TESTIMONY
OF
Mike Mowry

GOVERNMENT OVERSIGHT COMMITTEE
OHIO HOUSE OF REPRESENTATIVES
COLUMBUS, OHIO

LEGISLATIVE HEARING ON H.J.R. 2

Chair Hall, Vice Chair Ferguson, Ranking Member Humphrey, and members of the committee:

My name is Mike Mowry and I am from Ashland, Ohio, House District 67. My remarks submitted for this testimony are intended to refute the false claim that is commonly repeated by those in opposition to convening an Article V amendments convention that the Constitutional Convention of 1787 was a 'runaway convention'". Opponents claim that an Article V Convention for proposing amendments will "run-way" like the last Article V amendments convention. This is wrong in two regards, first there has never been an Article V convention for proposing amendments and the plenipotentiary Constitutional Convention of 1787 was not an amendments convention convened under the auspices of the Articles of Confederation, (which was the governing document for the United States at the time).

The time allotted for this testimony does not allow other than an outline of why these are true so I have included a summary with linked resources to accompany my testimony. This includes an 86-page article authored by Michael Farris that appeared in the Harvard Journal of Law and Public Policy, "Defying Convention Wisdom: The Constitution Was Not The Product Of A Run-away Convention" and a 92-page article authored by Robert Natelson that appeared in the Florida Law review "Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments".

It is important for any review of what and why the Confederation was failing and the desperate need for reform that the context of the situation of the new nation at the time be known. The Articles of Confederation, first drafted the summer of 1776, and debated until November of 1777. Full ratification of the Articles by the 13th and final state was not completed until February 1781, almost four years after the original draft was produced. The amount of time to reach a final draft and then ratification was in part due to the vagaries of the on-going war with Great Britain but it also portended the difficulties and challenges ahead for successful integration of the several states into a single nation.

This context is important as an assertion is often made that an amendments convention cannot be as safely held in our current times of turmoil as when the Convention of 1787 was held during the "calm times" after the war. First, it was expected that amendments proposed by the states through Article V conventions would likely be needed during times of an intransigent national government during times of divisiveness and second the new nation under the Confederacy far from untroubled faced extreme and turbulent challenges from the time of ratification until the Articles were replaced by the Constitution.

<u>Congress chased out of Philadelphia</u>

At the time the Convention of 1787 was called and convened the Confederation Congress was meeting in New York City. This was not because New York City was the largest city in the nation, it was not at that time. The Confederation Congress was housed in New York City because it needed to evacuate the largest city, Philadelphia in June 1783 due to threats from segments of their own army (which was protesting lack of supplies and non-payment for their years of service). The Congress asked for protection by the Pennsylvania Commonwealth government but they were either unwilling or unable to

provide protection to Congress so Congress moved successively to Princeton, Annapolis, and Trenton prior to finally settling in New York City in 1785.

The Confederation Congress was unable to reform the Articles by amendments

On August 7, 1786, 7 amendments to the Articles of Confederation to make the Confederation government more effective were proposed in Congress but the resolution was never passed nor sent to the states for consideration, in part due to expectations that the convention process had better chance of success.

Lawlessness and rebellion

Between the time the Constitutional Convention was first proposed and actually held, from August 1786 until February 1787 violent protests (known as Shay's Rebellion) were closing court proceedings as protests over taxes and problems of fiat paper money creating severe economic issues. This culminated in an attack at the armory in Springfield Massachusetts where hired militia men fended of the attacking and protesting farmers and veterans with grapeshot from their cannon.

It is in the context of this environment that twelve of the states and the Confederation Congress recognized the need for reform and acted to call, in the instances of the states, and recommend in the instance of the Congress for a Convention to propose reforms the federated national government.

Some points refuting the myth of a run-away convention:

1. The Convention of 1787 was not an article V convention for proposing amendments, differing from an Article V convention in two major regards:
    a. Convention was not a function within the framework of the Articles of Confederation; there was no process included within the scope of the Articles for Congress to call or conduct a convention; the word convention does not even appear within the document. An Article V convention to propose amendments is a defined process that was included in our current Constitution.
    b. The Convention of 1787 was understood by at least ten of the twelve states legislatures to be **a plenipotentiary convention, called by the states** (as shown in contemporary communications between the founders that are included in the testimony summary). As conventions were not a process of the Articles of Confederation, the calling of a convention would need to be done by the states under their own sovereignty that was expressly retained in the Articles of Confederation. An Article V amendments convention for proposing amendments is clearly defines as being limited to just the proposal of amendments with the only powers being derived granted to them by the commission given to them by their respective state legislatures.

2. The Convention of 1787 was not a run-away. This suggestion is a slander on our founding fathers with the implication that they were either incompetent or duplicitous in the conduct and outcome of the Convention.

    a. Contemporaneous communications between the founders prior to the start of the Convention on May 25, 1787 clearly show that it was expected that the powers of the Convention would be broad and the proposed reform would be "*as may be necessary to render the Federal Constitution adequate to the exigencies of the Union"* as the Annapolis Convention stated. Ten states said as much in their Convention resolutions and through their commissions for their delegates to the Convention of 1787. Some

communications between the framers in the period before commencement of the Convention on May 25, 1787:

I. Madison to Jefferson, August 12, 1786 – "*Many Gentlemen both within & without Congs.* ***Wish to make this Meeting subservient to a Plenipotentiary Convention for amending the Confederation.*** *Tho' my wishes are in favor of such an event, yet I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform."*

II. Madison to Jefferson, December 4, 1787 – ***"The recommendation from the Meeting at Annapolis of a plenipotentiary Convention in Philada. in May next has been well received by the Assembly here."***

III. Washington to Madison, March 31, 1787 – ***"as my wish is, that the Convention may adopt no temporising expedient, but probe the defects of the Constitution to the bottom, and provide radical cures, whether they are agreed to or not." A conduct like this, will stamp wisdom and dignity on the proceedings, and be looked to as a luminary, which sooner or later will shed its influence."***

IV. Madison to Washington, April 16, 1787 – **"your views of the reform which ought to be pursued by the Convention, give a sanction to those which I have entertained.** ***Temporising applications will dishonor the Councils which propose them, and may foment the internal malignity of the disease, at the same time that they produce an ostensible palliation of it. Radical attempts, although unsuccessful, will at least justify the authors of them."***

V. George Mason to George Mason, Jr., May 20, 1787 - ***"The most prevalent idea in the principal States seems to be a total alteration of the present federal system, and substituting a great national council or parliament, consisting of two branches of the legislature,"***

VI. George Mason to Arthur Lee, May 21, 1787 –" ***The most prevalent Idea, I think at present, is a total Change of the Federal System; and instituting a great national Council, or Parliament"***

b. Ten of the state legislatures directed their commissioners through their resolutions and commissions to exercise broad powers in "*discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate to the exigencies of the Union"* as suggested by the commissioners at the Annapolis Convention held earlier that year.

Virginia was the first state to call for the Convention on November 23, 1786 followed by five other states prior to Congress issuing a recomendary resolution in February of 1787 stating that it would be "expedient" to conduct a convention for the "sole and exclusive purpose" of proposing amendments to the Articles of Confederation. Congress explicitly said that this was only its "opinion", i.e. not a directive. There is no evidence that Congress ever voted to create a transmittal letter instructing executive officers in any state to do anything.

Of the states passing resolutions to attend the Convention only New York and Massachusetts adapted the more restrictive language suggested by Congress. The full resolutions of each state and Congress is included in the testimony attachments.

c. Madison and the Virginians clearly expected commissioners to have the leeway to propose a replacement to the Articles of Confederation and replacement of the Confederation with a strong national government given that they had the Virginia (Randolph) Plan drafted prior to the start of the Convention. The Virginia Plan, presented on May 29, 1787, almost immediately after the Convention started, was a draft depicting a strong national government so dissimilar from the Confederation that replacement rather than amending the Articles would have been needed. The outline of the plan was fully laid out in a letter to Washington sent on April 16, 1787, over a month prior to the Convention.

   See: From James Madison to George Washington, 16 April 1787 (archives.gov)

In closing, I would say it could also be observed that the general sense of the time was that the commissioners did not "run-away" and present a wholly unexpected product with the Constitution presented to the Confederation Congress and the States. While there was an outcry, regarding the lack of a bill of rights such as those that were included in many of the state constitutions there was very little said either at the Confederation Congress or the ratifying conventions that implied that the Commissioners had exceeded their authority in proposing to replace the Articles of Confederation. This I think was in part not just because the inadequacies of the Articles to be a functioning central government needed to be addressed but also that the mode of the ratification process of the Constitution truly made the Constitution a product of "We the people".

More detail and source material for your review can be found in the summaries and articles attached to this testimony.

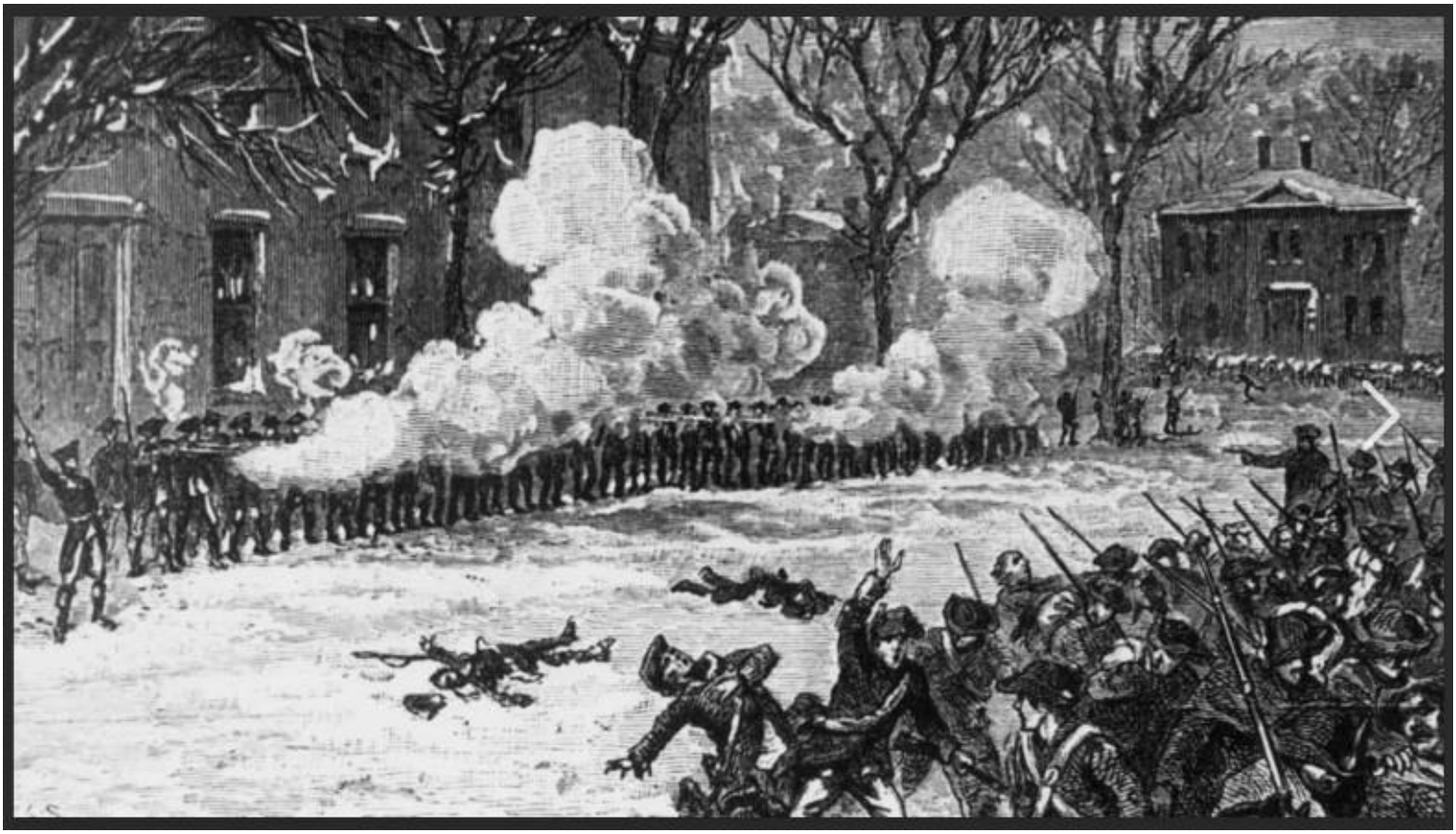
Thank you for this opportunity to submit this testimony. Please pass HJR 2 out of committee for consideration by the House in a floor vote.

The Confederation Congress Chased Out of Philadelphia

My dear Brother Philada. 23 June 1783 -- I have only a moment to inform you, that there has been a most dangerous insurrection and mutiny among a few Soldiers in the Barracks here. About 3 or 400 surrounded Congress and the Supreme Executive Council, and kept us Prisoners in a manner near three hours, tho' they offered no insult personally. To my great mortification, not a Citizen came to our assistance. The President and Council have not firmness enough to call out the Militia, and allege as the reason that they would not obey them. In short the political Maneuvers here, previous to that important election of next October, entirely unhinges Government. This handful of Mutineers continue still with Arms in their hands and are privately supported, and it is well if we are not all Prisoners in a short time. Congress will not meet here, but has authorized me to change their place of residence. I mean to adjourn to Princeton if the Inhabitants of Jersey will protect us. I have wrote to the Governor particularly. I wish you could get your Troop of Horse to offer them aid and be ready, if necessary, to meet us at Princeton on Saturday or Sunday next, if required. - *Letters of Delegates to Congress, 1774-1789. Elias Boudinot to Elisha Boudinot June 23, 1783*

The Confederation Congress chased out of Philadelphia

Massachusetts veterans and farmers in rebellion August 1786-January 1787
Fired upon, January 26, 1787, Springfield Armory



https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/shays-rebellion/

Origins of the Convention of 1787

The claims that the constitutional convention of 1787 was a "run-away" convention is especially ironic in that the original suggestion that the Constitutional Convention of 1787 be called by the state legislatures was made, in part, by the commissioners an earlier convention that understood their commissions were insufficient for the solutions needed to remedy the inadequacies of the Articles of Confederation.

The origins of the recommendation that there should be a call for a convention to propose how to reform the federated government so that it had adequate power to fulfill the proper function of the central authority was first made by the commissioners at the Annapolis Convention of 1786. **The Annapolis Convention was initially called by the Virginia state legislature** for the several member states to meet together to promote more efficient commerce between the states. Conventions under British tradition were extra-legislative bodies that were called by the states (as they were earlier by the colonies). After ratification of the Articles of Confederation, they did so under their reserved sovereignty as independent states via Article II of the Articles where it was written, **"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"**. It can be further noted that the power to call a convention or even the word convention does NOT appear in the Articles of Confederation.

(See: Avalon Project - Articles of Confederation : March 1, 1781 (yale.edu)).

The Annapolis Convention failed, in part, due to lack of attendance by an adequate number of states to form a quorum, but also, in part, because there was an agreement amongst the commissioners in attendance that waiting for the other delegates to arrive would be futile in that the authority to discuss commercial matters alone would not be enough to fix all the difficulties that were presented by the weaknesses of the current structure of the central authority as defined by the Articles of Confederation. It was f*or this reason that the commissioners at the Annapolis Convention of 1786 wrote this on September 14, 1786:*

"To the Honorable, The Legislatures of Virginia, Delaware, Pennsylvania, New Jersey, and New York–assembled at Annapolis, humbly beg leave to report."..... ***"Under this impression, 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 the States, by whom they have been respectively delegated, would themselves concur, and use their endeavors 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.

Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to represent, they have nevertheless concluded from motives of respect, to transmit copies of the Report to the United States in Congress assembled, and to the executives of the other States."

Of additional note is that the unanimously elected chairman of the Commissioners at Annapolis was John Dickinson of Delaware (formerly of Pennsylvania) who was tasked by the Second Continental Congress with preparing the first draft of the Articles of Confederation.

See: http://press-pubs.uchicago.edu/founders/documents/v1ch6s2.html

Accordingly, the suggestion that a broader topic convention be held on the second Monday of May 1787 was transmitted to the several state legislatures as well as to the Confederation Congress.

Authority to call the states to convention

The Confederation Congress itself could not call a convention; conventions were not part of the amendment process in the Articles of Confederation **(indeed, the word convention does not appear anywhere in the Articles of Confederation)**.

