was to provide that a national convention to propose amendments be summoned at the request of two-thirds of the state legislatures.”<sup>115</sup>

But this description of the convention proceedings is misleading. As I have shown, Hamilton’s objections were not made to a method under which Congress could propose amendments on its own. Rather, he objected to a method that gave the state legislatures the sole power to initiate the amendment process. Thus, one cannot infer that Hamilton opposed significant state involvement in the proposal process.<sup>116</sup>

We can now turn to the second problem with Dellinger’s claim: Dellinger has weak arguments for why the Philadelphia Convention would have opposed a convention limited to a specifically worded amendment. He maintains that a convention limited to voting on whether or not to propose a specific amendment would have had little purpose, merely serving the function of “delaying the amendment process” and thereby providing additional time for reflection and debate.<sup>117</sup> But it is not clear why Dellinger reads the convention’s function so

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115. Dellinger, *supra* note 20, at 1625–26.

116. Dellinger also relies on Roger Sherman’s objection to Madison’s proposal (discussed above) of an amendment provision, which would have allowed the states to apply for Congress to pass an amendment. See Dellinger, *supra* note 20, at 1627–28. Sherman objected to the proposal on the ground that “three-quarters of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.” Dellinger claims that the change to the final Article V “might be seen as responsive to Sherman’s concern, for it provided that a national convention, rather than the states, would formulate proposed amendments.” *Id.*

Dellinger’s argument here, however, is quite a reach. First, if Sherman was concerned about protecting the states, then relying on a national institution (the convention), rather than the states, seems like a counterintuitive strategy. Moreover, employing a national convention that could act based on a majority vote would be less protective of “particular States” than relying on a two thirds vote of the states generally. (Although Dellinger does not make the argument, it might be thought that requiring two thirds of the state legislatures would be redundant, since three quarters of the states are required for ratification. But the Congress can choose ratification by state conventions and therefore having two thirds of the state legislatures approve the amendment would be an additional check.)

Finally, rather than Sherman’s concerns leading to the adoption of a national convention method, it seems that they led to other changes in Madison’s proposal. Once Madison’s proposal was replaced with a national proposing convention, Sherman sought to amend it by adding a provision stating “that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.” 2 RECORDS, *supra* note 52, at 630. The first part of the provision relating to internal police did not pass, but the second part was added to Article V.

117. See Dellinger, *supra* note 20, at 1632.

narrowly. The convention does not merely have the power to delay the amendment. The convention has the power to refuse to propose the amendment applied for by the states. This is a veto. Few people regard the President's veto over legislation as inconsequential; it is not clear why this veto is any different.<sup>118</sup> The convention's veto means that a national forum must agree to propose the amendment and it can choose not to do so. This is an important power.

Dellinger also argues that the Framers would not have intended a convention limited to a specifically worded amendment, because calling and holding the convention would have involved a great deal of work just to vote on a predetermined amendment.<sup>119</sup>

This argument, however, suffers from two problems. First, it seems problematic to argue that a convention limited to a specifically worded amendment would not be worth the effort. As discussed, that convention has a crucial role—it is the sole national institution that reviews the proposed amendment and it has the power to veto the proposed amendment. Thus, the convention's role seems important enough to justify its existence. While this convention does not do any drafting, that does not mean its function is unimportant. The Constitution employs state ratifying conventions, which also do no drafting, and no one believes that is odd or inappropriate.

Second, Dellinger focuses only on a convention limited to a specifically worded amendment. But the Framers did not restrict the states to applying only for this type of convention. Rather, they also allowed the states to apply for an unlimited convention or a convention limited to a subject. Thus, the question is not whether it would have made sense for the Framers to have established a procedure only for conventions limited to specifically worded amendments, but instead whether it would have made sense to have allowed the states to call either an unlimited convention, a convention limited to a general subject, or a convention limited to a specifically worded amendment. This convention method makes perfect sense, since it allows the state legislatures to decide what type of convention the particular circumstances required.

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118. In fact, this veto is much stronger than the President's, since it is absolute veto that cannot be overridden.

119. Dellinger, *supra* note 20, at 1632–33.

## 2. Congress's Alleged Excessive Power

Having shown that the debates at the Philadelphia Convention do not suggest that the Framers would have opposed a convention limited to a specifically worded amendment, we can now turn to Dellinger's claims about a convention limited to a subject. Dellinger argues that a convention limited to a sufficiently broad subject might avoid the problems discussed above, but would suffer from another problem. If the different states apply for a single convention limited to a subject, but submit applications with differing language, then this will require the Congress to determine whether the states have applied for the same convention and, if so, to determine what the limits of that convention are.<sup>120</sup> Dellinger argues that the Framers would not have intended for Congress to have this power, because the purpose of the convention method was to provide an amendment method that did not require Congress's consent and Congress might abuse its power in an effort to sabotage an amendment. Once again, there are several serious problems with Dellinger's argument.

First, Dellinger's argument that the Framers would not have desired the Congress to be involved in determining what limits the states had applied for is unsupported. The Framers, of course, do not discuss the specific issue. Although initially it might seem reasonable to infer that the Framers would have always desired Congress to have less power, that is not necessarily the case. The Philadelphia Convention did not entirely strip Congress from participating in the convention process. Congress is clearly given the role of calling the convention, which requires that it decide a host of matters. Even under the unlimited convention view that Dellinger assumes, Congress must make numerous decisions, including how long state applications for a convention last, whether states can withdraw their applications, whether applications sent to the wrong place count, whether state applications that have not received the approval of the governor count, whether applications that seek a limited convention should be counted for an unlimited convention, whether Congress can regulate the voting rule at the convention, whether Congress can regulate the

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120. For example, if some states apply for a convention that will propose an amendment that limits debt, and other states apply for one that will propose a limit on debt and taxes, the Congress will have to determine whether they have applied for the same convention and, if so, to determine whether that convention can make a proposal limiting taxation.

number of delegates from each state, and whether Congress can regulate the method of appointing or electing convention delegates.<sup>121</sup> In addition, Congress is expressly given the power to decide whether the proposed amendment should be ratified by state legislatures or conventions.<sup>122</sup>

Thus, the Framers did not uniformly disfavor a congressional role. Rather, they gave Congress a limited role, appearing to allow Congress to act when the Framers believed the advantages outweighed the costs. Since it is quite possible that the Framers believed that having a limited convention was worth the additional congressional involvement, Dellinger has not pointed to anything in the convention debates to suggest the Framers would not have allowed for limited conventions.

Second, even if one assumes that the Philadelphia Convention did want to minimize Congress's ability to block amendments under the convention method, the delegates still might have adopted the limited convention view. Although the limited convention view might give Congress more of a role, the dangers from that additional role might be outweighed by the problems created by allowing only unlimited conventions. Under the unlimited convention view, state legislatures may fear applying for unlimited conventions out of the concern that such conventions might propose amendments the state legislatures strongly oppose. If that fear leaves the convention method ineffective, then Congress would have more ability to block amendments under the unlimited convention view than under the limited convention view, because the only workable convention method would be the congressional proposal method. Thus, one cannot even infer that the Framers would have adopted the unlimited convention view had they been solely focused on minimizing Congress's ability to obstruct amendments.

Finally, the case for concluding that the Framers would have opposed limited conventions is further weakened when one recognizes that the harm to the convention method from congressional involvement is much smaller than Dellinger suggests. Under the limited convention view, the states have a

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121. See CAPLAN, *supra* note 3, at 105–14, 146–49.