The states, did, however, retain sovereign powers under Article II of the Articles of Confederation where it was written:

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.

http://avalon.law.yale.edu/18th_century/artconf.asp#art2

Accordingly, under their retained sovereignty, most of the states, independent of the Confederation Congress, called for a convention to be held in May of 1787 for determining how to remedy deficiencies in the then current confederation of independent states. Examination of the resolutions of the individual states shows that the commissioners of most of the states were given wide latitude of what they could consider and propose for alterations of the structure of the Federal Government.

Despite receiving notice in September 1786 from the Annapolis Convention of the suggestion that the several state governments that a convention with expanded powers be held " ***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"***, the Confederation Congress did not act on the notice of the Annapolis commissioners suggestion of the expanded convention made by the Annapolis Convention to the states and Congress until February 23, 1787, but not until **after** at least six state legislatures had already called for the May convention (indeed, many of those states had already appointed commissioners for the convention). These states did so as sovereign states, independent of the Articles of Confederation and of the Confederation Congress, which again had no convention process within the bounds of the Articles of Confederation.

The resolutions made by these six states had broad statements in their commissions, giving their commissioners broad authority in their considerations of remedies to *propose* solutions for the deficiencies in the structure of the Federal Government **(*see excerpts from, and links to, the full text of the respective state resolutions on the pages, also below*)**.

When the Confederation Congress did finally write a ---- recommendatory resolution regarding the convention using a more narrow scope (which was passed by a majority of one), it was with language modified from that proposed by the Annapolis commissioners as compromise to language suggested by the congressional delegation from anti-federalist New York. Congress wrote their advisory resolution with a more limiting scope, restricting the call to amendments to the Articles of Confederation (also see excerpt and link to Congress' resolution below).

Madison's entry in his notes on the debates of the Confederation Congress from February 21, 1787 noted in part the following regarding Congress' resolution:

"There was reason to believe however from the Language of the instruction from N York that her object was to obtain a new Convention, under the sanction of Congs. rather than to accede to the one on foot, or perhaps by dividing the plans of the States in their appointments to frustrate all of them. The latter suspicion is in some degree countenanced by their refusal of the Impost a few days before the instruction passed, and by their other marks of an unfederal disposition."

Madison then concluded in his notes of the debates of Congress, February 21, 1787 with the following:

"It appeared from the debates & still more from the conversation among the members tha[t] [many] of them considered this resolution as a deadly blow to the existing Confederation. Docr. Johnson who voted agst. it, particularly declared himself to that effect. Others viewed it in the same light, but were pleased with it as the harbinger of a better Confederation.

The reserve of many of the members made it difficult to decide their real wishes & expectations from the present crisis of their affairs. All agreed & owned that the federal Govt. in its existing shape was inefficient & could not last long. The members from the Southern & middle States seemed generally anxious for some republican organization of the System which wd. preserve the Union and give due energy to the Govermt. of it. Mr. Bingham alone avowed his wishes that the Confederacy might be divided into several distinct confederacies, its great extent & various interests, being incompatible with a single Government.6 The Eastern members were suspected by some of leaning towards some antirepublican establishment, (the effect of their late confusions) or of being less desirous or hopeful of preserving the Unity of the Empire. For the first time the idea of separate Confederacies had got into the Newspapers. It appeared to day under the Boston head.7 Whatever the views of leading men in the Eastern States may be, it would seem that the great body of the people particularly in Connecticut, are equally indisposed either to dissolve or divide the Confederacy or to submit to any antirepublican innovations.

For Madison's contemporaneous notes of the debates of congress see:https://founders.archives.gov/?q=Volume%3AMadison-01-09&s=1511311112&r=149

Madison passed a similar assessment regarding the motives of the representatives from New York and congress in his letter to Edmund Randolph, the governor of Virginia in his letter of February 25 (see https://founders.archives.gov/?q=Volume%3AMadison-01-09&s=1511311112&r=154)

Accordingly, the next two states, New York and Massachusetts, wrote their commissions with the narrower scope with the limitations to amendments to the AOC suggested by congress but they were the only states of the remaining states to do so (see below) .

The final four states that would attend the convention, however, maintained in their commissions the broader scope that the first six states had used in their resolutions (see below).

The resolutions of the several states and the Confederation Congress to call a convention are found below in the order that they were made, after suggestion by the Annapolis commissioners that was made on September 14, 1786.

State Legislature Resolutions for Calling the Convention of 1787

At least six states issued resolutions for calling the Constitutional Convention with broad powers to deliberate on changes in the government ***before*** *the Confederation* Congress made their recommendatory resolution that in the opinion of Congress a convention should be held:

1. **Virginia, November 23, 1786 (broad instructions)**

"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 further provisions, as may be necessary to render the Federal 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."

2 Virginia Act Authorizing the Election of Delegates.docx (wisc.edu)

2. **New Jersey, November 24, 1786 (broad instructions)**

"for the purpose of taking into consideration the state of the Union as to trade and other important objects ***and of devising such further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof.***"

Microsoft Word - 3 New Jersey Resolution Authorizing and Empowering the Delegates.docx (wisc.edu)

3. **Pennsylvania, December 30, 1786 (broad instructions)**

"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 constitution fully adequate to the exigencies of the Union**;"

http://csac.history.wisc.edu/delegate_inst4.pdf

4. **North Carolina, January 6, 1787 (broad instructions)**

"meet and confer with such Deputies as may be appointed by the other states for similar purposes, and with them **to discuss and decide upon the most effectual means to remove the defects of our foederal union, and to procure the enlarged purposes which it was intended to effect**, and that they report such

an act to the General Assembly of this state, as when agreed to by them, will effectually provide for the same."

http://csac.history.wisc.edu/delegate_inst5.pdf

5. **Delaware, February 3, 1787 (broad instructions)**

" Whereas the General Assembly of this State are fully convinced of the Necessity of revising the Foederal Constitution**, and adding thereto such further Provisions as may render the same more adequate to the Exigencies of the Union**;

http://csac.history.wisc.edu/delegate_inst6.pdf

6. **Georgia, February 10, 1787 (broad instructions)**

"and to join with them in 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,"

http://csac.history.wisc.edu/delegate_inst7.pdf

- **Confederation Congress' Call, February 23, 1787 (narrowed scope)**

"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."

Note that the Confederation Congress added more restrictive language in it's recommendation; Madison conjectured in his contemporaneous notes (see link below) that Congress did so at the instigation of the New York delegation for the purpose of dividing the convention and frustrating its goals. Madison's notes indicate that the tenor of the debates and conversations between delegates that the pending convention portended a "deadly blow" to the confederation with some seeing that speculation as a harbinger of a better Confederation.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN-01-01-02-0005-0005 [accessed 11 May 2011]
Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

7. **New York, February 26-28, 1787 (narrow instructions)**

"for the sole and express purpose of revising the Articles of Confederation and reporting to Congress, and to the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the several states, render the federal constitution adequate to the exigencies of government and the preservation of the Union"

http://csac.history.wisc.edu/delegate_inst10.pdf

8. **Massachusetts, February 22-April 9, 1787 (narrow instructions)**

"for the sole & express purpose of revising the articles of Confederation, and reporting to Congress & the several Legislatures, such alterations & provisions therein, as shall when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigences of Government; & the preservation of the Union"…. and …. "they are hereby instructed not to accede to any alterations or additions that may be proposed to be made in the present Article of Confederation, which may appear to them, not to consist with the true republican Spirit and Genius of the Said Confederation"

http://csac.history.wisc.edu/delegate_inst11.pdf

9. **South Carolina, March 8, 1787 (broad instructions)**

"join with such deputies or commissioners, they being duly authorised and impowered in devising and discussing ***all such alterations, clauses, articles and provisions as may be thought necessary to render the foederal constitution entirely adequate to the actual situation and future good government of the confederated states***"

http://csac.history.wisc.edu/delegate_inst12.pdf

10. **Connecticut, May 17, 1787 (broad instructions)**

"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 foederal Constitution adequate to the Exigencies of Government, and the Preservation of the Union***"

http://csac.history.wisc.edu/delegate_inst13.pdf

11. **Maryland, May 26, 1787 (broad instructions)**

"***for the purpose of revising the federal system, and to join with them in considering such alterations, and further provisions, as may be necessary*** to render the federal constitution adequate to the exigencies of the union"

http://csac.history.wisc.edu/delegate_inst14.pdf

12. **New Hampshire, June 27, 1787 (broad instructions)**

"and with them to discuss and ***decide upon the most effectual means to remedy the defects of our federal union; and to procure, and secure, the enlarged purposes which it was intended to effect***"

http://csac.history.wisc.edu/delegate_inst15.pdf

13. **Rhode Island** – Made no resolution and did not attend the convention.

Citation of the Delegates and their credentials and record of attendance

The credentials presented by the commissioners to the secretary of the convention contained the same broad language as the respective state resolutions for what the commissioners were authorized to review and propose with the understanding that the New York and Massachusetts commissioners had additional restraints. See the following link for examples of the delegation credentials:

https://en.wikisource.org/wiki/The_Records_of_the_Federal_Convention_of_1787/Volume_3/Appendix_B

Contemporaneous Pre-convention Correspondence

That the proposal of a complete overhaul of the central governmental structure would be considered at the convention was broadly known by many well before the convention, as demonstrated in the following contemporaneous correspondence by well-honored participants months and days prior to the actual start of the convention in late May, 1787 (underlines added for emphasis, links to the full documents beneath the citations):

James Madison to Thomas Jefferson, August 12, 1786 (in recognition of limitations of commissions):

The States which have appointed deputies to Annapolis are N. Hampshire, Massts. R. Island, N. Y. N. J. Pena. Delaware & Virga. Connecticut declined not from a dislike to the object, but to the idea of a Convention, which it seems has been rendered obnoxious by some internal Conventions which embarrassed the Legislative Authority. Maryd. or rather her Senate negatived an appointment because they supposed the measure might interfere with the plans or prerogatives of Congs. N. Carolina has had no Legislative meeting since the proposition was communicated. S. Carolina supposed she had sufficiently signified her concurrence in a general regulation of trade by vesting the power in Congs. for 15 years. Georgia ——6 ***Many Gentlemen both within & without Congs. wish to make this Meeting subservient to a Plenipotentiary Convention for amending the Confederation. Tho' my wishes are in favor of such an event, yet I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform****.*

From James Madison to Thomas Jefferson, 12 August 1786 (archives.gov)

James Madison to Thomas Jefferson, December 4, 1786 (the "Assembly" being the Virginia Legislature):

The recommendation from the Meeting at Annapolis of ***a plenipotentiary Convention*** *in Philada. in May next has been well received by the Assembly here. Indeed the evidence of dangerous defects in the Confederation has at length proselyted the most obstinate adversaries to a reform. The unanimous sanction given by the Assembly to* the inclosed compliance *with the Recommendation marks sufficiently the revolution of sentiment which the experience of one year has effected in this country. The deputies are not yet appointed. It is expected that Genl. Washington, the present Govr. E. Randolph Esqr. and the late one Mr. Henry will be of the number.*

To Thomas Jefferson from James Madison, 4 December 1786 (archives.gov)

George Washington to James Madison, March 31, 1787 (prior to agreeing to serve as a commissioner):

*"It gives me pleasure to hear that there is a probability of a full Representation of the States in Convention, but if the delegates come to it under fetters, the salutary ends proposed will in my opinion be greatly embarrassed & retarded, if not altogether defeated. I am anxious to know how this matter really is**, as my wish is, that the Convention may adopt no temporising expedient, but probe the defects of the Constitution to the bottom, and provide radical cures, whether they are agreed to or not." A conduct like this, will stamp wisdom and dignity on the proceedings, and be looked to as a luminary, which sooner or later will shed its influence."***

https://founders.archives.gov/?q=&s=1511311111&sa=washington&r=11&sr=madison

James Madison to George Washington, April 16, 1787 (Madison assuring Washington):

"I have been honoured with your letter of the 31 of March, and find with much pleasure that your views of the reform which ought to be pursued by the Convention, give a sanction to those which I have entertained. ***Temporising applications will dishonor the Councils which propose them, and may foment the internal malignity of the disease, at the same time that they produce an ostensible palliation of it. Radical attempts, although unsuccessful, will at least justify the authors of them."***

https://founders.archives.gov/?q=Project%3A%22Madison%20Papers%22&s=1511311111&r=19&sr=washington

George Mason to George Mason Jr., May 20, 1787 (just days prior to the start of the convention):

The most prevalent idea in the principal States seems to be a total alteration of the present federal system, *and substituting a great national council or parliament, consisting of two branches of the legislature, founded upon the principles of equal proportionate representation, with full legislative powers upon all the subjects of the Union; and an executive: and to make the several State legislatures subordinate to the national, by giving the latter the power of a negative upon all such laws as they shall judge contrary to the interest of the federal Union. It is easy to foresee that there will be much difficulty in organizing a government upon this great scale, and at the same time reserving to the State legislatures a sufficient portion of power for promoting and securing the prosperity and happiness of their respective citizens; yet with a proper degree of coolness, liberality and candor (very rare commodities by the bye), I doubt not but it may be effected.*

George Mason to George Mason Jr. | Teaching American History

George Mason to Arthur Lee, May 21, 1787 (just days prior to the start of the convention):

The most prevalent Idea, I think at present, is a total Change of the Federal System; and instituting a great national Council, or Parliament *upon the Principles of equal proportionate Representation, consisting on two Branches of the Legislature, invested with full legislative Powers upon the Objects of the Union; and to make the State Legislatures subordinate to the national Executive; and a judiciary System, with Cognizance of all such Matters as depend upon the Law of Nations, & such other Objects as the local Courts of Justice may be inadequate to.*

Letter from George Mason to Arthur Lee (1787) | Teaching American History

At the Convention

As noted above, even though many fully expected prior to the convention that a new structure of the central government could, and should be considered, in order to be adequate to "***render the Federal Constitution adequate to the exigencies of the Union",*** the point was examined and confirmed in the early sessions as well as at other points through-out the convention. The convention which was supposed to start on the second Monday in May which was May 14 did not start until May 25 when there was seven states in house to establish a quorum, running into September later that year.

There was a short debate in the first few days of the convention after which it was acknowledged that only broad reforms could accomplish the goals of the convention. Accordingly, two of the three New York delegates left the convention for lack of authorization in their commission. While under similar difficulty, the Massachusetts commissioners stayed, ostensibly to ensure that they could represent the interests of their state to the extent possible in the debates to come (as well as be able to communicate the results better to the authorities and the people of their state). It was noted that the credentials of the Delaware delegates "were prohibited from changing the article in the Confederation establishing an equality of votes among the States.", which is of course the reason for the "Great Compromise" which is protected by the concluding statement of Article V which states "and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

http://avalon.law.yale.edu/18th_century/debates_514525.asp

On May 28 Delegate Randolph of Virginia presents the deficiencies of the Confederation and an outline of a new frame of the central government (known historically as the Virginia plan). Delegate Pinkney of South Carolina presents a competing plan for consideration:

http://avalon.law.yale.edu/18th_century/debates_529.asp

On May 30, after limited debate regarding the scope of the proposed changes ***"it was resolved in Committee of the whole that a national governt. ought to be established consisting of a supreme Legislative Executive & Judiciary." Massts. being ay-Connect.-no. N. York divided [Col. Hamilton ay Mr. Yates no] Pena. ay. Delaware ay. Virga. ay. N. C. ay. S. C. ay."*** Out of deference to the delegation from Delaware It was voted to postpone the determination of the mode of representation until after further debate (they were restrained by their commissions from considering equal state representation, only).

https://avalon.law.yale.edu/18th_century/debates_530.asp

Later in the convention, the dilemma of the restrictions of Delaware's commission was famously resolved by the great compromise, where it was proposed that the states have equal representation in the Senate.

See Madison's Notes of The Debates of the Convention:

Avalon Project - Notes on the Debates in the Federal Convention (yale.edu)

The Confederation Congress Receives the Constitution

After the convention, the proposed Constitution and a letter from the president of the convention, George Washington was forwarded to the Confederation Congress. According to Madison's notes and his report to Washington cited below, after some informal debate by member of the Confederation Congress, it was agreed that Congress could not act on the document nor alter the document against the intent expressed by the convention. After which, Congress passed a unanimous resolution to pass the document without comment on to the states for ratification conventions as proposed by the Convention (unanimously voted to pass the Constitution on to the State Legislatures by the representatives of the states that were present; Rhode Island and Maryland's representatives were absent). While there was some debate as to whether Congress could alter the document or if Congress needed to subject the Constitution to the amendment process in the end there appears to have been no controversy regarding the states having the authority to proceed with ratification under their own sovereign authority (subsequent debate was primarily regarding the lack of a bill of rights). See Madison's letter to Washington dated 30 September 1787. After some debate on the language the resolution that the Confederation Congress passed the Constitution on to the state legislatures was written:

--"Congress having recd. the Report of the Convention lately assembled in Philada., Resold. unanimously that the said Report, with the Resolutions & letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of Delegates chosen in each State by the people thereof, in conformity to the Resolves of the Convention made & provided in that case."

http://press-pubs.uchicago.edu/founders/documents/v1ch6s15.html

The State Ratification Conventions

At the state ratifying conventions, little was made of the assertion that the commissioners at the Constitutional Convention exceeded their authority in proposing the new Constitution to the people for their approval vs. the impossible task of making the Articles of Confederation a usable frame of government given the impossibility of amending the framework of the Articles. Even though there was no formal vote to end the Confederation the actions of Congress and the states eventually complied with the requirements of Article XIII of the Articles in that the Confederation Congress' recommended that the states hold ratifying conventions was eventually observed by all 13 original states.

Article XIII of the Articles of Confederation (the amendments clause)

"Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

Avalon Project - Articles of Confederation : March 1, 1781 (yale.edu)

The ninth state required to fully establish and ratify the Constitution for the states in agreement occurred on June 21, 1788 with two other states ratifying the constitution later that year. The Confederation Congress certified the ratification of the Constitution for eleven ratifying states on September 13, 1788 and set the dates for the new Congress to meet and the date of the election for president. The remaining two states, North Carolina and Rhode Island eventually ratified the constitution in 1789 and 1790 respectively.

List of Supplemental Attachments

Madison to Washington - April 16, 1787 (outline for the Virginia Plan)
Michael Farris - Harvard Law Review - Defying Conventional Wisdom
Robert Natelson - Florida Law Review - Founding Era Conventions
Robert Natelson - Amending the Constitution - A More Complete View
The Articles of Confederation
State and Confederation Congress Resolutions

Madison's outline of the Virginia Plan over a month before the start of the Convention

From James Madison to George Washington, 16 April 1787

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DEFYING CONVENTIONAL WISDOM: THE CONSTITUTION WAS NOT THE PRODUCT OF A RUNAWAY CONVENTION

MICHAEL FARRIS*

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INTRODUCTION

The Constitution stands at the pinnacle of our legal and political system as the "supreme Law of the Land,"[1] but it is far more important than just a set of rules. We do not take oaths to defend our nation, our government, or our leaders. Our ultimate oath of loyalty affirms that we "will to the best of [our] Ability, preserve, protect and defend the Constitution of the United States."[2] Each president, every member of the Supreme Court, legislators in both houses of Congress, all members of the military, countless state and federal officials, all new citi- zens, and all members of the legal profession pledge our honor and duty to defend this document.

Despite this formal and symbolic profession of devotion, many leaders, lawyers, and citizens repeat the apparently inconsistent claim that the Constitution was illegally adopted by a runaway convention. In the words of former Chief Justice Warren Burger, the Constitution's Framers "didn't pay much attention to any limitations on their mandate."[3] The oft-repeated claim is that the Constitutional Convention was called by the Confederation Congress "for the sole and express purpose of revising the Articles of Confederation."[4] However, "the Convention departed from the mission that Congress had given it. The Convention did not simply draft 'alterations' for the Articles of Confederation as amendments. Instead, it proposed an entirely new Constitution to replace the Articles of Confederation."[5]

Critics also assert that the Founders' illegal behavior extended into the ratification process. "The Convention did not ask Congress or the state legislatures to approve the proposed Constitution. Instead, perhaps fearing delay and possible de-

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1. U.S. CONST. art. VI, cl. 2.

2. *Id.* art. II, § 1, cl. 8; *see also id.* art. VI, cl. 3.

3. Warren Burger, Remarks at the Fifth Annual Judicial Conference of the United States Court of Appeals for the Fifth Circuit (May 8, 1987), *in* 119 F.R.D. 45, 79.

4. Resolution of Confederation Congress (February 21, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC].

5. Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 As A Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1711 (2012).

feat, the Convention called for separate ratifying conventions to be held in each state."[6]

These criticisms are not new. Many of the Anti-Federalist opponents of the Constitution unleashed a string of vile invectives aimed at the architects of this "outrageous violation."[7] The Framers employed "all the arts of insinuation, and influence, to betray the people of the United States."[8] "[T]hat vile conspirator, *the author of Publius:* I think he might be impeached for high treason."[9] The Constitution itself was treated to similar opprobrium:

> Upon the whole I look upon the new system as a most ridiculous piece of business—something (*entre nouz*) like the legs of Nebuchadnezar's image: It seems to have been formed by jumbling or compressing a number of ideas to- gether, something like the manner in which poems were made in Swift's flying Island.[10]

Modern legal writers level critiques that are equally harsh, albeit with less colorful language. One author contends that James Madison led the delegates "[i]n what might be termed a bloodless coup."[11] Another suggests that the intentional violation of their limited mandate "could likely have led to the participants being found guilty of treason in the event that their proceedings were publicized or unsuccessful."[12] Ironically, Chief Justice Burger's critique of the legality of the Constitution was delivered in his capacity as Chairman of the National Commission on the Bicentennial of the Constitution of the United States.[13] This is a classic ex-

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6. *Id.*

7. *Sydney,* N.Y.J., June 13–14, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 1153, 1157.

8. A COLUMBIAN PATRIOT: OBSERVATIONS ON THE CONSTITUTION (1788), *reprinted in* 16 DHRC, *supra* note 4, at 272, 277.

9. *Curtiopolis*, N.Y. DAILY ADVERTISER, Jan. 18, 1788, *reprinted in* 15 DHRC, *supra* note 4, at 399, 402.

10. Letter from William Grayson to William Short (Nov. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 150, 151.

11. Paul Finkelman, *The First American Constitutions: State and Federal*, 59 TEXAS L. REV. 1141, 1162 n.43 (1981) (reviewing WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980) and WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1980)).

12. Brian Kane, *Idaho's Open Meetings Act: Government's Guarantee of Openness or the Toothless Promise?*, 44 IDAHO L. REV. 135, 137 (2007).

13. Burger, Remarks, *supra* note 3, at 77.

ample of Orwellian "double-think." Our belief that the Constitution is Supreme Law deserving respect and oaths of allegiance is utterly inconsistent with the notion that it was crafted by an illegal convention and ratified by an unsanctioned process that bordered on treason.

As we will see, the scholarship on this issue is inadequate. Only two articles have been dedicated to developing the argument that the Constitution was illegally adopted by revolutionary action.[14] Nearly all other scholarly references to the illegality of the adoption of the Constitution consist of either brief discussions or naked assertions.[15] Professors Bruce Ackerman and Neal Katyal argue that the illegality of the Consitution justifies the constitutional "revolutions" of Reconstruction and twentieth-century judicial activism.[16]

Despite the widespread belief that the Constitutional Convention delegates viewed their instructions as mere suggestions which could be ignored with impunity, the historical record paints a different picture. In *Federalist No. 78,* Alexander Hamilton underlined the importance of acting within one's authority: "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."[17] And in *Federalist No. 40*, James Madison had already answered the charge that the Convention delegates had ex- ceeded their commissions.[18]

Understanding the lawfulness of the adoption of the Constitution is not merely of historical interest. State appellate courts have cited the allegedly unauthorized acts of the delegates as

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14. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62. U. CHI. L. REV. 475 (1995); Richard S. Kay, *The Illegality of the Constitution,* 4 CONST. COMMENT. 57 (1987).

15. *See, e.g.*, John C. Godbold, *"Lawyer"—A Title of Honor*, 29 CUMB. L. REV. 301, 314 (1999); Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 523 (2001); L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 539–40 (2007); Lindsay K. Jonker, Note, *Learning from the Past: How the Events That Shaped the Constitutions of the United States and Germany Play Out in the Abortion Controversy*, 23 REGENT U. L. REV. 447, 453–54 (2011).

16. Ackerman & Katyal, *supra* note 14, at 476.

17. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. THE FEDERALIST NO. 40 (James Madison).

legal precedent in lawsuits challenging the legitimacy of the process for the adoption of state constitutions.[19] When critics claim that the Supreme Court's judicial activism is tantamount to an improper revision of the Constitution's text, some scholars defend the Court by comparison to the "unauthorized acts" of the delegates to the Constitutional Convention.[20] And as noted by Professor Robert Natelson, the specter of the "runaway convention" of 1787 is a common argument employed by political opponents of modern calls for an Article V Convention of States.[21] If the Philadelphia Convention violated its mandate, a new convention will do so today, critics assert. Even without such pragmatic implications, this article respectfully suggests that in a nation that treats allegiance to the Constitution as the ultimate standard of national fidelity, it is a self-evident truth that we ought to be satisfied, if at all possible, that the Constitution was lawfully and properly adopted. Yet, while this is obviously the preferred outcome, we must test this premise with fair-minded and thorough scholarship.

To this end, this Article separately examines the two claims of illegal action by the Founders. First, it reviews the question of whether the delegates violated their commis- sions by proposing "a whole new" Constitution rather than merely amending the Articles of Confederation. Second, it explores the legality of the ratification process that permitted the Constitution to become operational upon approval of nine state conventions rather than awaiting the unanimous approval of the thirteen state legislatures.

Each issue will be developed in the following sequence:

- Review of the timing and text of the official documents that are claimed to control the process.
- Review of the discussion of the issue at the Constitutional Convention.
- Review of the debates on the issue during the ratification process.

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19. *See* Smith v. Cenarrusa, 475 P.2d 11, 14 (Idaho 1970); Wheeler v. Bd. of Trs. of Fargo Consol. Sch. Dist., 37 S.E.2d 322, 328–29 (Ga. 1946).

20. *See, e.g.*, Lash, *supra* note 15, at 523.

21. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 719–23 (2011).

Finally, after developing the legal issues surrounding the Framers' allegedly illegal acts, this article examines modern scholarly literature to assess whether the critics have correctly analyzed each of these two related but distinct legal issues.

I. DID THE CONVENTION DELEGATES EXCEED THEIR AUTHORITY?

A. The Call of the Convention

The idea of "calling" the convention actually raises several distinct questions: (1) Who had the authority to convene the meeting? (2) When and where was it to be held? (3) Who actually invited the states to appoint delegates and attend the meeting? (4) Who chose the delegates? (5) Who gave the delegates their authority and instructions? (6) What were those instructions? (7) Who had the authority to determine the rules for the Convention?

It might be thought that the place to begin our analysis of these questions would be Article XIII of the Articles of Confederation, which laid out the process for amending that document.[22] However, this Article contains no provision whatsoever for holding a convention. Accordingly, the Convention had to originate from other sources that are easily discovered by a sequential examination of the relevant events. We start with the Annapolis Convention.

On November 30, 1785, the Virginia House of Delegates approved James Madison's motion requesting Virginia's congressional delegates to seek an expansion of congressional authority to regulate commerce. However, on the following day the House reconsidered because "it does not, from a mistake, contain the sense of the majority of this house that voted for the said resolutions."[23] On January 21, 1786, a similar effort was initiated. Rather than a solution in Congress, the Virginia

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22. ARTICLES OF CONFEDERATION OF 1781, art. XIII. ("[N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legisla- tures of every State.").

23. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 115 (Jonathan Elliot ed., 2nd ed. 1891) [hereinafter ELLIOT'S DEBATES].

House proposed a convention of states—a meeting that would become known as the Annapolis Convention. Its purpose was:

> [T]o take into consideration the trade of the United States; to examine the relative situation and trade of the said 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 assembled effectually to provide for the same [24]

It is clear that the Annapolis Convention was intended to propose a change to the Articles of Confederation using the power of the states and without involving Congress. Patrick Henry, who became an Anti-Federalist leader of the first rank, signed the resolution calling this Convention as Gov- ernor of Virginia and it was communicated with the requi- site formalities to the other states.[25] The minutes of the An- napolis Convention reflect that only five states (New York, New Jersey, Pennsylvania, Delaware, and Virginia) were in attendance.[26] Four additional states appointed commission- ers, but they did not arrive in a timely fashion and as such were not part of the proceedings.[27] The credentials of the delegates were read and then the Convention turned to the issue of "what would be proper to be done by the commis- sioners now assembled."[28]

The final Report of the Commissioners concluded that they "did not conceive it advisable to proceed on the business of their mission under the circumstance of so partial and defective a representation."[29] They then expressed a desire "that speedy measures may be taken to effect a general meeting of the states, in a future convention, for the same and such other purposes as the situation of public affairs may be found to require."[30] The commissioners repeatedly mentioned the limits of their authority and even worried that by making a mere recommendation for

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24. *Id.* at 115–16.
25. *Id.* at 116.
26. *Id.*
27. 1 DHRC, *supra* note 4, at 177.
28. 1 ELLIOT'S DEBATES, *supra* note 23, at 116.
29. *Id.* at 117.
30. *Id.*

a future meeting it might "seem to exceed the strict bounds of their appointment."[31] Nonetheless, they passed a recommendation for a new convention "with more enlarged powers" necessitated by a situation "so serious" as "to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the confederacy."[32] It was apparent to all that the act of these delegates was a mere political recommendation.

The Annapolis report suggested the framework for the next convention of states in four specific ways. First, it set the date and place—Philadelphia, on the second Monday of May, 1787.[33] Second, it recommended a "convention of deputies from the different states" who would gather "for the special and sole purpose of entering into [an] investigation [of the national government's ills], and digesting a plan for supplying such defects as may be discovered to exist . . . ."[34] Third, it looked to the state legislatures to name the delegates and to give them their authorization. The Annapolis commissioners "beg[ged] leave to suggest" that "the states, by whom [we] have been respectively delegated," "concur" in this plan and send delegates "with more enlarged powers."[35] Moreover, the commissioners recommended that the states "use their endeavors to procure the concurrence of the other states, in the appointment of commissioners."[36] The purpose of the next convention would be 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 . . . ."[37] The next convention's proposals would be adopted by a familiar process. It would "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."[38]

There was no request to Congress to authorize the Philadelphia Convention. But the Annapolis commissioners "neverthe-

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31. *Id.*
32. *Id.* at 118.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

less concluded, from motives of respect, to transmit copies of this report to the United States in Congress assembled, and to the executive of the other states."[39] Importantly, the term "Articles of Confederation" is totally absent from their report. Instead, the Annapolis report asked the states to appoint and authorize delegates "to render the constitution of the federal government adequate to the exigencies of the Union."[40]

1. The States Begin the Official Process

The plan for the second convention was launched on November 23rd, 1786, once again by the Virginia General Assembly.[41] The measure recited that the Annapolis commissioners "have recommended" the proposed Philadelphia Convention.[42] Virginia gave its two-fold rationale for not pursuing this matter in Congress: (1) Congress "might be too much interrupted by the ordinary business before them;" (2) discussions in Congress might be "deprived of the valuable counsels of sundry individuals, who are disqualified [from Congress]" because of state laws or the circumstances of the individuals.[43] George Washington was undoubtedly the best known example of the latter class of persons.[44] Having Washington at such a convention would be invaluable to convey a sense of dignity and seriousness, but he was not willing to serve in Congress.[45]

Seven commissioners were to be appointed "to meet such Deputies as may be appointed and authorised by other States" at the time and place specified "to join with them in devising and discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate to the exigencies of the Union."[46] There was no mention of seeking the permission of Congress to hold the convention, nor does the phrase "Articles of Confederation" appear in the doc-

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39. *Id.*

40. *Id.*

41. Virginia's Appointment of Delegates to the Constitutional Convention (Nov. 23, 1786), *reprinted in* 8 DHRC, *supra* note 4, at 540, 540.

42. *Id.*

43. *Id.*

44. *See* Whit Ridgeway, *George Washington and the Constitution*, *in* A COMPANION TO GEORGE WASHINGTON 413, 421–24 (Edward G.Lengel ed., 2012).

45. *Id.*

46. 8 DHRC, *supra* note 4, at 541.

ument. On December 4th, Virginia elected seven delegates to the Philadelphia Convention.[47] The act provided that "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."[48] Edmund Randolph, who became governor just four days earlier, complied with the request.[49]

New Jersey voted on November 24th, 1786 to send authorized delegates "for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof."[50] Pennsylvania acted next, voting on December 30th to send delegates to the Philadelphia Convention. The legislature recited that it was "fully convinced of the necessity of revising the Foederal Constitution, for the purpose of making such alterations and amendments as the exigencies of our public affairs require."[51] Pennsylvania instructed their delegates "to join with [delegates from other states] in devis- ing, deliberating on, and discussing all such alterations and further provisions as may be necessary to render the foederal constitution fully adequate to the exigencies of the Union."[52]

North Carolina's legislature passed a measure on January 6th, 1787 bearing the title "for the purpose of revising the foed- eral constitution."[53] This state's delegates were empowered "to discuss and decide upon the most effectual means to remove the defects of our foederal union, and to procure the enlarged purposes which it was intended to effect."[54] North Carolina refers to the Articles of Confederation in the preamble of its resolution but not in the delegates' instructions.[55]

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47. *Id.*

48. *Id.*

49. 1 DHRC, *supra* note 4, at 192 (Randolph circulated the Virginia resolution).