122. U.S. CONST. art. V. Congress's power to decide on the ratification method is a significant power. Not only is the method important for influencing whether a proposed amendment will be ratified; it is also subject to abuse because Congress might fail to choose a ratification method, which might cause an amendment never to be ratified.

choice. If they believe that the risk of Congress acting improperly is too great, they can always choose to apply for an unlimited convention, which would leave them in the same place that Dellinger's interpretation would. But if they believe the risks are small enough—or the benefits outweigh this risk—then they can apply for a convention limited to a subject. Moreover, to reduce the risks of Congress abusing its power, the different states can all agree to use the same language to describe the subject. Given that the states have a choice under the limited convention view as to what type of convention to apply for, one might actually argue that they are unambiguously better off under that view, since they can always choose to apply for an unlimited convention. One might, then, reach the further conclusion that the harm from the unlimited convention view to the Framers' purpose of allowing amendments to be enacted without a congressional obstacle is small indeed.

## VII. CONCLUSION

This Article has re-examined the question of whether the Constitution authorizes limited conventions. I have argued that the Constitution's original public meaning allows the state legislatures to apply for a convention limited either to a subject or to a specifically worded amendment, that Congress must then respond to that application by calling for a limited convention, and that the convention must then follow the limitations of that call. The conclusions I have reached here do depart from those of most of the commentators who discussed the issue in the 1960s and 1970s, as well as some since then. But as I have tried to show, their conclusions were based on a mistaken understanding of the original meaning.

If my argument is correct, it shows that a significant problem with the constitutional amendment process—that the only method for enacting amendments, that does not require Congress's consent, does not work—is not primarily the fault of the Constitution's drafters and ratifiers. Rather, it is the responsibility of interpreters who have failed to follow the original meaning. If the correct understanding of the original meaning were widely accepted in the legal academy, that would bring us one step closer to a workable noncongressional amendment process. Taking the next step, however, would be harder. It would involve generating a sufficiently strong consensus among politicians, judges, and lawyers that limited conventions are constitutional, so that state legislators would

have the confidence that their application for a limited convention would not result in a runaway convention. Unfortunately, it is at present difficult to imagine getting to that point, but stranger things have happened.

§ 5.4. *Michael Stern, Toward a Safeguarded Article V Convention*

**Reopening the Constitutional Road to Reform:  
Toward a Safeguarded Article V Convention**

Michael Stern

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# REOPENING THE CONSTITUTIONAL ROAD TO REFORM: TOWARD A SAFEGUARDED ARTICLE V CONVENTION

MICHAEL STERN\*

“[A] constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions.”  
—James Madison, *The Federalist No. 49*<sup>1</sup>

Every one of the twenty-seven amendments to the United States Constitution has been proposed by the Congress.<sup>2</sup> Even though the First Congress proposed a number of amendments that limited congressional powers or privileges (namely the Bill of Rights<sup>3</sup> and the amendment to limit congressional pay raises<sup>4</sup>), subsequent Congresses have shown little interest in following this example. They have proposed amendments that significantly expand congressional power (such as the Sixteenth Amendment that authorized a federal income tax<sup>5</sup>) but have proposed none that significantly limit congressional power or prerogatives. Recent Congresses, for example, have declined to propose amendments to require a balanced budget or impose term limits.<sup>6</sup> This would have come as no surprise to the Framers, who understood that Congress could not be expected to provide a check on itself.<sup>7</sup> The system they designed not only divided powers within the federal government, but also between the federal and state governments to provide a “double security” for the rights of the people.<sup>8</sup> As James Madison explained in *The Federalist No. 51*, under this

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1. THE FEDERALIST NO. 49, at 108 (James Madison) (J. & A. McLean ed., 1788).
2. See Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 904 (1968).
3. U.S. CONST. amends. I–X.
4. U.S. CONST. amend. XXVII.
5. U.S. CONST. amend. XVI.
6. See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1513 (2010).
7. See *id.* at 1525.
8. See THE FEDERALIST NO. 51, at 119–20 (James Madison) (J. & A. McLean ed., 1788).



system “[t]he different governments will control each other.”<sup>9</sup> For this reason they included in Article V of the Constitution an alternative method for proposing constitutional amendments, one that did not require congressional acquiescence.<sup>10</sup> The convention method of amendment gave the states a constitutional road to bypass Congress when it was necessary to “erect barriers against the encroachments of the national authority,” as Alexander Hamilton wrote in *The Federalist No. 85*.<sup>11</sup>

However, uncertainties and fears regarding the convention method have prevented its successful use to propose constitutional amendments.<sup>12</sup> In particular, many have feared that an Article V Convention might stray far from the concerns that caused the states to call for it.<sup>13</sup> The states might desire to set forth on the road to a specific constitutional reform, but a so-called “runaway convention,” it is suggested, could take an unforeseen and dangerous detour from the intended path, proposing radical or ill-considered amendments to the Constitution.<sup>14</sup>

In this Article, I will evaluate the risks of a runaway convention in light of the constitutional text, structure, and purpose of Article V and will suggest why these risks are much smaller than often suggested. I will also suggest additional safeguards to minimize any concerns regarding a runaway convention. In combination with the inherent protections of Article V, such safeguards can ensure that the constitutional road to reform will be clearly defined and well marked, and may be traveled safely by the states when they must act to impose limitations on a “runaway Congress.”

## I. CONSTITUTIONAL CONSIDERATIONS

Article V provides that:

[T]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no

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9. *Id.* at 120.

10. See Rappaport, *supra* note 6, at 1516–17.

11. THE FEDERALIST NO. 85, at 363–64 (Alexander Hamilton) (J. & A. McLean ed., 1788).

12. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 763 (1993).

13. See generally, e.g., Arthur H. Taylor, *Fear of an Article V Convention*, 20 BYU J. PUB. L. 407 (2006) (analyzing the rationality of common fears related to the process).

14. See, e.g., Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 4–5 (1979).

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.<sup>15</sup>

The debate involving the risk of a runaway convention has generally focused on the question of whether a “Convention for proposing Amendments” is, by its constitutional nature, an unlimited convention or whether such a convention may be limited, as a matter of constitutional theory, to considering only such amendments within the scope of the “Application” of the states. Some commentators suggest that unless one can provide a definitive answer to this legal question, it is simply too risky to hold an Article V Convention.<sup>16</sup> I maintain that this is not the case. Nonetheless, the constitutional foundations of the Article V Convention are significant insofar as they shed light on how the constitutional actors in the convention amendment process should, and likely will, fulfill their roles.

#### *A. The Origins of the Article V Convention*

Article V originated as part of the Virginia Plan presented to the Philadelphia Convention on May 29, 1787.<sup>17</sup> The Virginia Plan stated that the “Articles of Union” should be amendable “whensoever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto.”<sup>18</sup>

This provision was referred to the Committee of Detail, which produced a draft stating that “[t]his Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose.”<sup>19</sup> Implicit in this statement is that state legislatures would determine, at least in the first instance, when it would become necessary to amend the Constitution and that a convention would be called for the purpose of considering any amendment that the states deemed necessary.<sup>20</sup>

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15. U.S. CONST. art. V.

16. See, e.g., Gunther, *supra* note 14, at 25 (warning that the road “promises controversy and confusion and confrontation at every turn”); Richard W. Hemstad, *Constitutional Amendment by Convention – a Risky Business*, 36 WASH. ST. B. NEWS 16, 21 (1982) (predicting the possibility of “[A] period of significant instability in the American political system . . .”).

17. See Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 360–61 (1979).

18. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., 1911).

19. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 159 (Max Farrand ed., 1911).