50. Resolution Authorizing and Empowering the Delegates (Nov. 24, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 196.

51. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199.

52. *Id.*

53. Act Authorizing the Election of Delegates (Jan. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 200, 200.

54. *Id.* at 201.

55. *Id.* at 200–201.

On February 3rd, Delaware became the fifth state to authorize the Philadelphia Convention with an act entitled "for the purpose of revising the federal Constitution."[56] The preamble recites that the legislature was "fully convinced of the Necessity of revising the Foederal Constitution, and adding thereto such further Provisions as may render the same more adequate to the Exigencies of the Union."[57]

Delaware employed the familiar language of international diplomacy in granting "powers" to its delegates.[58] They were "hereby constituted and appointed Deputies from this State, with Powers to meet such Deputies as may be appointed and authorized by the other States . . . and to join with them in devising, deliberating on, and discussing, such Alterations and further Provisions, as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union."[59] Delaware added one extremely important limitation to their delegates' authority. Their powers did "not extend to that Part of the Fifth Article of the Confederation . . . which declares that . . . each State shall have one Vote."[60]

On February 10th, Georgia enacted a measure "for the Purpose of revising the Federal Constitution."[61] Its delegates were empowered "to join with [delegates from other states] in devising and discussing all such alterations and farther [sic] provisions, as may be necessary to render the federal constitution adequate to the exigencies of the union."[62]

In addition to Delaware's specific instruction on preserving the equality of the states, all six of the initial states issued formal instruction to their delegates regarding voting. For example, each state established its own rule for a minimum number of delegates authorized to cast a vote for the state. Virginia, New Jersey, North Carolina, and Delaware required a mini- mum of three delegates to be present to cast the state's single

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56. Act Electing and Empowering Delegates (Feb. 3, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

62. *Id.*

vote.[63] Pennsylvania required a four-delegate quorum.[64] Georgia set the number at two delegates.[65]

In chronological order, the next event was a February 21st resolution passed by the Confederation Congress that is widely proclaimed as the measure that "called" the Constitutional Convention. But, to understand the origins of this controversial and important measure, we need to turn our attention to the legislature of New York.

2. Machinations in New York

Congress's inability to pay the debts from the War for American Independence was one of the key reasons that the states were looking to revise the federal system.[66] Congress proposed a new system in April 1783 containing two important changes to the Articles of Confederation.[67] First, apportionment of debt would be based on population rather than the value of land.[68] Second, the Impost of 1783 requested that the states permit Congress to impose a five-percent tariff on imports for twenty-five years with the funds dedicated to paying off war debt.[69]

The Impost of 1783 reveals the formalities the Confederation Congress employed when it requested that the states take official action. Congress proclaimed that their measure was "recommended to the several states."[70] Moreover, "the several states are advised to authorize their respective delegates to subscribe and ratify the same as part of said instrument of un- ion."[71] This was followed by a formal printed, six-page "Ad-

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63. Act Authorizing the Election of Delegates (Nov. 23, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 196; Act Authorizing the Election of Delegates (Jan. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 200, 200; Act Electing and Empowering Delegates (Feb. 3, 1787) *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

64. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199.

65. Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

66. *See e.g.*, THE FEDERALIST NO. 15, at 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

67. 19 DHRC, *supra* note 4, at xxxvi.

68. *Id.*

69. *Id.*

70. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 258 (Worthington C. Ford et al. eds., 1904–37) [hereinafter JOURNALS OF CONGRESS].

71. *Id.* at 260.

dress to the States, by the United States in Congress Assembled *to accompany the act of April 18, 1783*."[72]

The Impost measure was eventually adopted by twelve states.[73] However, New York's Senate defeated the Impost by a vote of 11-7 on April 14th, 1785.[74] With no other solutions on the horizon, on February 15th, 1786, Congress urged the New York legislature to reconsider.[75] Repeated requests from Con- gress and rebuffs from New York left the dangerously divisive matter unsettled when the state's legislature convened in Janu- ary 1787.[76] On February 15th, the legislature rejected an impassioned plea by Alexander Hamilton to approve the Impost, voting 38 to 19 to send yet another deliberately unacceptable proposal back to Congress.[77]

Rather than complying with the request of Congress to approve the Impost, the New York House voted on February 17th to instruct the state's delegates in Congress to make a motion to call for a convention of states under very specific terms.[78] After an acrimonious attack from Senator Abraham Yates, Jr., the Senate approved the measure by a vote of 10-9 on February 20th.[79] The context strongly suggests that the New York legislature believed that this motion was an effort to not only respond to the ongoing dispute about the Impost, but to attempt to control the upcoming convention of states to be held in Philadelphia on terms acceptable to this most recalcitrant state.

3. Congress Responds to the Annapolis Convention Report

While the conflict with New York remained in a hostile stalemate, on February 19th, a committee in Congress voted by a one-vote margin to approve a resolution responding to

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72. 1 ELLIOT'S DEBATES, *supra* note 23, at 96–100. Scholars of the era understood the importance of this document in the process of adopting the Constitution. The Impost of 1783 is cited in *Elliot's Debates* in the chapter entitled: "Proceedings which led to the Adoption of the Constitution of the United States." *Id.* at 92.

73. CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 224 (2005).

74. 19 DHRC, *supra* note 4, at xxxvi.

75. *Id.*

76. *Id.* at xxxvi–xxxix.

77. *Id*. at xl.

78. 31 JOURNALS OF CONGRESS, *supra* note 70, at 72.

79. 19 DHRC, *supra* note 4, at 507.

the Annapolis report.[80] It expressed the view that Congress "entirely coincide[ed]" with the report as "the inefficiency of the federal government and the necessity of devising such farther [sic] provisions as shall render the same adequate to the exigencies of the Union" and "strongly recommend[ed] to the different state legislatures to send forward delegates to meet the proposed convention "[81]

However, before the resolution could be voted on by Congress, New York's delegates introduced a competing resolution as instructed by their state legislature.[82] New York's motion was limited to "revising the Articles of Confederation."[83] In light of the underlying acrimony, New York's alternative measure was doomed. The final vote was five votes no, three votes yes, and two states divided.[84] Neither Rhode Island nor New Hampshire was present or voting.[85]

Massachusetts' delegates—one of the three states voting to approve the New York measure—followed immediately with an alternative viewed as a compromise.[86] Congress approved these fateful words:

> 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.[87]

While the language of this resolution has been oft-quoted, scholars have generally failed to look at the resolution and its context to determine whether this was in fact the formal call for the Phila-

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80. Commentaries on the Constitution, *reprinted in* 13 DHRC, *supra* note 4, at 36–37.

81. 32 JOURNALS OF CONGRESS, *supra* note 70, at 71–72.

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 73.

85. *Id.*

86. *Id.* at 73–74.

87. Confederation Congress Calls the Constitutional Convention (Feb. 21, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 185, 187.

delphia Convention. There are two attributes that would be found in a formal call that are completely absent here. First, the language of the resolution would be addressed to the states. Second, Congress would follow its normal formal protocol for submitting measures for the consideration of the states. For example, when Congress asked the states to ratify the amendment to the Articles in the Impost of 1783, the language was directed to the states and there was formal communication to the chief executives of each state.[88] There is no such language of invitation contained in the February 21st resolution of Congress and there is no record of any formal instruments of communication to the states inviting them to send delegates to Philadelphia. When Virginia called the Philadelphia Convention, it had sent such communications.[89] Congress never did in this instance.

The absence of the formalities is strong evidence that Congress was merely issuing its blessing on the convention planning already in progress at the initiative of Virginia and five other states. Congress expressed its "opinion" that "it is expedient" that a convention of delegates "be held." On its face, it reads more like an endorsement than a formal request to the states to send delegates. Moreover, the question of the power of Congress to issue such a formal call cannot be overlooked. There is nothing in the text of the Articles of Confederation (particularly Article XIII) that suggests that Congress had any power to actually call a convention of states.[90]

However, the historical record demonstrates that the states clearly believed that they could call conventions of states to discuss common problems. Natelson has catalogued ten such conventions after the Declaration of Independence but prior to the Annapolis Convention.[91] Congress was basically a bystander in this process. Virginia did not seek the approval of Congress when it invited the other states to the conventions held in Annapolis and Philadelphia. It is clear that the states believed, as the text of the Annapolis report makes plain, that notifying Congress arose

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88. 24 JOURNALS OF CONGRESS, *supra* note 70, at 258.

89. Virginia's Appointment of Delegates to the Constitutional Convention (Nov. 23, 1786), *reprinted in* 8 DHRC, *supra* note 4, at 540, 540.

90. *See supra* note 22 and accompanying text.

91. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*", 65 FLA. L. REV. 615 (2013).

"from motives of respect"[92] rather than from any sense that it was necessary to seek congressional approval.

Calling a convention is a formal invitation to participate in an official gathering. A call to the states to take action at the request of Congress would have said so directly and would have been sent to the states with appropriate formalities. All such indicia of a formal call are missing from the February 21st resolution but are clearly present in the measure enacted the previous fall by the Virginia legislature.

4. The Six Remaining States Appoint Delegates

A February 22nd resolution by the Massachusetts legislature was enacted without knowledge that Congress had acted the prior day.[93] It was repealed and replaced with another enactment on March 7th.[94] This resolution adopted the operative paragraph from the congressional resolution.[95] Thus, Massachusetts delegates were instructed to "solely" amend the Articles of Confederation to "render the federal constitution adequate to the exigencies of government and the preservation of the union."[96] Without specifically citing the Congressional resolution, on March 6th, New York's legislature appointed delegates with the verbatim language used in the resolution.[97] Consequently, the Empire State's delegates were under the same instructions as those from Massachusetts.

South Carolina's legislature ignored the language proffered by Congress. It essentially returned to the Virginia model with an enactment entitled "for the purpose of revising the foederal constitution."[98] On March 8th, its delegates were given the authority "to join" with other delegates "in devising and discussing all such alterations, clauses, articles and provisions as may

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92. 1 ELLIOT'S DEBATES, *supra* note 23, at 118.

93. Resolution Authorizing the Appointment of Delegates and Providing Instructions for Them (Feb. 22, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 205, 205.

94. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207.

95. *Id.*

96. *Id.*

97. Assembly and Senate Authorize Election of Delegates (Feb. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 209, 209.

98. Act Authorizing the Election of Delegates (Mar. 8, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 213, 214.

be thought necessary to render the foederal constitution entirely adequate to the actual situation and future good government of the confederated states."[99]

Connecticut was the second state to formally acknowledge the Congressional measure in its appointment of delegates. Its enactment recited that the act of Congress was a recommendation.[100] The measure specified that the delegates were "authorized and impowered . . . to confer with [other delegates] for the Purposes mentioned in the sd [sic] Act of Congress."[101] However, it granted further authority under a different formula. Its delegates were "duly empowered" to discuss and report "such Alterations and Provisions, agreeable to the general Principles of Republican Government, as they shall think proper, to render the foederal Constitution adequate to the Exigencies of Government, and the Preservation of the Union."[102] Thus, the final phrasing is essentially the same as the Virginia formula. Connecticut appears to have been covering both alternatives when it finally acted on May 17th—two days after the scheduled start of the Convention.

After prolonged discord between the House and Senate, on May 26th, Maryland appointed delegates authorized to meet and negotiate "for the purpose of revising the federal system."[103] Working with other states, the delegates were sanctioned to join in "considering such alterations, and further provisions, as may be necessary to render the federal constitution adequate for the exigencies of the union."[104] Following the Virginia model, New Hampshire was the twelfth and final state to authorize delegates on June 27th—a month after the Convention was in full operation.[105] Its delegates were to join with other states "in devising and discussing all such alterations and further provi-

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99. *Id.*

100. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 215.

101. *Id.* at 216.

102. *Id.*

103. Act Electing and Empowering Delegates (May 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 222, 222.

104. *Id.*

105. Act Electing and Empowering Delegates (June 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 223, 223.

sions as to render the federal constitution adequate to the exigencies of the Union."[106]

Like the first six states, each of the final six states imposed an internal quorum rule that was strictly observed by the Convention. Massachusetts and South Carolina required the presence of at least three delegates.[107] New Hampshire permitted two delegates to represent the state.[108] Connecticut and Maryland allowed one delegate to suffice.[109] New York, in its ongoing obstinate approach, appointed three delegates but made no provision for any lesser number to suffice to cast the state's vote.[110] Every other state appointed more delegates than the minimum number required by that state's quorum rule.

Only two states, Massachusetts and Connecticut, actually cited the Congressional resolution in their formal appointment of delegates.[111] Connecticut described the Congressional resolution as a "recommend[ation]" but did not limit its delegates to the merely amending the Articles of Confederation.[112] New York and Massachusetts appointed delegates employing the verbatim language of the Congressional resolution.[113] From the context, however, it was clear to all that these delegates were to "solely amend the Articles" as specified by their states—not because of the language from Congress.

On the other hand, both Pennsylvania and Delaware specifically cite the Virginia resolution as the impetus for their

106. Resolution Electing and Empowering Delegates (Jan. 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 223, 223.

107. 3 RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 584 (Max Farrand ed., 1st ed. 1911) [hereinafter FARRAND'S RECORDS].

108. *Id*. at 572–73.

109. *Id*. at 585–86.

110. *Id*. at 579–81.

111. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207; Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 215.

112. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 215.

113. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207; Assembly and Senate Authorize Election of Delegates (Feb. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 209, 209.

action.[114] Moreover, in the official communications between the Maryland House and Senate, the Senate cited the Virgin- ia resolution as the basis for action by the Maryland legisla- ture.[115] Nine states essentially followed the Virginia language in the grant of authority to their delegates. Connecticut adopted broad language of its own creation. One thing is clear about all twelve states: every legislature acted on the premise that it was the body that would decide what author- ity it would give its own delegates.

B. Arguments about Delegates' Authority at the Constitutional Convention

On the second Monday in May, in the eleventh year of the independence of the United States of America, "in virtue of appointments from their respective States, sundry Deputies to the foederal-Convention appeared."[116] No quorum of states materialized until May 25th.[117] On that day, the first order of business was the election of George Washington as President of the Convention followed by the election of a secretary.[118] The next order of business was for each state to produce its creden- tials.[119] The credentials of the seven states in attendance were read.[120] We know this from the following entry:

> On reading the Credentials of the deputies it was noticed that those from Delaware were prohibited from changing the Article in the Confederation establishing an equality of votes among the states.[121]

Through the remainder of the Convention, upon the arrival of a new state, or a new delegate, the record repeatedly reflects that the credentials were produced and read.[122] The Delaware

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114. Act Electing and Empowering Delegates (Dec. 30, 1787), *reprinted in* 1 DHRC, *supra* note 4, 199, 199; Act Electing and Empowering Delegates (Feb. 3, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

115. Senate Message to House Objecting to Adjournment (Jan. 20, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 217, 217–18.

116. 1 FARRAND'S RECORDS, *supra* note 107, at 1.

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.* at 4.

122. *See id.* at 7, 45, 62, 76, 115, 334, 353.

example indicates clearly that the Convention understood that these deputies were agents of their state and subject to the instructions contained in their credentials.

On May 29th, 1789, Edmund Randolph introduced his plan for a truly national government.[123] It was met with immediate resistance on various grounds. General Charles Cotesworth Pinckney, a delegate from South Carolina, "expressed a doubt whether the act of Congs. recommending the Convention, or the Commissions of the deputies to it, could authorize a dis- cussion of a System founded on different principles from the federal Constitution."[124] Elbridge Gerry, from Massachusetts, expressed the same doubt. "The commission from Massachu- setts empowers the deputies to proceed agreeably to the recommendation of Congress. This [sic] the foundation of the convention. If we have a right to pass this resolution we have a right to annihilate the confederation."[125] Both objectors—who became leading Anti-Federalists after the Convention—described the act of Congress as a "recommendation."[126] Both cited their state commissions as the formal source of their authority.[127] There was no motion made and no vote taken in response to these arguments. On June 7th, George Mason, who ultimately refused to sign the Constitution and became a leading Anti-Federalist,[128] described the authority of the convention somewhat more broadly. The delegates were "appointed for the special purpose of revising and amending the federal constitution, so as to obtain and preserve the important objects for which it was instituted."[129]

William Paterson rose on June 9th in opposition to the proposal to adopt a system of proportional representation for the legislative chamber. He contended that the Convention "was formed in pursuance of an Act of Congs. that this act was recited in several of the Commissions, particularly that of Massts.

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123. *Id.* at 20.
124. *Id.* at 34.
125. *Id.* at 43.
126. *Id.* at 41, 43.
127. *Id.* at 34, 43.
128. Virginia Convention Debates (June 10, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 811–813.
129. 1 FARRAND'S RECORDS, *supra* note 107, at 160–61.

which he required to be read."[130] Of course, the formula created by Congress was only followed precisely by New York and Massachusetts. Paterson cleverly avoided asking for a reading of his own New Jersey credentials, which contained a much broader statement of authority.[131] He was attempting to defeat proportional representation, and he carefully selected the credentials he thought would bolster his political argument. Paterson elaborated on his view of the delegates' authority:

> Our powers do not extend to the abolition of the State Governments, and the Erection of a national Govt. —They only authorise amendments in the present System, and have for yr. Basis the present Confederation which establishes the principle that each State has an equal vote in Congress [132]

Six days later, Paterson introduced his well-known New Jersey plan which contained nine points: (1) federal powers were to be enlarged; (2) Congress should be given the power to tax; (3) enforcement powers should be given to collect delinquencies from the states; (4) Congress would appoint an executive; (5) a federal judiciary would be created; (6) a supremacy clause was included; (7) a process was created for admission of new states; (8) a uniform rule of naturalization should be adopted in each state; and (9) full faith and credit observed between the states with regard to criminal convictions.[133]

The New Jersey Plan was no minor revision of the Articles of Confederation. It contained a radical expansion of power compared with the existing system. Paterson did not include any change in the system of voting in Congress. However, Congress would remain one-state, one-vote. And, he did not propose the direct election of any branch of government by the people. If the New Jersey Plan had formed the ultimate framework from the Convention, it would have almost certainly required a comprehensive rewrite of the Articles of Confederation—a "whole new document"—rather than discrete amendments. Paterson and the other Anti-Federalists did not object to massive changes or a new document; rather they contended that the delegates were unau-

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130. *Id.* at 177.

131. *See* Resolution Authorizing and Empowering the Delegates (Nov. 24, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 196.

132. 1 FARRAND'S RECORDS, *supra* note 107, at 184.

133. *Id.* at 242–45.

thorized to adopt a different theory of government. When the advocates of the New Jersey Plan raised arguments about the scope of the delegates' authority, they were not making technical legal arguments. Their contention was one of political philosophy. Any plan that they deemed insufficiently "federalist" in character was beyond the scope of their view of the delegates' authority.

This is clearly shown by debates on the following day, Saturday, June 16th. John Lansing, Jr., an ardent Anti-Federalist from New York, asked for a reading of the first resolutions of both Paterson's plan and Randolph's Virginia Plan.[134] Lansing contended that Paterson's plan sustained the sovereignty of the states, while Randolph's destroyed state sovereignty.[135] He picked up Paterson's earlier contention that the Convention had the authority to adopt the New Jersey Plan but not the Vir- ginia Plan.[136] "He was decidedly of opinion that the power of the Convention was restrained to amendments of a federal na- ture, and having for their basis the Confederacy in being."[137] Then he asserted, "The Act of Congress[, t]he tenor of the Acts of the States, the commissions produced by the several deputa- tions all proved this."[138]

While Lansing's own New York credentials followed the limited formula of Congress, he was playing fast and loose with the facts to assert that this was a fair description of the authority of any other state except Massachusetts. However, one component of his argument was more than disingenuous political spin. He emphasized the concept that the Convention must propose a federal, not national government.[139] Every state's credentials had explicit language embracing the view that the revised government should be federal in character since they were to deliver an adequate "federal constitution." Like Randolph's plan, the Anti-Federalists' plan would have required a substantial rewrite of the Articles of Confederation. Their continued objection was not to the writing of a "whole new document" but to a form of government that they personally deemed to be insufficiently "federal" in character. James Wilson took the floor immediately follow-

134. *Id.* at 249.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 246.

ing Lansing and Paterson on this Saturday session. He began with a side-by-side comparison of the two comprehensive plans. He contended that his powers allowed him to "agree to either plan or none."[140]

On the following Monday, June 18th, Madison picked up the argument. He contended that the New Jersey Plan itself varied from some delegates' views of a federal system "since it is to operate eventually on individuals."[141] Madison contended that the States "sent us here to provide for the exigences [sic] of the Union. To rely on & propose any plan not adequate to these exigences [sic], merely because it was not clearly within our powers, would be to sacrifice the means to the end."[142] Here, and in other speeches and writings, Madison embraced the no- tion that the delegates would be justified in exceeding their strict instructions if necessary. But his moral argument was not a concession by him that, in fact, their proposed actions were a legal violation of their credentials. His argument was clearly in the alternative. He bolstered his argument based on the language adopted by ten states. This recitation makes it clear that he believed that their actions were justified under the language of their credentials.

Hamilton followed Madison in defense of the delegates' authority to consider the Virginia Plan. They had been "appointed for the *sole* and *express* purpose of revising the confederation, and to *alter* or *amend* it, so as to render it effectual for the purposes of a good government."[143] He concluded with a reminder that the Convention could only "propose and recommend."[144] The power of ratifying or rejecting lay solely with the states.[145]

On the following day, June 19th, Madison again defended the Virginia Plan against the charge that it was not sufficiently "federal" in character.[146] Madison focused on the claimed differences between a federal system and a national system to demonstrate that the Virginia Plan was indeed federal in char-

140. *Id.* at 261.
141. *Id.* at 283.
142. *Id.*
143. *Id.* at 294.
144. *Id.* at 295.
145. *Id.*
146. *Id.* at 313–22.

acter.[147] The Anti-Federalists claimed that a federal government could not operate directly on individuals.[148] Madison demonstrated that in certain instances both the existing Articles and the New Jersey Plan would permit direct governance of individuals.[149] Second, it was contended that to qualify as a federal plan the delegates to Congress had to be chosen by the state legislatures.[150] But, as Madison pointed out, Connecticut and Rhode Island currently selected their members in the Confederation Congress by a vote of the people rather than by the legislature.[151] Thus, Madison convincingly argued that if the New Jersey Plan was "federal" in character and fell within the delegates' credentials, the Virginia Plan was likewise a federal proposal and could be properly considered.

About two weeks later, when the contentious issue of the method of voting in the two houses of Congress hit a stalemate, on July 2nd, Robert Yates, an Anti-Federalist from New York, was appointed to the committee to discuss a proposal from Oliver Ellsworth that has come to be known as the Connecticut Compromise.[152] That committee, headed by Elbridge Gerry, reported its recommendations on July 5th. Two days later, Gerry explained that the "new Govern[ment] would be partly national, partly federal."[153]

The Convention approved equal representation for each state in the Senate on July 7th.[154] And on July 10th, as they were hammering out the details for popular representation in the House of Representatives, Lansing and Yates left the Convention for good.[155] This left New York without a vote from that point on in the Convention. Hamilton remained and participated in the debates, but New York never cast another vote.

During the Convention, every allegation that delegates were exceeding their credentials was directed at the Virginia Plan and not the final product. Thus, it is simply not true to suggest

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147. *Id.* at 314.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 509.
153. *Id.* at 551 (statement of Gouverneur Morris quoting Gerry).
154. *Id.* at 548–49.
155. *Id.* at 536.

that the Convention believed it was intentionally violating its credentials when voting to adopt the Constitution. Even during the earlier stages of the Convention, the Federalists defended the Virginia Plan as being within the scope of their authority. The final product—the actual Constitution—was more bal- anced toward true federalism than the Virginia Plan. Thus, at no stage of the Convention was there a consensus that the del- egates were acting in an *ultra vires* manner.

C. Debates in the Confederation Congress

The Constitution was carried by William Jackson, secretary of the Convention, to New York where he delivered it to Con- gress on September 19th.[156] The debates over the Constitution began the following week on September 26th.[157]

On the first day of debate, Nathan Dane made a motion contending that it was beyond the power of Congress to recommend approval of the new Constitution.[158] Congress was limited to proposing amendments to the Articles of Confederation rather than recommending a new system of government.[159] Dane's motion acknowledges that the delegates' powers were found in their state credentials.[160] Dane referred to the February 21st action of Congress as having "resolved that it was expedient that a Convention of the States should be held for the Sole and express purpose of revising the articles of Confederation."[161] A fair reading of Dane's motion suggests that he was surprised by the outcome. Nothing he said implied that the delegates had violated their credentials from the states. Dane contended that Congress should simply forward the Constitution to the state legislatures for their consideration.[162] He argued that this was neutral toward the Constitution, though he clearly opposed the document.[163]

Richard Henry Lee vigorously contended that the Constitution could be amended by the Confederation Congress before it

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156. 13 DHRC, *supra* note 4, at 229.
157. *Id.* at 231.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 232.
163. *Id.*

was sent to the states.[164] He ultimately proposed a series of amendments outlining many provisions in the nature of a bill of rights and various changes in the structure of government.[165] He also sought to establish the Senate on the basis of propor- tional representation rather than the equality of the states.[166] Rufus King of Massachusetts argued that Congress could not "constitutionally make alterations" and that "[t]he idea of [the] Convention originated in the states."[167] Madison followed this argument almost immediately contending that "[t]he Convention was not appointed by Congress, but by the people from whom Congress derive their power."[168]

It must be noted there were substantial conflicts in Congress over the mode of ratification (which will be considered in section II) and it is was fair to conclude that some members of Congress were surprised with the outcome of the Convention. Nonetheless, there was no serious contention that the delegates had violated their instructions from the states. Notably absent from the record is any claim that Congress had called the Convention and given the delegates their instructions and authority. This silence is powerful evidence that Congress did not believe that it had called the Convention or had issued binding instructions.

Every attempt to propose amendments or to express a substantive opinion on the merits of the Constitution was unsuccessful. On September 28th, Congress (voting by states) unanimously approved the following resolution:

> Resolved unanimously, That the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a conven- tion of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.[169]

The only recommendation coming from Congress was that the state legislatures should send the matter to state conventions. This

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164. *Id.* at 237–38.

165. *Id.* at 238–240.

166. *Id.* at 240.

167. Melancton Smith's Notes (Sept. 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 335, 335–36.

168. *Id.* at 336.

169. Journals of Congress (Sept. 28, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 340, 340.

was an approval of the new ratification process only, and not an approval of the merits of the Constitution.

D. Debates in the State Ratification Convention Process

Many people—even some scholars—contend that the Constitution was sent straight from the Constitutional Convention in Philadelphia to the ratification conventions in the several states.[170] Such "history" obviously misses two important steps. First, Congress dealt with the issue as we have just seen. Second, Congress sent the Constitution together with its recommendation for following the new process to the state legislatures—not the state ratification conventions. Each legislature had to decide whether it would follow this new process by calling a ratification convention within the state. Some of the most important discussions of the propriety of the actions of the Constitutional Convention are found in these state legislative debates. In some states, the issue spilled over into the ratification conventions and public debates as well. We consider the evidence from all such sources below.

1. There was a General Consensus that the States, Not Congress Called the Convention

While modern scholars generally assert that the Philadelphia Convention was called by Congress on February 21st, 1787, the contemporary view was decidedly different.[171] As we shall see, the friends and opponents of the Constitution widely agreed that the origins and authority for the Convention came from the States.

During the Pennsylvania legislative debates over calling the state ratification convention, an important Federalist, Hugh Breckenridge, explained the origins of the Convention:

> How did this business first originate? Did Virginia wait the recommendation of Congress? Did Pennsylvania, who followed her in the appointment of delegates, wait the recommendation of Congress? The Assembly of New York, when they found they had not the honor of being foremost in the measure, revived the idea of its being necessary to have it

170. *See, e.g.*, Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 976 (1992) ("Moreover, the Convention did not present the proposed Constitution to Congress for approval, or to the legislatures of the states, but called for ratification by 'specially elected conventions' in the states.'").

171. *See supra* notes 88–92 and accompanying text.

> recommended by Congress, as an excuse for their tardiness (being the seat of the federal government), and Congress, to humor them, complied with their suggestions . . . . But we never heard, that it was supposed necessary to wait [for Congress's] recommendations.[172]

George Washington described the origins of the Convention in similar terms in a letter to Marquis de Lafayette on March 25th, 1787:

> [M]ost of the Legislatures have appointed, & the rest it is said will appoint, delegates to meet at Philadelphia the second monday [sic] in may [sic] next in general Conven- tion of the States to revise, and correct the defects of the federal System. Congress have also recognized, & recom- mended the measure.[173]

Madison echoed this theme in a letter to Washington sent on September 30th, 1787. "[E]very circumstance indicated that the introduction of Congress as a party to the reform was intended by the states merely as a matter of form and respect," he wrote.[174] Federalists, as may be expected, consistently adhered to the view that the Convention had been called by the states and the action of Congress was a mere endorsement.

Even in the midst of their assertions that the Convention had violated its instructions, leading Anti-Federalists repeatedly admitted that the Convention was called by the states and not by Congress. In the Pennsylvania legislature, an Anti-Federalist leader read the credentials granted to that state's delegates to the Constitutional Convention, followed by the contention that "no other power was given to the delegates from this state (and I believe the power given by the other states was of the same nature and extent)."[175] An Anti- Federalist writer—who took the unpopular tack of attacking George Washington—admitted this point as well. "[T]he mo- tion made by Virginia for a General Convention, was so readily

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172. Assembly Debates, A.M. (Sept. 28, 1787), *reprinted in* 2 DHRC, *supra* note 4, at XX, 79–80.

173. Letter from George Washington to Marquis de Lafayette (Mar. 25, 1787), *reprinted in* THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION 106 (Theodore J. Crackel ed., 2008).

174. Letter from James Madison to George Washington, New York (Sept. 30, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 343, 343–44.

175. Convention Debates (Nov. 28, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 382, 394.

agreed to by all the States; and that as the people were so very zealous for a good Federal Government "[176] A series of Anti-Federalist articles appeared in the Massachusetts Centinel from December 29th, 1787 through February 6th, 1788.[177] In the first installment, this writer admitted that the Constitutional Convention originated in the Virginia legislature:

> The Federal Convention was first proposed by the legislature of Virginia, to whom America is much indebted for having taken the lead on the most important occasions.— She first sounded the alarm respecting the intended usurpa- tion and tyranny of Great-Britain, and has now proclaimed the necessity of more *power* and *energy* in our federal government . . . .
>
> In consequence of the measures of Virginia respecting the calling a federal Convention, the legislature of this State on the 21st of February last, *Resolved*, "That five Commissioners be appointed by the General Court, who, or any three of whom, are hereby impowered to meet such commissioners as are or may be appointed by the legislatures of the other States [178]

Even in a state that formally adopted Congressional language, a major Anti-Federalist advocate admitted that its legislature was prompted to act "in consequence" of the call from Virginia.

2. Who gave the delegates their instructions?

An article in the New York Daily Advertiser on May 24, 1787, may provide us the most objective view on the source of the delegates' authority since it was published the day before the Convention began its work. No one yet had a reason to claim that the delegates had violated their instructions.

> [W]e are informed, that the authority granted to their delegates, by some states, are very extensive; by others even general, and by all much enlarged. Upon the whole we may

176. *An American*, AM. HERALD, Jan. 28, 1788, *reprinted in* 5 DHRC, *supra* note 4, at 792, 792.

177. *See* 5 DHRC, *supra* note 4, at 549, 589, 661, 698, 833, 843, 869.

178. *The Republican Federalist I*, MASS. CENTINEL, Dec. 29, 1787, *reprinted in* 5 DHRC, *supra* note 4, at 549, 551–52.

> conclude that they will find their authority equal to the important work that will lay before them [179]

This writer—opining before sides were formed—agreed with both the Federalists and the Anti-Federalists after the Convention that the relevant instructions to the delegates were issued by their respective states.

a. Anti-Federalist Views

Perhaps the most famous Anti-Federalist was Virginia's Patrick Henry. He led a nearly successful effort to defeat the ratification of the Constitution in that state's convention.[180] But, early in the process, as a superb trial lawyer, Henry sought to lay the documentary record before the Virginia convention to prove that the delegates had violated their instructions.