20. The language chosen by the Committee of Detail may have been derived from the

Subsequently, on September 10, 1787, objections targeted this provision on the grounds that it gave only the state legislatures the power to initiate amendments.<sup>21</sup> Hamilton argued that the states would “not apply for alterations but with a view to increase their own powers.”<sup>22</sup> Congress, he contended, “will be the first to perceive and will be most sensible to the necessity of amendments, and ought also be empowered” to call a convention on its own initiative.<sup>23</sup>

Madison then proposed a substitute that addressed Hamilton’s concerns.<sup>24</sup> His proposal provided:

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.<sup>25</sup>

The convention adopted the proposal by a vote of nine in favor, one opposed, and one divided.<sup>26</sup>

The Madison Substitute served two functions. First, it eliminated the convention altogether, reflecting Madison’s reservations regarding the effectiveness of the convention method.<sup>27</sup> Second, it put the state legislatures and Congress on equal footing. Congress shall propose amendments whenever amendments are deemed necessary by two-thirds of both Houses or applied for by two-thirds of the states.

The Madison Substitute does not explicitly state *what* amendments Congress shall propose. The only reasonable interpretation, however, is that

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Georgia Constitution of 1777, which stated that “the assembly shall order a convention to be called for that purpose.” GA. CONST. of 1777, art. LXIII. The Georgia assembly was to call a convention for amendments “specifying the alterations to be made, according to the petitions preferred to the assembly.” *Id.*; see RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 95 (1988).

21. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 557–58.

22. *Id.* at 558.

23. *Id.*

24. See *id.* at 559.

25. *Id.*

26. See *id.*

27. Responding to the draft produced by the Committee of Detail, “Mr. Madison remarked on the vagueness of the terms, ‘call a Convention for that purpose,’” posing the following questions: “How was a Convention to be formed? [B]y what rule decide[d]? [W]hat the force of its acts?” *Id.* at 558. After the convention method was reintroduced, Madison again noted “difficulties might arise as to the form, the quorum [etc.]” *Id.* at 630.

Congress is to propose those amendments deemed necessary by two-thirds of both Houses or applied for by two-thirds of the states. It would be far-fetched to contend, as literally permitted by the language, that Congress could propose an amendment that was different from one deemed necessary by two-thirds of both Houses. It would be equally unreasonable to conclude that Congress could propose an amendment that was different from one applied for by the state legislatures.<sup>28</sup>

There is, or at least there was at the time, a significant logistical difference between the two types of amendments. While it would have been straightforward to determine which amendments might be deemed necessary by two-thirds of Congress, coordination among the state legislatures was much more difficult considering the limitations of communications in the eighteenth century. It does not appear from the records of the Philadelphia Convention that anyone considered the possibility that the state legislatures could agree, in advance, on the text of a particular desired amendment to the Constitution. One can only assume that the Framers believed that agreement on a single text without a meeting among the states was impractical or created too great a potential for miscommunication and misunderstanding.

This view likely underlay the objection raised by George Mason, on September 15, 1787, to the Madison Substitute.<sup>29</sup> Mason described the provision as “exceptionable [and] dangerous” because “the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress.”<sup>30</sup> Therefore, Mason believed that “no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.”<sup>31</sup>

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28. Such a reading would mean that if the states applied for an amendment to establish freedom of speech, for example, the Congress could propose, by a majority vote, an amendment on an entirely different subject, something that it would lack the power to do in the absence of the state applications. Clearly this was not the intent of the Madison Substitute. As James Kenneth Rogers has noted, the Madison Substitute makes little sense except in the context of a specific type of amendment desired by the states. Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1017 (2007).

29. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 629.

30. *Id.*

31. *Id.* Mason’s view would be echoed in the remarks of a delegate to the state constitutional convention of Maryland two centuries later; Royce Hanson, during the debates of Maryland Constitutional Convention of 1967–68, noted that:

[T]here is probably no group of people in creation less likely to reform themselves than the members of the legislature when the time for that reform has arrived, and it is for this reason that it seems to me that we should provide in the constitution a means external to the legislature for the revision of that part of the constitution which pertains to the legislature.

To remedy this problem, “[Gouverneur] Morris [and Eldridge] Gerry moved to amend [Madison’s language] so as to require a Convention on [the] application of [two thirds] of the [states.]”<sup>32</sup> Madison responded that he “did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call . . . a Convention on the like application.”<sup>33</sup>

Although not reflected in the records of the Philadelphia Convention, the answer to Madison’s point must have been that the calling of a convention was merely a ministerial act, with no degree of discretion, while proposing amendments would necessarily have involved some degree of discretion. For example, even if two-thirds of the states applied for a convention and clearly specified the type of amendment they wanted, Congress would still have to agree on the precise wording of the amendment. If Congress was unable to do so, the amendment would never be proposed.

Despite believing the Morris/Gerry proposal to be unnecessary, Madison stated that he had no objection to “a Convention for the purpose of amendments,” although he reiterated his concerns about the effectiveness of the convention method, given that there was no definition of how the convention would actually operate.<sup>34</sup> Lacking time or inclination to address these concerns, the Philadelphia Convention agreed to the Morris/Gerry proposal.<sup>35</sup> The amendment assumed its final form when it was agreed to include substantive limitations on the amendment power, including “that no State, without its Consent, [could] be deprived of . . . equal Suffrage in the Senate.”<sup>36</sup>

It seems evident from this history that the primary, if not sole, purpose of the convention method was to enable the states to initiate the amendment process without the need of congressional assistance and to solve the logistical problem of reaching agreement on a single text.<sup>37</sup> The history also suggests an intent that the Article V Convention serves as an aid to the states and not to function as an independent entity exercising significant discretion in its own right.

This view of Article V, moreover, was the one presented to the states during the ratification process. Madison continued to adhere to the view that the proposing power given to the convention was merely a quasi-

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JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 61 (2009).

32. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 629.

33. *Id.* at 629–30.

34. *Id.*

35. *See id.*

36. *Id.* at 662–63.

37. *See* CAPLAN, *supra* note 20, at 29 (“The division of the amendment power was the essential compromise of [A]rticle V, for determining who could propose amendments went far to determining what kind of amendments would be adopted.”).

ministerial extension of the state's power to initiate amendments.<sup>38</sup> In *The Federalist No. 43*, he explained that Article V “equally enables the general and the State governments to originate the amendment of errors.”<sup>39</sup> In other words, there was no substantive difference between the power of the states to apply for a convention and the power of Congress to propose amendments.

During the debates over ratification of the Constitution, Federalists pointed to the convention method as a key safeguard to protect the states and the rights of the people against potential overreach by the new national government. For example, in *The Federalist No. 85*, Hamilton emphasized the convention method as a means of correcting any perceived errors in the Constitution, explaining that “alterations [in the Constitution] may at any time be effected by” the requisite number of states.<sup>40</sup> He explained that “whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.”<sup>41</sup> Rejecting the notion that Congress could block the convention method, Hamilton wrote:

[T]he national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan, [C]ongress will be *obliged*, “on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the [C]onstitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof.” The words of this article are preemptory. The [C]ongress “*shall* call a convention.” Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. . . . We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.<sup>42</sup>

These assurances regarding the convention method would, at best, be misleading if the states lacked any ability to define or control the Article V Convention. If the proposing power of the convention were entirely separate from and independent of the application power of the states, one could not “safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority,”<sup>43</sup> nor could one say that the state and federal governments had equal ability to “originate the amendment of errors.”<sup>44</sup>

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38. THE FEDERALIST NO. 43, at 65 (James Madison) (J. & A. McLean ed., 1788).

39. *Id.*

40. THE FEDERALIST NO. 85, *supra* note 11, at 361.

41. *Id.* at 362.

42. *Id.* at 363–64.