> Mr. *Henry* moved, That the Act of Assembly appointing Deputies to meet at Annapolis, to consult with those from some other States, on the situation of the commerce of the United States—The Act of Assembly for appointing Deputies to meet at Philadelphia, to revise the Articles of Confederation—and other public papers relative thereto—should be read.[181]

Henry's maneuver demonstrates that he believed that the controlling instructions were to be found, not in a congressional measure, but in the two Virginia acts which appointed delegates to Annapolis and Philadelphia.

One of the most widely circulated Anti-Federalist attacks against the legitimacy of the Convention was a letter from Robert Yates and John Lansing, Jr. explaining their early exit from the Convention.[182] The core of their argument was that the Convention had violated its restricted purpose. After reciting the familiar language that the convention had been confined to the "*sole and express purpose of revising the articles of Confederation*,"[183] their letter identifies what they believed to be the controlling source of those

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179. *To the Political Freethinkers of America*, N.Y. DAILY ADVERTISER, May 24, 1787, *reprinted in* 13 DHRC, *supra* note 4, at 113, 114.

180. Virginia Convention Debates (June 10, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 897–900.

181. Virginia Convention Debates (June 4, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 915, 917.

182. *The Report of New York's Delegates to the Constitutional Convention*, N.Y. DAILY ADVERTISER, Jan. 14, 1788, *reprinted in* 15 DHRC, *supra* note 4, at 366.

183. *Id.* at 369.

instructions: "From these expressions, we were led to believe that a system of consolidated Government, could not, in the remotest degree, have been in contemplation of the Legislature of this State."[184] Their admission should lay to rest any suggestion that the Anti-Federalists believed that Congress gave the Convention its authority and instructions.

The New York Journal published a series of Anti-Federalist articles penned by Hugh Hughes under the pen name of "A Countryman."[185] He decries what seemed to be "a Predetermination of a Majority of the Members to reject their Instructions, and all authority under which they acted."[186] But earlier in the same paragraph he recites "the Resolutions of several of the States, for calling a Convention to *amend* the Confederation"[187] as the source of the delegates' instructions. His argument strongly suggests that all of the delegates violated their instructions. However, he recites only a paraphrase of the New York instructions in support of his contention. Again, he assumes that the state legislatures, not Congress, were the source for the delegates' instructions.

An Anti-Federalist writer from Georgia admitted the correct legal standard even in the midst of an assertion that played fast and loose with the facts:

> [I]t is to be observed, delegates from all the states, except Rhode Island, were appointed by the legislatures, with this power only, "to meet in Convention, to join in devising and discussing all such ALTERATIONS and farther [sic] provisions as may be necessary to render the articles of the confederation adequate to the exigencies of the Union."[188]

Not a single state appointed delegates with the exact language set out in this writer's alleged quotation. His own state's resolution does not even mention the Articles of Confederation.[189] He begins

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184. *Id.*

185. *See* 19 DHRC, *supra* note 4, at 271, 291, 347, 424.

186. Hugh Hughes, *A Countryman I*, N.Y.J., Nov. 21, 1787, *reprinted in* 19 DHRC, *supra* note 4, at 271, 273.

187. *Id.*

188. *A Georgian*, GAZETTE ST. GA., Nov. 15, 1787, *reprinted in* 3 DHRC, *supra* note 4, at 236, 237.

189. The operative language from the Georgia legislature instructed the delegates: "to join with [other delegates] in devising and discussing all such altera- tions and farther [sic] provisions, as may be necessary to render the federal consti- tution adequate to the exigencies of the union." Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

by accurately citing the states as the source of the instructions and then, as was commonly the case, went from fact to fantasy when he purported to quote the delegates' instructions.

Letters from a Federal Farmer, which are widely recognized as the pinnacle of Anti-Federalist writing, contains the same admission—even in the midst of attacking the legitimacy of the convention. The Farmer accuses the Annapolis Convention of launching a plan aimed at "destroying the old constitution, and making a new one."[190] The states were duped and fell in line. "The states still unsuspecting, and not aware that, they were passing the Rubicon, appointed members to the new convention, for the sole and express purpose of revising and amending the confederation."[191] The Farmer's political purpose was served by selectively quoting the language used only by two states. But his argument about the states being unaware they were passing the Rubicon applied to all twelve states—including the six that named their delegates and gave them their instructions before this phrase was ever drafted in the Confederation Congress. Again, the Farmer blames the states for being duped when they gave instructions to their delegates.

The Anti-Federalist Cato also contended that the process employed was improper. However, in a classic straw man argument, he decried a process that never happened. According to Cato, "a short history of the rise and progress of the Convention" starts with Congress determining that there were problems in the Articles of Confederation that could be fixed in a convention of states.[192] He contends that Congress was the initiator and that the states were in the role of responders.[193] All citizens were entitled to their own opinions, but several Anti-Federalists seemed to believe they were also entitled to their own facts.

As we can see, while Anti-Federalists had serious doubts about the propriety of the actions of the Convention's delegates, there was an overriding acknowledgement within their ranks of one key legal issue: the sources of the authority for the delegates were the enactments of each of the several state legislatures.

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190. Federal Farmer, *Letters to the Republican*, Nov. 8, 1787, *reprinted in* 19 DHRC, *supra* note 4, at 203, 211.

191. *Id.*

192. *Cato II*, N.Y.J., Oct. 11, 1787, *reprinted in* 19 DHRC, *supra* note 4, at 79, 81.

193. *Id.* at 79–82.

b. Federalist Views

In *Federalist No. 40*, Madison posed the question "whether the convention [was] authorized to frame and propose this mixed Constitution[?]"[194] His response was to the point: "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."[195] Even though Madison discusses the language from the Annapolis Report and the Congressional Resolution of February 21st, he establishes that his examination of those two documents is predicated on the idea that all the states essentially followed one formula or the other. Publius was clear: the states gave the delegates their instructions.[196]

During the debate in the Massachusetts legislature over calling a state ratification convention, one Federalist member proclaimed, "Twelve States have appointed Deputies for the sole purpose of forming a system of federal government, adequate to the purposes of the union."[197] The states gave the instructions, and the language he cites is the most common element of all state appointments.[198] John Marshall gave the ultimate answer to Henry's claim that the delegates had exceeded their powers:

> The Convention did not in fact assume any power. They have proposed to our consideration a scheme of Govern- ment which they thought advisable. We are not bound to adopt it, if we disapprove of it. Had not every individual in this community a right to tender that scheme which he thought most conducive to the welfare of his country? Have

194. THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961).

195. *Id.*

196. *Id.* at 254.

197. *House Proceedings and Debates of 24 October*, MASS. CENTINEL, Oct. 27, 1787, *reprinted in* 4 DHRC, *supra* note 4, at 135, 136.

198. *See A Friend to Good Government*, POUGHKEEPSIE COUNTRY J., Apr. 8, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 902, 905 ("[T]he Convention that framed the Constitution, in question; they were appointed by the State Legislatures, and empowered by the letter of the authority under which they acted "); Oliver Ellsworth and William Samuel Johnson, Speeches in the Connecticut Convention (Jan. 4, 1788), *reprinted in* 15 DHRC, *supra* note 4, at 243, 249, ("As to the old system, we can go no further with it; experience has shewn [sic] it to be utterly inefficient. The States were sensible of this, to remedy the evil they appointed the convention.") (statement of William Samuel Johnson).

> not several Gentlemen already demonstrated, that the Convention did not exceed their powers?[199]

Federalist authors defended the charge that the delegates exceeded their authority in several publications. Curtius II mocked Cato for making the allegation.[200] "One of the People," writing in the Pennsylvania Gazette, recited that the delegates had been authorized by their states to make alterations—an inherent right of the people.[201] "A Friend to Good Govern- ment," in the Poughkeepsie Country Journal, defended the le- gitimacy of the convention with an accurate review of the events and documents.[202]

The most stinging defenses of the legitimacy of the actions of the Convention were aimed at New York's Robert Yates and John Lansing, who had left the convention early and had widely attacked the Constitution as the result of unauthorized action. "A Dutchess County Farmer" argued that the Convention was:

> [I]mpowered to make such alterations and provisions therein, as will render the federal Government (not Confederation) adequate to the exigencies of the Government and the preservation of the Union[.] In the discharge of this important trust, I am bold to say, that the Convention have not

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199. Virginia Convention Debates (June 10, 1788) *reprinted in* 9 DHRC, *supra* note 4, at 1092, 1118.

200. *Curtius II*, N.Y. DAILY ADVERTISER, Oct. 18, 1787, *reprinted in* 19 DHRC, *supra* note 4, at 97, 97–102.

201. *See One of the People*, PENN. GAZETTE, Oct. 17, 1787, *reprinted in* 2 DHRC, *supra* note 4, at 186, 189–190 ("The deputies from this state were empowered, they had power to make such *alterations* and *further provisions as may be necessary to render the federal government fully adequate to the exigencies of the Union*. Had objec- tions such as these prevailed, America never would have had a Congress, nor had America been independent. Alterations in government are always made by the people.").

202. *See A Friend to Good Government*, POUGHKEEPSIE COUNTRY J., Apr. 8, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 902, 902 ("[T]hey were appointed by the State Legislatures, and empowered by the letter of the authority under which they acted to report such alterations and amendments in the Confederation as would render the federal government adequate to the exigencies of government and *the preservation of the Union*—you will here perceive that the latitude given in the instruction, were amply large enough to justify the measures the Convention have taken. The objects in view were the welfare and preservation of the Union, and their business so far to new model our government as to encompass those ob- jects.").

> gone beyond the spirit and letter of the authority under which they acted [203]

But it was the critique of Lansing and Yates that was the most contentious charge. They had justified their early exit on the basis that it was impractical to establish a general government. The Farmer asked:

> [I]f you were convinced of the impracticability of establishing a general Government, what lead you to a Convention appointed for the sole and express purpose of establishing one; *could you suppose it was the intention of the Legislature* to send you to Philadelphia, to stalk down through Water street, cross over by the way of Chesnut, into Second street, and so return to Albany? [T]he public are well acquainted with what you have not done. Now good Sirs, in the name of humanity, tell us what you have done, or do you suppose that the *limited and well defined powers under which you acted*, made your business only *negative?*[204]

Lansing and Yates were also strongly criticized by "A Citizen" writing in the Lansingburg Northern Centinel:

> The powers given to the Convention were for the purpose of proposing amendments to an old Constitution; and I conceive, with powers so defined, if this body saw the necessity of amending the whole, as well as any of its parts, which they undoubtedly had an equal right to do, thence it follows, that an amendment of every article from the first to the last, inclusive, is such a one as is comprehended within the powers of the Convention, and differs only from an entire new Constitution in this, that the one is an old one made new, the other new originally.[205]

"The Citizen" turned out to be a lawyer from Albany named George Metcalf.[206] Lansing and Yates were so incensed at his effective attacks on their actions and character that they commenced a legal action against him.[207] They also sought,

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203. *A Dutchess County Farmer*, POUGHKEEPSIE COUNTRY J., Feb. 26, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 815, 816.

204. *Id.* at 817.

205. *A Citizen*, LANSINGBURGH NORTHERN CENTINEL, Jan. 29, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 674, 676–77.

206. *See id.* at 674.

207. *George Metcalf Defends Himself*, ALBANY J., Mar. 1, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 832, 832–33.

apparently unsuccessfully, to determine the identity of the Duchess County Farmer.[208]

The charge that the Convention exceeded its authority was leveled in state legislatures, ratification conventions, and in the public debates in the papers. In every one of those ven- ues, the Federalists responded to the charges with timely and effective arguments. The overwhelming evidence is that the Federalists believed that they had repeatedly and suc- cessfully defeated these claims. As John Marshall said: "Have not several Gentlemen already demonstrated, that the Convention did not exceed their powers?"[209]

3. Was the Convention unlawful from the beginning?

The most extreme Anti-Federalist argument was proffered by Abraham Yates, Jr., of New York. He argued that every stage of the process was illegal. The New York legislature violated the state constitution, when on February 19th, 1787, it voted to instruct the state's delegates in Congress to recommend a convention to propose amendments to the articles.[210] Congress violated Article XIII of the Articles of Confederation when it voted on February 21st "to recommend a convention to the several legislatures."[211] The New York Senate and Assembly violated the state constitution yet again, he contended, by voting on March 27th to appoint delegates to the convention in Philadelphia.[212]

Yates continued the list of alleged violations to include the September 17th vote of the Convention to approve the Constitution, the refusal of Congress to defeat the Constitution on September 28th, and the action of the New York legislature in February 1788 to call the ratification convention.[213] Yates' argument was not based on the parsing of the language of state instructions and congressional resolutions. He contended that "to attempt a consolidation of the union and utterly destroy the confederation, and

208. *See* Letter from Abraham G. Lansing to Abraham Yates, Jr. (Mar. 2, 1788), *reprinted in* 20 DHRC, *supra* note 4, at 835.

209. Virginia Convention Debates (June 10, 1788) *reprinted in* 9 DHRC, *supra* note 4, at 1092, 1118.

210. *Sydney,* N.Y.J., June 13–14, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 1153, 1156.

211. *Id.*

212. *Id.* at 1156–57.

213. *Id.* at 1157.

the sovereignty of particular states" was beyond the authority granted to any state legislature in their respective constitutions and beyond the power of Congress in the Articles of Confederation.[214] To justify the kind of government created by the Constitution, Yates apparently believed that the people of every state would first need to amend their state constitutions to give their legislatures the power to enter into such a government. Then the states would be authorized to direct their delegates in Congress to propose amendments to the Articles of Confederation in accord with the new state constitutional provisions. Finally, Congress would be required to approve the new measure followed by the unanimous consent of the legislatures of every state. This position was echoed in delegate instructions drafted by the town of Great Barrington, Massachusetts[215]—a community that was at the center of Shay's Rebellion.[216]

Yates does help us understand the true nature of the Anti-Federalist argument. They were not contending that they expected a series of discrete amendments to the Articles of Confederation. The New Jersey Plan would have also required a wholesale revision of that document. Anti-Federalists contended that no one was authorized at any point to adopt a government that was national rather than federal in character.[217] The Convention was condemned not for creating a whole new document, but for creating a government with a new nature. Anti-Federalists conceded the key procedural points—the states called the convention and the states gave their delegates their instructions. To have contended otherwise would have turned Anti-Federalist doctrine on its head. Advocates for state supremacy simply could not argue that Congress had an implied power to call a convention and that the states' delegates were bound to follow the will of Congress. Contemporary practice was exactly the opposite. State legislatures routinely instructed their delegations in Congress.[218] No one would have the audac-

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214. *Id.*

215. Draft Instructions (Nov. 26, 1787), *reprinted in* 5 DHRC, *supra* note 4, at 959.

216. Stephen T. Riley, *Dr. William Whiting and Shays' Rebellion*, 66 PROC. OF THE AM. ANTIQUARIAN SOC'Y 119, 120 (1957).

217. *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 107, at 34, 42–43.

218. *See, e.g.*, 5 THE PAPERS OF JAMES MADISON 231–34 (William T. Hutchinson et al. eds., 1962).

ity to contend the reverse was true—especially not a self-respecting Anti-Federalist.

4. The "Runaway Convention" theory was tested and rejected

The Anti-Federalists' claim that the delegates to the Convention exceeded their authority was put to a vote in New York and Massachusetts—the only two states that tracked the congressional language in their delegates' instructions.

The New York legislature was decidedly anti-reform—it systematically rejected amendments to the Articles of Confederation and had done its best to derail the Philadelphia Convention by proposing a limited alternative in Congress.[219] It is unsurprising, therefore, that there was a motion in the New York legislature to condemn the work of the Constitutional Convention as an *ultra vires* proposal. On January 31st, 1788, Cornelius C. Schoonmaker and Samuel Jones proposed a resolution which recited that "the Senate and Assembly of this State" had "appointed Delegates" to the Philadelphia convention "for the sole and express pur- pose of revising the articles of confederation."[220] To this point, the resolution was correct since it focused solely on the language employed by the New York legislature. How- ever, the resolution then claimed that the "Delegates from several of the States" met in Philadelphia "for the purpose aforesaid."[221] Based on this inaccurate recitation of the cre- dentials from the other states, the resolution claimed that "instead of revising and reporting alterations and provisions in the Articles of Confederation" the delegates "have report- ed a new Constitution for the United States" which "will ma- terially alter the Constitution and Government of this State."[222] A contentious debate ensued, but ultimately the legislature of this Anti-Federalist-leaning state defeated the motion by a vote of 27 to 25.[223]

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219. *See supra* notes 81–84 and accompanying text; 32 JOURNALS OF CONGRESS, *supra* note 70, at 72–73.

220. Assembly Proceedings (Jan. 31 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 703.

221. *Id.*

222. *Id.* at 704.