43. *Id.*

44. THE FEDERALIST NO. 43, *supra* note 38, at 65.

*B. Textual Analysis of Article V*

The key language of Article V is that "[t]he 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 . . . ."<sup>45</sup>

Professor Michael Stokes Paulsen, echoing Professor Charles Black, argues that "[t]he most straightforward reading of the constitutional text concerning what the convention *is*—'a Convention for proposing Amendments'—strongly suggests that it must be, in the words of Professor Black, 'a convention for proposing such amendments as that convention decides to propose.'"<sup>46</sup> Professor Paulsen further contends that "[t]he text supplies no basis for inferring a power, on the part of either Congress or applying state legislatures, alone or in concert, to limit what the convention may consider."<sup>47</sup>

It is true that the text is silent as to what amendments the convention may propose. It is not at all obvious, however, that this silence means that the convention is unlimited in what it may propose. To the contrary, it seems perfectly logical to infer a relationship between the "Application" of the state legislatures and the "Convention for proposing Amendments" to which the application gives rise.<sup>48</sup> Rather than reading the "Convention for proposing Amendments" as a "[c]onvention for proposing such amendments as that convention decides to propose,"<sup>49</sup> it would be at least equally natural to read it as a "convention for proposing such amendments as the state legislatures have applied for."<sup>50</sup>

Professor Paulsen also suggests that the structure of Article V supports the inference that a convention must be unlimited. In his words, "[t]he convention-proposal method is worded in parallel with the congressional-proposal method, implying an equivalence of their proposing powers . . . ."<sup>51</sup> Because Congress is not subject to any limitation on the amendments it may propose, in Professor Paulsen's view, the convention must be similarly unlimited.<sup>52</sup>

This analysis overlooks the presence of the two triggering clauses in Article V.<sup>53</sup> In the case of the congressional-proposal method, the triggering

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45. U.S. CONST. art. V.

46. Paulsen, *supra* note 12, at 738 (quoting Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 199 (1972)).

47. *Id.*

48. U.S. CONST. art. V.

49. Black, Jr., *supra* note 46, at 199.

50. *Id.*

51. Paulsen, *supra* note 12, at 739.

52. *See id.*

53. U.S. CONST. art. V.

clause is “whenever two thirds of both Houses shall deem it necessary.”<sup>54</sup> In the case of the convention-proposal method, the triggering clause is “on the Application of the Legislatures of two thirds of the several States.”<sup>55</sup> The structure of Article V implies an equivalence between these two triggering clauses, which becomes clearer when one considers the original language of the Madison Substitute.<sup>56</sup> In that provision, the two triggering clauses were alternative means of triggering the congressional-proposal method.<sup>57</sup> As finally adopted in Article V, one clause triggers the congressional-proposal method, while the other triggers the convention-proposal method.<sup>58</sup>

When one recognizes the equivalence of the two triggering clauses, the structure of Article V strongly supports the conclusion that a convention may be limited.<sup>59</sup> Just as Congress’s power to propose amendments is limited to those amendments that two-thirds of both Houses deem necessary, the convention’s power to propose amendments must be limited to those amendments that two-thirds of the state legislatures have applied for.

Finally, Professor Paulsen argues that the Framers must have understood the term “convention” to refer to a body with unlimited or “plenary” powers.<sup>60</sup> This contention is unpersuasive for several reasons. First, the historical evidence of practice at the time of the founding generation suggests that conventions served a variety of purposes and the term did not have a single fixed meaning.<sup>61</sup> Specifically, not all conventions were understood to be plenary, and limited conventions were known—such as the convention provided for in the Georgia Constitution of 1777.<sup>62</sup>

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54. *Id.*

55. *Id.*

56. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 559.

57. See *id.*

58. See U.S. CONST. art. V.

59. See *id.*

60. Paulsen, *supra* note 12, at 740 (“[T]he best early evidence of ‘contemporaneous understanding,’ as revealed by early practice, suggests that the founding generation understood conventions to be plenary.”).

61. See CAPLAN, *supra* note 20, at 3–26. Indeed, Madison’s objection to “the vagueness of the terms, ‘call a Convention for the purpose’” strongly suggests that the meaning of the term in the context of Article V was not so clear or self-evident. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 558.

62. See CAPLAN, *supra* note 20, at 95–98. Recent scholarship by Professor Robert Natelson further supports this point. See Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan (Part 1 in a 3 Part Series)*, POLICY REPORT NO. 241 (GOLDWATER INSTITUTE), Sept. 2010, at 8–12, available at <http://www.goldwaterinstitute.org/article/5005>. Surveying the historical evidence, Professor Natelson concludes that “[a] reference to a ‘convention’ in an 18th-century document did not necessarily mean a convention with plenary powers, even if the reference was in a constitution. Although it *might* refer to an assembly with plenary powers, it was *more likely* to denote one for a limited purpose.” *Id.* at 10.



Second, even if conventions generally had been understood to be plenary, it does not follow that the specific "Convention for proposing Amendments" established in Article V was intended to be of this nature.<sup>63</sup> This convention, after all, was intended for a specific, and limited purpose—to propose amendments to "this Constitution."<sup>64</sup> It was not given the power to enact anything, merely to propose, and the power to propose was limited to "amendments" to "this Constitution."<sup>65</sup> Even the power to propose was subject to substantive limits.<sup>66</sup> For example, it could not extend to denying the states equal suffrage in the Senate.<sup>67</sup> The evidence, therefore, does not support the conclusion that an Article V Convention must be understood as plenary.

### *C. The Purpose of the Article V Convention*

Scholars who believe that an Article V Convention must be unlimited have struggled to explain the constitutional purpose that would be advanced by this interpretation. Although it is possible to argue that the unlimited convention is simply an unintended consequence of the compromise language that the Framers ultimately settled upon, this argument is weakened by the absence of a plausible rationale for the unlimited convention.<sup>68</sup>

This issue must be distinguished from questions regarding the practical difficulties of defining and enforcing limits on an Article V Convention. It is one thing to argue that these difficulties mean that an Article V

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63. See generally Gunther, *supra* note 14.

64. U.S. CONST. art. V.

65. I will not rehearse here the long-standing debate as to whether the Philadelphia Convention itself was a "runaway convention" that ignored the limits on its authority under the Articles of Confederation. Fears that an Article V Convention might exercise power beyond that granted by Article V itself are, by definition, extra-constitutional in nature. No one can prove definitively that a group of individuals will not claim to exercise some authority that they do not have. It should be observed, however, that the chances of an Article V Convention having the prestige or ability to assert an extra-constitutional legitimacy, in effect to proclaim a new constitutional order for the United States, is exceedingly remote.

66. U.S. CONST. art. V

67. *Id.*

68. As Professor Rappaport notes:

If limited conventions are not recognized by the Constitution, then the constitutional provision allowing the states to decide whether to hold a convention seems peculiar. Why would the Constitution allow the states to decide to call a convention, but not allow them to specify what subjects the convention should discuss?

Rappaport, *supra* note 6, at 1521.

Convention will be unlimited as a practical matter. It is another to contend that Article V affirmatively grants a convention the power to address any subject, however unrelated to the application that gave rise to that convention. Other than to discourage state legislatures from applying for a convention in the first place, it is difficult to see what purpose is served by granting the convention such wide powers of proposal.

It might be argued that the Framers chose an unlimited convention because, on the one hand, they saw little risk in allowing the convention to propose whatever amendments it pleased, while, on the other, attempting to define the limits of an Article V Convention in any kind of useful way would simply be too difficult. This argument has some attraction, particularly if one believes, as I do, that the ratification requirements of Article V constitute substantial protection against radical or ill-conceived amendments.

There are, however, two strong objections to this argument. First, the Framers were not as blithe toward proposed constitutional amendments as it would suggest. Article V requires a two-thirds majority of both Houses to propose a constitutional amendment, even though the amendment must still be ratified by three-fourths of the states.<sup>69</sup> It is difficult to see why the Framers would not have insisted that an amendment proposed by a convention be similarly grounded in a broad consensus—as would be the case if the amendment were responsive to the application of two-thirds of the state legislatures.

Second, the difficulty of definition may explain why Article V does not attempt to define the relationship between the state application and amendments proposed by convention for purposes of *all* conventions that might be applied for by the states. It does not, however, provide a reason why constitutional actors<sup>70</sup> in the amendment process could not define and enforce such a relationship in the context of a *particular* convention call.

Other attempts to identify a constitutional purpose of the unlimited convention are similarly unavailing. Professor Walter Dellinger argues that “the [F]ramers did not want to permit enactment of amendments by a process of state proposal followed by state ratifications without the substantive involvement of a national forum.”<sup>71</sup> By transferring the proposing power from Congress to the convention, the Framers chose a body that would be “like Congress, a deliberative body with a national perspective, capable of assessing the need for constitutional change as well as developing proposals to be submitted for ratification.”<sup>72</sup>

It is possible that the Framers valued the deliberative capabilities of the convention, although there is no evidence of this in the debates during the

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69. *Id.*

70. State legislatures, the courts, Congress, and the convention itself.

71. Walter Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1630 (1979).

72. *Id.* at 1626.

Philadelphia Convention or the ratification process. To the contrary, the evidence discussed above suggests that the purpose of the deliberation process was to serve primarily as an aid to the states in solving the logistical difficulties of reaching an agreement on the text of a proposed amendment.<sup>73</sup>

In the event that the convention was to exercise a significant deliberative function, it does not follow that its deliberations should be unlimited. It is possible that the Framers intended the convention to deliberate on alternative solutions to pertinent issues; however, it is difficult to imagine what purpose would be served by having the convention deliberate on unrelated issues. Not only would such a broad deliberative scope serve no discernible purpose, it would make it less likely that the convention would fulfill what Professor Dellinger acknowledges as its core mission of responding to the states' grievances.<sup>74</sup>

Like Professor Dellinger, Professor Gerald Gunther emphasizes the deliberative function of the Article V Convention, but he also suggests that the convention serves the purpose of providing a check on the less deliberative proceedings of the state legislatures.<sup>75</sup> He notes that "[t]hirty-four state legislatures acting separately simply are not as likely to act as seriously as a single national forum in the proposing of constitutional amendments."<sup>76</sup> Professor Gunther contends that this consideration supports the interpretation of the convention as unlimited.

There is little evidence to suggest that the Article V Convention was intended to provide a check on the state legislatures. Professor Gunther cites Roger Sherman's objection, raised after the Philadelphia Convention had adopted the Madison Substitute, "that three fourths of the States might be brought to do things fatal to particular States."<sup>77</sup> Contrary to Gunther's assertion, Sherman's objection was not to the Madison Substitute in particular, as shown by the fact that he continued to raise objections after

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73. Indeed, Professor Dellinger acknowledges that the amendment-proposing function does not necessarily involve any significant degree of deliberation. He notes that the "most plausible reading" of the Madison Substitute "is that it would have permitted two-thirds of the state legislatures to propose amendments to the Constitution; Congress would merely transmit those amendments to be ratified." *Id.* at 1628. Moreover, he acknowledges that the transfer of the amendment-proposing function from Congress to the convention "may have been based on Mason's belief in the practical necessity of having a single deliberative body undertake the consultation, debate, drafting, compromise, and revision necessary to produce an amendment." *Id.* at 1629-30.

74. *See id.* at 1639 ("It is reasonable to expect that a convention would choose to confine itself to considering amendments addressing the problem that led states to apply for the convention.").

75. *See* Gunther, *supra* note 14, at 12-13.

76. *Id.* at 19.

77. *Id.* at 15 (internal quotation marks omitted).

the convention method was adopted.<sup>78</sup> What Sherman wanted was substantive limits on the amendment power to protect states' rights.<sup>79</sup>

Granting Professor Gunther's premise that the Framers intended the convention as a check on the states, the rationale for an unlimited convention is still lacking. Even a convention that is limited to consideration of a single amendment must deliberate regarding the meaning and effect of that amendment and reach a decision as to whether to propose it.<sup>80</sup> Thus, assuming for argument's sake that the Framers intended that the Article V Convention serve as a check on the allegedly impulsive state legislatures, it fulfills that purpose just as well within the framework of a limited convention as that of an unlimited convention.

Finally, it has been argued that the unlimited convention is a necessary result of the Framers' desire to limit Congress's role in the convention method process.<sup>81</sup> Professor Paulsen, for example, argues that "[i]f states could call for a limited convention, Congress would be placed in the position of prescribing and enforcing . . . limitations on the work of the convention, giving Congress a major role inconsistent with the convention method's intended purpose."<sup>82</sup>

The convention method was designed to limit Congress's role in the state-initiated amendment process.<sup>83</sup> Allowing Congress to define the limits of an Article V Convention would indeed raise serious concerns. However, no such concerns are raised if the states prescribe the limits in their application and Congress simply calls the convention, without adding to or subtracting from what the states have declared. In fact, were Congress to reject the application for a limited convention, or call for an unlimited convention in contravention of the application, this would, itself, arguably expand Congress's role beyond what the Framers intended.<sup>84</sup>

With regard to determining whether a proposed amendment must be submitted to the states for ratification, Congress will have to exercise some degree of judgment, regardless of whether a convention is limited or unlimited. There could, for example, be disputes about whether a particular amendment was proposed in accordance with the convention's voting or other rules. Similarly, Congress may have to resolve disputes about whether a particular amendment falls within the scope of a limited convention. Such a determination, however, need not involve an undue amount of

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78. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 630–31.

79. *See id.*

80. *See* Dellinger, *supra* note 71, at 1631–32.

81. *See* Paulsen, *supra* note 12, at 739.

82. *Id.* at 739.

83. *See* Paulsen, *supra* note 12, at 739.

84. To be clear, if one assumes that an application for a limited convention is invalid, Congress presumably would have the power to reject such application. But the fact that Congress is required to determine whether an application is valid is not an argument for or against a limited convention. *See* Dellinger, *supra* note 71, at 1624.

congressional discretion. If the states set forth clear rules defining the scope of the convention, Congress may enforce these rules without raising any concerns about exceeding its proper role.<sup>85</sup>

#### *D. The Role of Constitutional Doubt*

The above discussion identifies some weaknesses of the theory that an Article V Convention must be unlimited and explains why the limited convention theory is more consistent with the constitutional text, structure, and purpose. It must be acknowledged, however, that the *purely legal* issue of whether an Article V Convention may be limited cannot be definitively resolved. Constitutional scholars have long debated the question, and it is widely recognized to be a quintessentially open one.

Our concern here, however, is not with identifying the “right answer” to a constitutional question in the abstract, but with determining the real-world risks of a runaway convention. Those who are worried about a runaway convention will probably not be mollified by the assurance that such a convention would be unconstitutional, even if there were greater scholarly consensus on the point. Moreover, asking the question of how the United States Supreme Court might resolve the issue produces no more of a definitive answer, and indeed, it is unclear when or whether the courts might intervene in the convention amendment process.<sup>86</sup>

It has often been assumed that these uncertainties enhance the risks of an Article V Convention, but this assumption is flawed. What it overlooks is the role of constitutional doubt in guiding the actions of constitutional actors, other than the courts, within the framework of the convention amendment process. These actors must exercise both political and legal judgment in performing their functions. So long as there is a serious doubt regarding the constitutionality of an out-of-scope amendment, the

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85. Cf. *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) (holding that a court may interpret and apply a rule of the U.S. House of Representatives without infringing on the House’s exclusive rulemaking power, so long as the rule is sufficiently clear that the court may be confident in its interpretation).