223. *Id.*

A similar debate arose in the Massachusetts legislature. Dr. Kilham argued that the Convention had "assum[ed] powers not delegated to them by their commission."[224] Immediately thereafter the Massachusetts House voted to call the ratification convention by a vote of 129 to 32.[225] A more specific resolution was made in the Massachusetts ratification convention. "Mr. Bishop" from Rehoboth, moved to "strike out all that related to the Constitution" and to "insert a clause" in which "the General Convention was charged with exceeding their powers & recommending measures which might involve the Country in blood."[226] The motion was defeated by a vote of "90 & od to 50 & od."[227] The final ratification by Massachusetts recites that the people of the United States had the opportunity to enter into "an explicit & solemn Compact" "without fraud or surprise."[228]

In addition to these formal defeats in the very states that had relied on the restrictive language from Congress, an Anti-Federalist critic penned an article in the New York Daily Advertiser that demonstrated that the general public in that city rejected these claims. "Curtiopolis" claimed that the "Convention were delegated to *amend* our political Constitution, instead of which they *altered it*."[229] He accused the delegates of "detestable *hypocricy*" and claimed that "their deeds were *evil*."[230] Focusing in on Alexander Hamilton, Curtiopolis urged the readers "to take good notice of that vile conspirator, *the author of Publius*: I think he might be impeached for high treason: he continues to do infinite mischief *among readers:* this whole city, except about forty [or] fifty of us, are all bewitched with him, and he is a playing the very devil elsewhere."[231] This Anti-Federalist writer openly admitted that only forty or fifty people in New York City agreed with his strident position—the rest of the population were "bewitched."

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224. MASS. CENTINEL, Oct. 27, 1787, *reprinted in* 4 DHRC, *supra* note 4, at 135, 135.

225. *Id.* at 138.

226. Letter from Nathaniel Gorham to Henry Knox (Mar. 9, 1788), *reprinted in* 7 DHRC, *supra* note 4, at 1673, 1674.

227. *Id.*

228. 16 DHRC, *supra* note 4, at 68.

229. *Curtiopolis*, N.Y. DAILY ADVERTISER, Jan. 18, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 625, 625.

230. *Id.* at 625–26.

231. *Id.* at 628.

While it is clear that the allegation of *ultra vires* action was widely asserted, this view was decisively rejected in the two states that had the only plausible basis for raising the contention. It was a minority view, often accompanied by inflammatory charges against the delegates to the Convention.

II. WAS THE CONSTITUTION PROPERLY RATIFIED?

The most common modern attack against the legitimacy of the Constitution has been addressed—the delegates did not exceed the authority granted to them by their states. Neither Federalists nor Anti-Federalists contended that the calling of the Convention was premised on the language of Article XIII of the Articles of Confederation. But, when critics of the Constitution's adoption turn to the ratification process, they suddenly shift gears. They claim the Constitution was not properly ratified when it was adopted because the process found in Article XIII was not followed. This Article specified that amendments had to be ratified by all thirteen states—rather than being approved by specially called conventions in just nine states.

Logically, if the Convention was not called under the authority of the Articles to begin with, as most concede, it makes little sense to argue that the Convention needed to follow the ratification process contained therein. This confusion is understandable because, prior to the Convention, the clear expectation was that the work product from Philadelphia would be first sent to Congress and then would be adopted only when ratified by all thirteen legislatures. But, as we see below, the source of this rule was not Article XIII, but the resolutions from the states, which had called the Convention and given instructions to their delegates.

However, we will also discover that most critics have overlooked two important steps taken in the process of adopting the Constitution. The Convention enacted two formal measures. One was the Constitution itself. The second was a formal proposal concerning a change in the ratification process. Congress and all thirteen state legislatures approved this change in process. The expected process was used to approve a process designed to obtain the consent of the governed. This two-stage endeavor was aimed to satisfy both the legal re- quirements from the old system and the moral claim that the Constitution should be approved by the people themselves.

A. The Source of Law for Ratification Authority

Although not formally binding, both the Annapolis Convention and the February 21st Congressional endorsement look to the same method for ratification of the Constitutional Convention's work. The Annapolis report suggests that the Convention should send its proposal "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."[232] The controlling documents—the delegates' appointments by their respective legislatures—were in general agreement as to the mode of ratification. Virginia's legislature specified the following: "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."[233] Georgia,[234] South Carolina,[235] Maryland,[236] and New Hampshire[237] employed the exact same phrasing. Pennsylvania made only a minor change allowing for the submission of "such act or acts."[238] This two-word variance was repeated precisely by Delaware.[239] Thus seven states were in near unison on the point. New Jersey and North Carolina were silent on the issue of the method of ratification. Massachusetts quoted the ratification language of the February 21st endorsement by Congress.[240] New York copied the Congressional language precisely in the formal directives to their dele-

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232. Proceedings and Report of the Commissioners at Annapolis, Maryland (Sept. 11–14, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 181, 184–185. The lan- guage of the Congressional endorsement was nearly identical. *See supra* note 89 and accompanying text.

233. Act Authorizing the Election of Delegates (Nov. 23, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 197.

234. Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

235. Act Authorizing the Election of Delegates, (Mar. 8, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 213, 214.

236. Act Electing and Empowering Delegates (May 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 222, 223.

237. Resolution Electing and Empowering Delegates (Jan. 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 223, 223.

238. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199–200.

239. Act Electing and Empowering Delegates (Feb. 3, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

240. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted* 1 *in* DHRC, *supra* note 4, at 207.

gates.[241] Connecticut used similar, but somewhat distinct language: "[r]eport such Alterations and Provisions . . . to the Congress of the United States, and to the General Assembly of this State."[242] The variances are legally insignificant. Every state that addressed the method of ratification contemplated that the Convention would send its report first for approval by Congress and then for final adoption by the legislatures of the several states.

B. The Constitutional Convention's Development of the Plan for Ratification

The very first mention of the plan for ratification was on May 29th in a speech by Edmund Randolph during the first substantive discussion in the Convention. Randolph laid out a fifteen-point outline that became known as the Virginia Plan.[243] The final item dealt with ratification:

> 15. Resd. that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress, to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.[244]

This obviously differed from the language of the delegates' instructions. Randolph's proposal, like the instructions from the states, called for approval by Congress. But rather than approval by the legislatures themselves, Randolph called for ratification conventions of specially elected delegates upon the recommendation of each legislature.

What is clear, both from this language and from the ensuing debates, is that there were two competing ideas concerning ratification of the Constitution. The first theory, driven by traditional, institutional, and legal concerns, was that Congress and all thirteen state legislatures should be the agencies that consent on behalf of the people. Alternatively, others contended that the people themselves should consent to the Constitution. Randolph's ratification method took elements of both. Congress—which had rep-

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241. Assembly and Senate Elect Delegates (Mar. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 211, 211.

242. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 216.

243. 1 FARRAND'S RECORDS, *supra* note 107, at 18–22.

244. *Id.* at 22.

resentatives from every state and which voted as states—would approve first to satisfy the institutional and legal interest. The second step of state ratification conventions was offered as the best method to obtain the direct consent of the people. It was believed that the consent of the governed was best obtained not by a vote by state legislators, who were chosen for multiple purposes, but by convention delegates elected solely for the purpose of ratifying or rejecting the Constitution.

The first debate on Randolph's fifteenth resolution was recorded on June 5th. Madison's notes list six delegates who spoke to the issue—Sherman, Madison, Gerry, King, Wilson, and Pinkney.[245] Yates' notes only mention comments by Madison, King, and Wilson.[246] Roger Sherman thought popular ratification was unnecessary.[247] He referred to the provision in the Articles of Confederation for changes and alterations.[248] It is not clear from the context whether Sherman believed that such measures were legally binding or merely provided an appropriate example that should be followed.[249] Madison argued that the new Constitution should be ratified in the "most unexceptionable form, and by the supreme authority of the people themselves."[250] He also suggested that the Confederation had been defective in the method of ratification since it lacked any direct approbation by the people.[251] Elbridge Gerry contended that the Articles had been sanctioned by the people in the eastern states.[252] He also warned that the people of this quarter were too wild to be trusted with a vote on the issue.[253] His fears undoubtedly arose from concerns about Shay's Rebellion and associated populist movements, particularly in Rhode Island.[254]

Rufus King argued that Article XIII legitimized the idea that legislatures were competent to ratify constitutional changes

245. *Id.* at 122–123.
246. *Id.* at 126–27.
247. *Id.* at 122.
248. *Id.*
249. *See id.*
250. *Id.* at 123.
251. *Id.* at 122–23, 126–127.
252. *Id.* at 123.
253. *Id.*
254. MASS. CENTINEL, Oct. 27, 1787, *reprinted in* 4 DHRC, *supra* note 4, at xliii.

and that the people had impliedly consented.[255] But, he continued, it might make good policy sense to change the mode.[256] In the end, the people wouldn't care which method of consent was employed so long as the substantive document was appropriate.[257] In Madison's notes, James Wilson of Pennsylvania argued that whatever process was adopted, it should not end with the result that a few inconsiderate or selfish states should be able to prevent the others from "confederat[ing] anew on better principles" while allowing the others to accede later.[258] Yates's notes focus on Wilson's contention that "the people by a convention are the only power that can ratify the proposed system of the new government."[259] Charles Pinckney of South Carolina agreed with the essence of Wilson's first point arguing that if nine states could agree on a new government, it should suffice.[260] After these speakers, it became obvious that more work would be needed to reach consensus on the topic. And it was quickly agreed that the issue should be postponed.[261]

The fifteenth resolution regarding the ratification process was raised for a vote in the Committee of the Whole on June 12th. Yates records that no debate arose and that it passed five in favor, three opposed, and two states divided.[262] Madison records the vote as six in favor, New York, New Jersey, and Connecticut opposed, while Delaware and New Jersey were divided.[263] On July 23rd, the issue was again addressed. The provision was now numbered as the nineteenth resolution of the amended Virginia Plan. Ellsworth moved to refer the Con- stitution to the legislatures of the States for ratification.[264] Alt- hough New Jersey temporarily lacked a quorum for voting purposes, Paterson seconded the motion.[265]

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255. 1 FARRAND'S RECORDS, *supra* note 107, at 123.
256. *Id.*
257. *Id.* at 123, 127.
258. *Id.* at 123.
259. *Id.* at 127.
260. *Id.* at 123.
261. *Id.* at 123, 127.
262. *Id.* at 220.
263. *Id.* at 214.
264. 2 FARRAND'S RECORDS, *supra* note 107, at 88.
265. *Id.*

Mason, Randolph, Nathaniel Gorham of Massachusetts, Hugh Williamson of North Carolina, Morris, King, and Madison spoke against the motion. It was supported only by Ellsworth and Gerry.[266] The vast majority of the debate was centered on the contention that the Constitution would be placed on the best footing if arising from the direct approval by the people. Though no one disputed this moral proposition, Gerry contended that the people had acquiesced in the ratification of the Articles of Confederation which was a sufficient expression of the consent of the governed.[267] Moreover, he argued, the contention that the direct consent of the governed was necessary proved too much since the argument would delegitimize the Articles of Confederation and many state constitutions.[268] Neither Gerry nor Ellsworth expressly argued that the text of Article XIII was legally controlling. But, Ellsworth came close to implying this idea. This prompted the following response from Morris:

> The amendmt. moved by Mr. Elseworth [sic] erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation.[269]

No refutation of Morris was forthcoming from any of the proponents of legislative ratification.

Ellsworth's motion was defeated 7 to 3, with Connecticut, Delaware, and Maryland supporting the motion.[270] Morris then moved for a new national ratification convention chosen and authorized by the people.[271] This idea was truly unpopular and died for the lack of a second.[272] Thus, as of July 23rd, the plan was to submit the new Constitution to Con- gress and then on to state ratification conventions.[273] But, this was not the end of the matter.

The Convention adjourned on July 26th until August 6th to allow a Committee of Detail to transform all of the resolutions into a single working draft.[274] On the 6th, the Convention re-

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266. *Id.* at 88–94.
267. *Id.* at 89–90.
268. *Id.*
269. *Id.* at 92.
270. *Id.* at 93.
271. *Id.*
272. *Id.*
273. *Id.* at 93–94.
274. *Id.* at 128.

convened, distributed the draft document and adjourned until the next day to allow the delegates a chance to read the whole document.[275] There were now three provisions concerning ratification and transition to the new government, Articles XXI, XXII and XXIII:

> ARTICLE XXI.
>
> The ratification of the conventions of __ States shall be sufficient for organizing this Constitution.
>
> ARTICLE XXII.
>
> This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a Convention chosen [in each State], under the recommendation of its legislature, in order to receive the ratification of such Convention.
>
> ARTICLE XXIII.
>
> To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the Conventions of __ States, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that after such publication, the Legislatures of the several States should elect members of the Senate, and direct the election of members of the House of Representatives; and that the members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be, after their meeting, choose the President of the United States, and proceed to execute this Constitution.[276]

Debate on these three articles began on August 30th.[277] The initial focus was the matter of filling in the blank left in the draft—how many states would be required to ratify. Wilson proposed seven—a majority.[278] Morris argued for two different numbers, a lower number if the ratifying states were contigu-

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275. *Id.* at 176.
276. *Id.* at 189.
277. *Id.* at 468.
278. *Id.*

ous, and a higher number if not.[279] Sherman argued that since the present system required unanimous approval, ten seemed like the right number.[280] Randolph argued for nine because it was a "respectable majority of the whole" and was a familiar number under the Articles.[281] Wilson suggested eight.[282] Carroll argued that the number should be thirteen since unanimity should be required to dissolve the existing confederation.[283]

Madison, Wilson, and King debated the issue of whether non-consenting states could be bound by the action of a majori- ty or super-majority.[284] The whole debate spilled over to the next day.[285] King immediately moved to add the words "be- tween the said States" to "confine the operation of the Govt. to the States ratifying it."[286] Nine states voted favorably.[287] Mary- land was the lone dissent.[288] Delaware was temporarily without a quorum. The moral principle of treaty law prevailed—no state could be bound by a treaty without its consent.

During the debates, various formulas were proposed and rejected. Madison offered seven states.[289] Morris moved to allow each state to choose its own method for ratification.[290] Sherman, who argued for ten states on the prior day, now argued that all thirteen should be required.[291] A motion to fill in the blank with 10 states was rejected 7 to 4.[292] Nine states (which was apparently moved by Mason) was approved by a vote of 8 to 3.[293] Virginia

279. *Id.*
280. *Id.* at 468–69.
281. *Id.* at 469. Nine states could declare war and take other military actions, for example. *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 6.
282. 2 FARRAND'S RECORDS, *supra* note 107, at 469.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 475.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 477.
293. *Id.*

and both Carolinas voted no.[294] Then final passage of the Article as amended was approved by all states save for Maryland.[295]

The debate then turned to Article XXII which required the approbation of Congress and then submission to the ratification conventions, with the state legislatures being responsible for the calling and associated rules.[296] Morris moved to strike the phrase requiring the "approbation" of Congress.[297] His motion passed eight states to three—with Massachusetts, Maryland, and Georgia voting no.[298] Other skirmishes ensued, the most important of which was the suggestion of Randolph to allow the state ratification conventions to be at liberty to propose amendments which would then be submitted to a second general convention.[299] He generated no support for his idea.[300] Final passage on Article XXII as drafted was 10 to 1, with Maryland again being the lone dissent.[301] Article XXIII, which provided a transition plan for moving from the Articles to the Constitution, was then approved with a minor amendment without dissent.[302]

On September 5th, Gerry gave notice that he intended to move for reconsideration of Articles XIX, XX, XXI, and XXII.[303] His motions regarding Articles XXI and XXII were heard on September 10th.[304] Gerry argued that failing to require the approbation of Congress would give umbrage to that body.[305] Hamilton spoke strongly in support of Gerry's motion:

> Mr. Hamilton concurred with Mr. Gerry as to the indeco- rum of not requiring the approbation of Congress. He con- sidered this as a necessary ingredient in the transaction. He thought it wrong also to allow nine States as provided by art. XXI. to institute a new Government on the ruins of the existing one. He [would] propose as a better modification of the two articles (XXI & XXII) that the plan should be sent

294. *Id.*
295. *Id.*
296. *Id.* at 478.
297. *Id.*
298. *Id.*
299. *Id.* at 479.
300. *Id.*
301. *Id.*
302. *Id.* at 479–80.
303. *Id.* at 511.
304. *Id.* at 559.
305. *Id.* at 559–60.