86. As Professor Randy Barnett has observed, claiming that something is “unconstitutional” usually means one of the following: (1) it may refer to the actual meaning of the Constitution, independent of any authority’s interpretation of that meaning; (2) it may refer to what the Supreme Court has said about a particular constitutional issue in the past; or (3) it may refer to a prediction that a majority of the Supreme Court would vote that the particular action is unconstitutional. See Randy Barnett, *In What Sense is the Personal Health Care Mandate “Unconstitutional”?*, THE VOLOKH CONSPIRACY (Apr. 16, 2010, 11:27 AM), <http://volokh.com/2010/04/16/in-what-sense-is-the-personal-health-insurance-mandate-unconstitutional>. In this case, however, there is virtually no relevant judicial authority and little basis for predicting how, or whether, the Supreme Court would rule. We are therefore primarily interested in the best arguments as to the meaning of the Constitution and how constitutional actors, other than the courts, will likely respond to them.

constitutional actors should refrain from proposing, submitting, or ratifying such an amendment.

1. The Article V Convention. If the state application limits the convention's deliberations either to a particular subject or a particular amendment, the convention will have to determine how to respond to that limitation. The issue is likely to arise at the outset of the convention, when the delegates vote to adopt rules to govern the proceedings. As discussed later, the states applying for a limited convention should instruct their delegates to vote for rules that limit the convention's deliberations in accordance with the application.

As a practical matter, the question of the constitutionality of an out-of-scope amendment will probably be of limited significance to the Article V Convention as a whole. Lacking any extended institutional existence, it is doubtful that the convention would give a great deal of attention to the constitutional issue, unless there was a serious attempt to push an out-of-scope amendment. In that case, it seems likely that the political difficulties of proposing the amendment would have greater salience than the legal issues.

Those delegates who have been instructed to comply with the limitations set forth in the application of their state, however, will have a strong legal incentive to abide by those instructions. Failure to do so would mean violating a personal obligation under state law. Unless the delegate believes that the United States Constitution clearly overrides this obligation, the delegate would likely comply with it. Furthermore, it should be noted that even if the Article V Convention had the power, under the federal Constitution, to propose out-of-scope amendments, it does not follow that states are powerless to instruct their delegates with regard to such amendments.<sup>87</sup> Thus, the legal uncertainties weigh heavily against any delegates violating their state law obligations to oppose an out-of-scope amendment.

2. Congress. If an Article V Convention were to propose an out-of-scope amendment, Congress would have to decide whether to submit the amendment to the states for ratification. Such submission cannot occur automatically because, under Article V, Congress must determine whether ratification will take place by state conventions or legislatures—as has been the case for all congressionally proposed amendments except for the Twenty-first Amendment.

Members of Congress take an oath to support the Constitution and are generally thought to have a duty not to vote for unconstitutional measures.<sup>88</sup>

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87. Professor Paulsen, for example, notes that the applying states, in his view without power to limit the convention directly, “might well exercise considerable control by selecting delegates committed to enforcing a limitation on the agenda.” Paulsen, *supra* note 12, at 760.

88. See *Oath of Office*, UNITED STATES SENATE, [http://senate.gov/artandhistory/history/common/briefing/Oath\\_Office.htm#1](http://senate.gov/artandhistory/history/common/briefing/Oath_Office.htm#1) (last visited Apr. 5, 2011).

Although the nature of this obligation and the quality of Congress's compliance with it have been the subject of considerable debate, it is likely that most members of Congress would feel themselves obligated to ensure that only valid amendments are submitted to the states for ratification. Furthermore, Congress has an institutional incentive to limit the authority of an Article V Convention with respect to proposing amendments. Finding that an Article V Convention could not be limited would give that convention a greater authority to propose amendments than Congress itself, since the latter can only propose amendments when two-thirds of both Houses deem it necessary.

Congress also has an incentive to act in advance of actually receiving an out-of-scope amendment. By declaring that it will not submit out-of-scope amendments for ratification, Congress would both deter any such amendments and avoid subsequent charges that its refusal to submit a particular amendment was based on policy preference, rather than constitutional principle.

It seems unlikely that many members of Congress would favor, as a matter of policy, an unlimited Article V Convention. Nevertheless, some members may believe that the Constitution requires that an Article V Convention be so unlimited. Alternatively, those members could support a constitutional amendment recently introduced in Congress that would remove any doubt that an Article V Convention may be limited to consideration of a single constitutional amendment.<sup>89</sup>

3. The States. If Congress were to submit an out-of-scope amendment for ratification by state legislatures, state legislators would face the same constitutional issue as members of Congress.<sup>90</sup> State legislators also take an oath to uphold the Constitution of the United States. State legislators who voted to apply for an Article V Convention limited to a single subject or amendment would arguably violate this oath if they subsequently voted to ratify an out-of-scope amendment.<sup>91</sup>

State legislatures have a substantial interest in avoiding this situation because ratifying an out-of-scope amendment might undermine future attempts to call a limited Article V Convention. Accordingly, as discussed later, state legislatures may adopt procedures that would make it virtually impossible to ratify out-of-scope amendments. This pre-commitment can ensure that subsequent political pressure to ratify a popular out-of-scope

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89. See H.R.J. Res. 95, 111th Cong. (2010) (known as the "Madison Amendment").

90. It is theoretically possible, but highly unlikely, that Congress could submit an out-of-scope amendment for ratification by state conventions. As discussed later, the state legislatures can erect legal barriers to protect against this remote possibility.

91. The state legislator's duty to reject an out-of-scope amendment does not necessarily turn on whether the legislator voted for a limited Article V Convention in the first place. However, it would be difficult for a legislator to reconcile a vote for a limited convention with a subsequent vote to ratify an amendment that exceeded the scope of that limited convention.

amendment will not undermine the constitutional position of state legislatures.

State legislatures are in a different position than Congress in one respect. While Congress has a constitutional duty to submit a valid proposed amendment for ratification, the state legislatures are under no such duty to ratify such an amendment. Thus, constitutional doubt as to the validity of an out-of-scope amendment cuts only one way—against ratification.

## II. EVALUATING THE RISK OF A “RUNAWAY CONVENTION”

At this point, we should define more precisely what is meant by a “runaway convention.” At the extreme, the phrase implies a convention that adopts radical or far-reaching proposals, such as repealing the Bill of Rights or similar outlandish measures. Those who suggest such a possibility warn that the absence of legal certainty regarding the outer scope of a convention’s power means that there is no such thing as a “safe” Article V Convention.

The question must be asked: “safe compared to what?” After all, somewhere in our constitutional system must lie the ultimate authority to make law and declare what the law is. This power, wherever it resides, necessarily implies the possibility of results that we would regard as unacceptable.

Judicial review, for example, creates the risk that the Constitution will effectively be changed or “amended” whenever a majority of the Supreme Court decides that it should be.<sup>92</sup> Whether one views any particular decision of the Court as unjustified or unacceptable, it is impossible to deny that judicial review creates the risk of extreme or unacceptable outcomes.

On the other hand, limiting or eliminating judicial review, while reducing the risk of “judicial amendments” to the Constitution, would increase the risk that the political branches would violate or ignore constitutional limits on their authority. Professor John Hart Ely paraphrases the critics of his theory of judicial review thus: “[Y]ou’d limit courts to the correction of failures of representation and wouldn’t let them second-guess the substantive merits? Why, that means you’d have to uphold a law that provided for \_\_\_\_\_!”<sup>93</sup> In other words, minimizing the risk of a runaway court means, to some extent, increasing the risk of a runaway legislature.

Assessing the risk of a runaway convention must therefore include consideration of not only the risks that may exist in using the convention method of amendment, but also the risks that might be reduced by the

92. See Taylor, *supra* note 13, at 415 (“[O]ur system already includes a wide-open amendment proposing process through the judiciary.”).

93. JOHN HART ELY, *DEMOCRACY AND DISTRUST A THEORY OF JUDICIAL REVIEW* 181 (1980).



method's use or by the mere recognition of the method as usable. These offsetting risks are, of course, precisely those for which the Framers designed the Article V Convention in the first place. It can scarcely be denied that the limited powers granted to the Congress in Article I of the Constitution have not proved to be a meaningful check on the expansion of federal power. The Article V Convention, if available as intended to check the "encroachments of the national authority," would mitigate this risk.

Of course, if one does not believe that the growth of federal power is a matter of concern, then one may not wish to take any risks, however minimal, to counteract it.<sup>94</sup> In that case, however, the real objection is to the existence of the convention method of amendment. Fear of a runaway convention, while reducing the risk that an Article V Convention will be called or even creditably threatened, in the short term, does not change the fact that the convention method of amendment is unquestionably a part of the Constitution. Insisting on the unlimited nature of the Article V Convention also increases the risk, whatever it may be, that someday such an unlimited convention will occur.

#### *A. The Inherent Safeguards of Article V*

Because no convention has ever been called under Article V and the process for selecting delegates is as yet undefined, it is relatively easy to stoke fears that the convention might fall under the control of radical or irresponsible elements prone to the temptation of a runaway convention. Yet sober reflection reveals that this danger is more imagined than real.

Although some state legislatures might choose a different method, it is likely that most delegates to an Article V Convention will be elected by popular vote.<sup>95</sup> Political scientists Paul J. Weber and Barbara A. Perry argue that the process of selecting delegates to an Article V Convention can be predicted with a reasonable degree of confidence.<sup>96</sup> Candidates for election "will include those who have an active interest in the purpose of the convention and who are willing to take a position for or against

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94. See Jack M. Balkin, *The Consequences of a Second Constitutional Convention*, BALKINIZATION (Sept. 17, 2010, 4:49 PM), <http://balkin.blogspot.com/2010/09/consequences-of-second-constitutional.html> (noting that whether one thinks an Article V Convention "is a good thing or a bad thing has much to do with whether you think that the convention will address and help resolve serious issues that the country needs to face down").

95. The great weight of opinion in modern times has favored election of convention delegates. See, e.g., Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 892 (1968) (noting that legislation introduced by Senator Ervin to govern Article V Convention proceedings initially allowed either election or appointment of delegates but was changed to require election). Delegates to the majority of state constitutional conventions have also been popularly elected. See DINAN, *supra* note 31, at 12.

96. See PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: THE MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION 113-15 (1989).

amendments.”<sup>97</sup> They are likely to have substantial name recognition, organizational and financial support, and prior campaign experience.<sup>98</sup> In the course of campaigning, they will be asked to take positions on proposed amendments and whether they would take part in a runaway convention.<sup>99</sup> Those elected will generally reflect mainstream political views, be representative of existing political interests, and will be “highly unlikely to approve radical changes.”<sup>100</sup>

Therefore, even apart from outside constraints on an Article V Convention, the chances of delegates approving outlandish types of amendments are highly remote. But it must be remembered that an Article V Convention has only the power to *propose* amendments. It cannot actually affect any change to the Constitution without the subsequent ratification of three-fourths of the states. Thus, the inherent safeguards in the Article V process include:

[T]he number of delegates and divisions within the convention itself, which would make it extraordinarily difficult for one faction or a radical position to prevail; the delegates’ awareness that the convention results must be presented to Congress, which might not forward any amendment that went beyond the convention mandate; the Supreme Court, which might well declare certain actions beyond the constitutional powers of the convention; and *most important of all, the need to get the proposed amendment ratified not only by the thirty-four states that called for the convention, but by thirty-eight states.*<sup>101</sup>

Noting that “[m]ore effective constraints on a constitutional convention can hardly be imagined,”<sup>102</sup> Weber and Perry conclude that, “[n]otwithstanding the arguments of legal scholars with limited methodological tools (or partisan objectives) and political columnists with active imaginations, calling a constitutional convention would be a safe political process.”<sup>103</sup> Before his appointment to the bench, Justice Antonin Scalia similarly observed that the risk of an “open convention” is “not much of a risk” since “[t]hree-quarters of the states would have to ratify whatever came out of the convention.”<sup>104</sup>

The safeguards inherent in the Article V Convention process apply to all potential amendments, but they particularly ensure that a convention will

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97. *Id.* at 113.

98. *See id.*

99. *See id.* at 114.

100. *Id.* at 115.

101. *Id.* at 117 (emphasis added).

102. *Id.*

103. *Id.* at 119–20.

104. Antonin Scalia, *Supplement at the American Enterprise Institute Forum, in A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK?* 22–23 (Am. Enter. Inst. for Pub. Policy Research, 1979), *quoted in* CAPLAN, *supra* note 20, at 138.

not adopt radical, divisive, or controversial proposals.<sup>105</sup> It might be argued, however, that an Article V Convention could still propose out-of-scope amendments of a different type. For example, a convention might make hasty or ill-considered changes to the text of an amendment contained in the state applications, with unintended consequences. Or, a convention might be faced with a temporary groundswell of support for a particular amendment, say, for instance, in reaction to an unpopular Supreme Court decision, causing it to exceed the mandate set forth by the applying states. These more realistic possibilities may necessitate that additional safeguards be built into the process.

### *B. Additional Safeguards*

To build additional safeguards into the Article V Convention process, the states applying for the convention must agree on and set forth in their applications the text of the single amendment they wish the convention to consider. Without such a text, a convention nominally limited to a particular topic is unlikely to be, in practice, significantly more limited than an unlimited convention. Judging whether a proposed amendment falls within a particular topic is ultimately a subjective exercise that is vulnerable to manipulation or obfuscation. Just as the enumerated powers of the Congress under Article I have proved to be a weak barrier against expansion of the federal government, so might a convention limited to a single subject, such as a "balanced budget," expand into unforeseen areas.<sup>106</sup>

It should be noted here that some commentators believe that, although the Article V Convention may be limited to a particular subject or topic, it cannot be limited solely to considering a specific amendment.<sup>107</sup> The distinction appears to be based on the idea that limiting the convention to a single amendment unduly restricts its deliberative freedom and effectively transfers the proposing power from the convention to the states.<sup>108</sup>

My own view is that this distinction, while attractive on the surface, is neither ultimately persuasive nor particularly workable. First of all, limiting

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105. Even Professor Gunther, who warns against the risks of an Article V Convention, acknowledges that it is unlikely to adopt "wild-eyed proposals." Gunther, *supra* note 14, at 10.

106. See *id.* at 18 ("If a convention cannot be limited to simply voting 'yes' or 'no' on a particular balanced budget scheme, what is to prevent it from considering such questions as permissible or impermissible expenditures for, say, abortions or health insurance or nuclear power?"). This is not to say that a limited convention would necessarily expand in such a way, but the primary constraints would be the inherent safeguards of Article V rather than any additional legal or procedural safeguards created by specifying a particular subject matter.

107. See, e.g., Ervin, *supra* note 95, at 884.

108. See *id.*

the convention to a single text does not prevent it from fully deliberating about the particular amendment. It is not clear why deliberating about a single text is any less deliberative than deliberating about a more broadly defined subject. Since the convention retains the ultimate decision as to whether to propose the amendment, a single amendment rule also does not transfer the proposing power to the states.

Second, limiting the convention to a single amendment is simply a way of narrowly defining the subject that the convention shall consider. If the state application for a convention defines the “subject” by reference to the text of a specific amendment, it is difficult to see how this categorically changes the nature of the convention. A rule giving the convention the deliberative freedom to consider alternative solutions to a particular problem would lead to endless debate whether the “problem” was defined so narrowly as to deprive the convention of the appropriate amount of deliberative freedom.

No constitutional principle appears to support distinguishing a convention limited to a single subject from one limited to a single amendment. The only justification for rejecting the narrower limitation would seem to be one of efficiency—if the convention rejects the particular amendment on the grounds that there is a superior solution, the states would have to submit a new application to permit consideration of the alternative. Efficiency, however, clearly was not the objective of Article V. Moreover, nothing in Article V requires the states to limit the convention to a particular amendment—it simply permits them to do so.

Accordingly, I concur with the view of Professor William Van Alstyne that an Article V Convention limited to the text of a single amendment is perfectly permissible.<sup>109</sup> Moreover, having the states submit such an amendment in their application would seem to address the criticism of the convention-method process that the states are too cavalier in applying for conventions.<sup>110</sup> If the states do the hard work of hammering out and agreeing on the text of a single amendment, they are far more likely to take the process seriously and use it only advisedly.

Nevertheless, the fact that the states propose a single amendment does not necessarily mean that the convention must be without any power to change it. The state legislatures could provide a channel by which minor and non-controversial changes could be adopted—for example, by unanimous consent of the convention—and thereby minimize constitutional objections without significantly increasing the risk of a runaway convention.

In order to ensure that an Article V Convention is limited to consideration of a single amendment identified by the states in their applications to Congress, the states may employ the following safeguards.

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109. See William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1305 (1978).

110. See Gunther, *supra* note 14, at 3.

These safeguards could be embodied in a uniform act similar to other uniform acts created to enable the states to exercise their federal functions.<sup>111</sup>

The Application Safeguard. In applying for an Article V Convention, each state legislature applying may pass a resolution containing the identically worded text of the amendment sought. The applications should specify (1) that they are to be considered only in conjunction with other applications seeking the identical amendment and (2) that the convention shall be for the sole purpose of considering the specified amendment.

The applications may also provide Congress with a period of time—for example, six months from the date on which the required thirty-four applications have been received—in which to propose an identical constitutional amendment pursuant to Article V's congressional method. If Congress acts, the applications will be voided and no convention will be required.

The Convention Safeguard. Each applying state will require its delegates to vote for convention rules that limit its deliberations to consideration of the single amendment at issue. As noted previously, such rules may permit looking beyond the stipulated amendment only if the convention complies with rigorous procedural requirements, such as for a unanimous vote of the convention.<sup>112</sup> These rules, adopted at the convention's outset, may also provide that the convention proceedings will terminate after an up-or-down vote on the amendment.

The Delegate Safeguard. Each state may require its delegates to support the specified rules and limit their participation in the convention to consideration of the specified amendment. Violation of this pledge might be made punishable by sanctions, disqualification, or both.

The Congressional Safeguard. Although Congress's role in the convention process is largely ministerial, Congress remains responsible for submitting any proposed constitutional amendments to the states for ratification and for determining the method of ratification. The applying states may request that Congress refuse to submit any out-of-scope amendment for ratification.

This safeguard would be further enhanced if Congress pre-committed not to submit an out-of-scope amendment for ratification. Congress could take this action either by joint resolution or by a resolution adopted by the House, the Senate, or both. Even a commitment by a single House would offer substantial assurance that an out-of-scope amendment would not be submitted for ratification. The resolution could be adopted with respect to a

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111. See, e.g., UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT (Interim Draft Mar. 2, 2010), available at <http://www.jamesmadisoncenter.org/PresidentialElectors/NCCUSLProposedFaithlPresElectors.pdf>.

112. Where an amendment is changed in accordance with such a procedural requirement, the modified amendment would continue to be considered an "in scope" amendment for purposes of subsequent ratification.

specific convention call. Alternatively, the states could adopt a uniform act establishing the procedures for the Article V Convention application, thereby enabling Congress to adopt a resolution regarding any “out-of-scope” amendment as defined by that uniform act.

The Ratification Safeguard. The most important safeguard, of course, is the one specifically provided by the Framers, namely that no amendment proposed by the convention is valid until ratified by three-fourths (thirty-eight) of the states. Needless to say, it is exceedingly unlikely that any applying state would ratify an out-of-scope amendment.

To further assure applying states that their sister states will not ratify an out-of-scope amendment, each applying state might adopt measures to prevent such an eventuality. State legislatures could adopt rules requiring a supermajority to ratify an out-of-scope amendment or stipulating that consideration of such an amendment is entirely out of order.<sup>113</sup> More controversially, a legislature might prohibit any state convention for the purpose of ratifying an out-of-scope amendment.<sup>114</sup>

The Judicial Safeguard. As a last resort, an out-of-scope amendment could be challenged in federal court. Such a challenge would, of course, raise significant justiciability issues, but enabling legislation could remove all non-constitutional barriers to such a suit. Thus, while there is no guarantee that the courts would reach the merits, proponents of an out-of-scope amendment would face a substantial risk that their efforts would be struck down by the courts.

### III. CONCLUSION

The full power of the above safeguards is evident in their cumulative impact, as illustrated by the difficult road faced by a proponent of an out-of-scope amendment. In order to obtain the convention’s endorsement of such an amendment, its proponent must first persuade a majority of the convention to defeat the convention rules and vote in favor of the out-of-scope amendment. This would mean persuading delegations from at least ten applying states to violate their oaths and risk legal sanctions, not to mention bad publicity. In addition, costly and protracted litigation would likely ensue in the respective state courts of the ten “faithless” delegations.

Second, the proponent of an out-of scope amendment must persuade Congress to submit the amendment for ratification, in clear violation of the

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113. One federal court has held that states have significant latitude in determining the procedures for ratifying a federal constitutional amendment. *See Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Future Supreme Court Justice John Paul Stevens authored the opinion).

114. Such a provision, which would become relevant only in the unlikely event that Congress chose the convention method of ratification, would present perhaps the most likely scenario under which federal courts might reach the merits of whether an out-of-scope amendment is constitutionally valid.

applying states' intentions and possibly in violation of Congress's own commitment not to do so.

Third, the proponent must to convince thirty-eight states to ratify the out-of-scope amendment. This would require ratification by at least twenty-two of the applying states. In order to have any prospect of accomplishing such a feat, the proponent would have to overcome state rules prohibiting ratification or establishing supermajority requirements of both houses in those twenty-two states to ratify the amendment. Alternatively, the proponent would have to believe that Congress would choose the convention method of ratification—which it has done only for ratification of the Twenty-first Amendment—and would have to have a legal strategy to require states to call such conventions.

Finally, the prospect of a federal court challenge would remain. Whatever its ultimate outcome, such a challenge would be time-consuming and expensive for the proponents of the out-of-scope amendment.

Given this outlook, it is impossible to imagine that anyone would seek to hijack a convention for purposes of promoting an out-of-scope amendment. If one hypothesizes an out-of-scope amendment so broadly popular as to have even a remote chance of surmounting the obstacles we would erect, there would be far easier ways to achieve the desired goal.

In short, these safeguards will keep the constitutional road to reform marked and open and will secure it against any chance of unwanted detours by a so-called "runaway convention."