> to Congress in order that the same if approved by them, may be communicated to the State Legislatures, to the end that they may refer it to State Conventions; each Legisla- ture declaring that if the convention of the State should think the plan ought to take effect among nine ratifying States, the same [should] take effect accordingly.[306]

In other words, Hamilton argued that the plan for nine states to approve the new Constitution would in fact be appropriate if the new plan for ratification was first approved by the Congress and then by the thirteen state legislatures. Hamilton's proposal would thread the needle, achieving both of the competing interests—the desire to follow the recognized procedures to achieve legal validity (approval of the new process both by Congress and the state legislatures) as well as the desire to ground the Constitution in the moral authority that flows from the approval of the people. Sherman made a second important suggestion in accord with Hamilton. Rather than embodying the Hamilton plan in the text of the proposed Constitution, Sherman proposed that these ratification requirements should be made a "separate Act"—a formal proposal having legal weight but distinct from the ultimate document itself.[307] The motion to reconsider was passed seven to three with New Hampshire divided. Massachusetts, Pennsylvania, and South Carolina were the dissenting states.[308]

A motion to take up Hamilton's idea was defeated, on a procedural vote, 10 to 1.[309] Article XXI as submitted was then approved unanimously.[310] Hamilton withdrew his motion regarding Article XXII since it was certain to meet with the same defeat.[311] Hamilton's motion would have provided a very clear argument for both legal and moral validity—but at this stage it was rejected.[312] Immediately after this vote, the Constitution was committed to the final committee of style to prepare the final draft of the Constitution.[313]

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306. *Id.* at 560.
307. *Id.* at 561.
308. *Id.*
309. *Id.* at 563.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 564.

Surprisingly, on September 10th, the Committee of Style returned with final language that essentially tracked the suggestions of Hamilton and Sherman.[314] The final version of Article VII regarding ratification followed the previously approved text of the draft Article XXI: "The ratification of the Conven- tions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."[315]

The contents of draft Articles XXII and XXIII were placed into a separate formal act adopted unanimously as an official act of the Convention.[316] The controlling paragraph of this second official enactment read as following:

> Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.[317]

This Act also contained the transition plan for elections for the new government that had been previously drafted as Article XXIII.[318] In addition to the Constitution and the "Ratification and Transition" Resolution, a formal letter of transmission was also sent from the Convention to Congress.[319] The letter was adopted by the "Unanimous Order of the Convention" and formally signed by George Washington, President of the Convention.[320]

In the end, the Convention followed Hamilton's suggestion as to content and Sherman's suggestion as to bifurcation. They would lay the matter before Congress with the request that Congress send the matter to the state legislatures.[321] The legislatures were, in turn, requested to approve the new methodology for ratification.[322] It is this final product that must be considered

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314. *Id.* at 579.
315. *Id.* at 603.
316. *Id.* at 604–05, 665–66.
317. *Id.* at 665.
318. *Id.* at 665–66.
319. *Id.* at 666–67.
320. *Id.* at 667.
321. *Id.* at 665.
322. *Id.*

in assessing the legality of the process employed for ratification—not any of the prior suggestions or drafts that were considered by the Convention.

There appears to be no scholarly work that assesses the validity of the ratification process taking into account the full process sanctioned by the Convention, followed by Congress, and approved by the thirteen state legislatures. No one would doubt the need to consider the legal ramifications of this language had it remained in the text of the Constitution. The decision of the Convention to separate the transitional articles into a separate act was not done so as to deny their efficacy. It was an apparent decision to not clutter the Constitution of the Unit- ed States with language that was temporary in nature. This language was just as formal as the Constitution itself and actually was employed by the sanction of Congress and the state legislatures for both the ratification process and in planning for an orderly transition.

C. Debates in the Confederation Congress

On September 19th, the Secretary of the Constitutional Convention, William Jackson, delivered the Constitution, the "Ratification and Transition" Resolution, and the letter to the Secretary of the Confederation Congress, Charles Thompson.[323] It was read to Congress on September 20th and the date of Sep- tember 26th was assigned for its consideration.[324] The debate lasted for two days.[325]

Every speaker in Congress ultimately argued that the Constitution should be laid before the people via the convention process outlined in Article VII and the "Ratification and Transition" Resolution.[326] However, there was a strong clash over the approach in so doing. Nathan Dane wanted Congress to adopt language that explained that since the "constitution appears to be intended as an entire system in itself, and not as any part of, or alteration in the Articles of Confederation" Congress— which was a creature of the Articles—was powerless to take

323. 13 DHRC, *supra* note 4, at 229.
324. *Id.*
325. *Id.*
326. *See* 1 DHRC, *supra* note 4, at 327–340.

any action thereon.[327] Richard Henry Lee proposed a resolution stating that the Articles of Confederation did not authorize Congress to create a new confederacy of nine states, but, out of respect, sending the Convention's plan to the states anyway.[328] He further recommended that Congress amend the Constitution.[329] Madison wanted Congress to formally approve the Constitution.[330] He agreed with Lee that Congress had the power to amend the document, but if it did so, then it would be subject to the procedural requirements of Article XIII which would require the assent of thirteen legislatures rather than nine state conventions.[331] Dane and R.H. Lee repeatedly point- ed out that approving the new process "brings into view so materially [the] question of 9 States *should be adopted*."[332]

Those arguing against the Constitution wanted Congress to review it article by article. Those arguing for the Constitution sought to avoid a repetition of the work of the Convention. In the end, Congress adopted essentially the same approach as was advocated by Hamilton at the end of the Constitutional Convention:

> Congress having received the report of the Convention lately assembled in Philadelphia.
>
> Resolved unanimously, That the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.[333]

Specifically referencing the accompanying resolutions ("Ratification and Transition"), Congress limited its approval to the process itself, rather than the Constitution on its substance.[334] The editors of the encyclopedic Documentary History of the

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327. Nathan Dane's Motion (Sept. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 327, 328.

328. Richard Henry Lee's Motion (Sept. 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 329, 329.

329. Melancton Smith's Notes (Sept. 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 335, 336.

330. *See id.* at 335.

331. *Id.* at 336.

332. Debates (Sept. 27, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 234, 234–35.

333. Journals of Congress (Sept. 28, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 340, 340.

334. *See id.*

Ratification of the Constitution summarize the approach taken by Congress thusly:

> On 28 September Congress reached a compromise. It resolved "unanimously" that the Constitution and the resolutions and the letter of the Convention be sent to the states with only a suggestion that the states call conventions to consider the Constitution. This compromise followed the recommendation of the Convention.[335]

Congress only approved the new process and sent the matter to the state legislatures with recommendation that they do the same.

D. Thirteen Legislatures Approve the New Process

Given the fact that the Convention had been held in Philadelphia, the first state legislature to receive the new Constitution and the accompanying resolutions was Pennsylvania.[336] There was an effort to call a ratification convention very quickly with the goal of making the Keystone state the first to ratify the Constitution.[337] However, this desire was thwarted by the quorum rules for the legislature found in the state constitution.[338] Rather than the typical majority requirement, two-thirds of the members of the Assembly were necessary to constitute a quorum.[339] And even though there was a clear pro-Constitution majority in the legislature, slightly more than a third of the members deliberately absented themselves from the chambers to defeat the ability of the legislature to transact any business—not only the calling of the ratification convention, but the ability to complete the state's legislative calendar before the end of the session on September 29th.[340] The Anti-Federalists hoped that the forthcoming elections after the end of session would result in a greater number of anti-Constitution representatives.[341]

Apparently, this was not the first time that members went missing for such purposes.[342] The Assembly directed the Sergeant-at-Arms to find the missing members and to direct them

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335. 13 DHRC, *supra* note 4, at 230.
336. *See* 2 DHRC, *supra* note 4, at 54.
337. *See id.*
338. *Id.* at 55.
339. *Id.*
340. *Id.*
341. *See id*. at 54.
342. *Id.* at 55.

back to their seats—which was their duty under law.[343] Finally, two members were located and were escorted by the Assembly's messengers—with the enthusiastic support of a threatening mob—back to their seats.[344] These two members were a sufficient addition to constitute a quorum.[345] On September 29th, the Pennsylvania legislature was the first to approve the new process by calling a convention.[346]

In October, five state legislatures followed suit: Connecticut on October 16th,[347] Massachusetts on October 25th,[348] Georgia October 26th,[349] New Jersey on October 29th,[350] and Virginia on October 31st.[351] Georgia is noteworthy because its delegates were permitted to "adopt or reject any part of the whole."[352] On November 9th and 10th, Delaware's legislature approved the new process by calling a convention.[353] Maryland's Assembly approved the call of the ratification convention on November 27th and the Senate followed on December 1st.[354] In December, two more state legislatures sanctioned the use of the new process: North Carolina on December 6th[355] and New Hampshire on December 14th.[356]

North Carolina is worthy of special mention. Pauline Maier notes that despite the fact that "critics of the Constitution con-

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343. *Id.*

344. *Id.*

345. *Id.*

346. Assembly Proceedings (Sept. 28, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 99, 99–103.

347. House Proceedings, A.M. (Oct. 16, 1787), *reprinted in* 3 DHRC, *supra* note 4, at 364, 364–66.

348. Report of the Joint Committee with Senate and House Amendments (Oct. 19–25, 1787), *reprinted in* 4 DHRC, *supra* note 4, at 130, 130–33.

349. Assembly Proceedings (Oct. 26, 1787), *reprinted in* 3 DHRC, *supra* note 4, at 227, 227–28.

350. Resolutions Calling the State Convention (Oct. 29, 1787), *reprinted in* 3 DHRC, *supra* note 4, at 167, 167–68.

351. Resolutions Calling the State Convention (Oct. 31, 1787), *reprinted in* 8 DHRC, *supra* note 4, at 118, 118.

352. Assembly Proceedings (Oct. 26, 1787), *reprinted in* 3 DHRC, *supra* note 4, at 227, 228.

353. Resolutions Calling the State Convention (Nov. 9–10, 1787), *reprinted in* 3 DHRC, *supra* note 4, at 90, 90.

354. JOHN FRANKLIN JAMESON, STUDIES IN THE HISTORY OF THE FEDERAL CONVENTION OF 1787, at 163 (1903).

355. *Id.*

356. *Id.* at 161.

trolled both houses," "[t]hey had . . . no intention of departing from the prescribed way of considering the Constitution."[357] Like the others, the North Carolina legislature approved the new method of ratification and held a ratification convention for the Constitution.[358]

On January 19th, 1788, South Carolina approved the new methodology,[359] followed by New York on February 1st.[360] Finally, on March 1st the Rhode Island legislature took action.[361] Rhode Island was by far the most antagonistic state toward the Constitution. Many different approaches were considered. Rhode Island had previously explained that its failure to participate in the Constitutional Convention was based on the fact that the legislature had never been authorized by the people to send delegates to a convention for such a purpose.[362] Many critics of Rhode Island, including the representatives from the more populous cities in the state, contended that this argument was specious and was nothing more than a tactic to express opposition to any move toward a stronger central government.[363]

In the end, the language adopted by the Rhode Island legislature was remarkably neutral in submitting the matter to the people. After reciting the procedural history of the Constitutional Convention, the legislature approved the following:

> And whereas this Legislative Body, in General Assembly convened, conceiving themselves Representatives of the great Body of People at large, and that they cannot make any Innovations in a Constitution which has been agreed upon, and the Compact settled between the Governors and Governed, without the express Consent of the Freemen at large, by their own Voices individually taken in Town-Meetings assembled: Wherefore, for the Purpose aforesaid, and for

357. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 403 (2010).

358. JAMESON, *supra* note 354, at 163.

359. *Id.* at 164.

360. Assembly Proceedings (Jan. 31, 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 703–07.

361. Rhode Island Act Calling a Referendum on the Constitution (Mar. 1, 1788), *reprinted in* 24 DHRC, *supra* note 4, at 133, 133–35.

362. Letter from the Rhode Island General Assembly to the President of Congress, Newport (Sept. 15, 1787), *reprinted in* 24 DHRC, *supra* note 4, at 19, 19–21.

363. Newport and Providence's Protest of Rhode Island General Assembly's Letter to Congress (Sept. 17, 1787), *reprinted in* 24 DHRC, *supra* note 4, at 21, 21–23.

> submitting the said Constitution for the United States to the Consideration of the Freemen of this State.[364]

The Freemen were tasked with the duty to "deliberate upon, and determine . . . . whether the said Constitution shall be adopted or negatived."[365] In effect, the Rhode Island legislature made every voter a delegate to a dispersed ratification conven- tion and handed them the authority to determine whether the Constitution should be adopted or rejected.

As predicted, the Rhode Island voters overwhelmingly rejected the Constitution by a vote of 238 to 2,714.[366] But the rejection by the people of Rhode Island was procedurally no different from the rejection by North Carolina's delegates in its 1788 convention. The ratification may have failed, but in each state the legislature sanctioned the use of the new methodology designed to obtain the consent of the people. Not one state re- fused to participate in the new process on the premise that the methodology set forth in Article XIII of the Articles of Confederation should be employed.

It is beyond legitimate debate that Congress approved and the state legislatures voted to implement the process outlined in Article VII and the "Ratification and Transition" Resolution. All thirteen state legislatures approved the implementation of the new process by March 1st, 1788. The legal argument that all thirteen legislatures approved the new process could not have been raised until after this step had been approved by the thirteenth state. Before this date, arguments bolstered by political philosophy and practical necessity were raised—and were all that could be raised.

The chief example of such an argument is *Federalist No. 40*, which was published on January 18th, 1788.[367] As of this date, only ten legislatures had approved the use of the new ratification process. South Carolina approved the following day.[368] But

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364. Rhode Island Act Calling a Referendum on the Constitution (Mar. 1, 1788), *reprinted in* 24 DHRC, *supra* note 4, at 133, 133–34.

365. *Id.* at 133–34.

366. Report of Committee Counting Yeas and Nays Upon the New Constitution (Apr. 3, 1788), *reprinted in* 24 DHRC, *supra* note 4, at 232, 233.

367. *See* Publius, *On the Powers of the Convention to Form a Mixed Government Examined and Sustained*, N.Y. PACKET, Jan. 18, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 629, 629 (THE FEDERALIST NO. 40 (James Madison)).

368. JAMESON, *supra* note 354, at 164.

the big prize was New York, where it was far from certain as to whether the legislature would approve the process and call a convention. On February 1st, by a vote of 27 to 25, the New York legislature rejected a motion to condemn the Convention for violating its instructions.[369] Immediately thereafter, the New York legislature approved the new process and called for the convening of its ratification convention.[370]

Madison made the defense that was available to him as of January 18th—a political and moral justification for ratifying the Constitution by the authority of the people.[371] The legal argument based on the approval of the new process by all thirteen legislatures was simply not available to Madison because he wrote in the midst of the fray before all steps were completed. But in hindsight we have the benefit of knowing how events unfolded and are entitled to reconsider the legal ques- tions in light of the totality of the record. Forty-one days after Madison published *Federalist No. 40*, all thirteen state legisla- tures had approved the new process.

Well prior to the date when the Constitution came into force (June 21st, 1788, upon New Hampshire's ratification), Congress and all thirteen state legislatures had approved the methodology for ratification of the new form of government. Whatever legal questions would have arisen if only twelve legislatures had approved or if the approval was subsequent to Constitu- tion entering into force are speculative and moot. It did not happen that way. It is probable that the Founders would have adopted the Constitution even if the legal processes had not fallen neatly into place. But we do not judge the legality of the process on the basis of what might have happened, but on the basis of the complete record of what actually transpired.

369. Assembly Proceedings (Jan. 31, 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 704.

370. *Id.* at 704–07.

371. *See* THE FEDERALIST NO. 40 (James Madison).

III. MOST MODERN SCHOLARSHIP FAILS TO CONSIDER THE ACTUAL PROCESS EMPLOYED IN ADOPTING THE CONSTITUTION

A. Most Scholarly References to the Legality of the Adoption of the Constitution are Superficial and Conclusory

No legal scholar should conclude that the Constitution was drafted by an illegal runaway convention without at least asking themselves a few questions: What is the evi- dence for this conclusion? Did the Framers of the Constitu- tion defend the propriety of their action? What is revealed by the relevant documents?

If one simply asks the second question, any reasonable scholar should think to consider the *Federalist Papers* to see if there is any defense of the legitimacy of the Constitutional Convention. *Federalist No. 40*'s first sentence alerts the reader to its central subject: "THE *second* point to be examined is, whether the convention were authorized to frame and propose this mixed Constitution."[372] Madison clearly defended the legitimacy of the delegates' actions. This defense puts every scholar on notice that one cannot simply assume that the delegates knowingly violated their instructions without some examination of the historical evidence.

There are dozens of "scholarly" references to the origins and legitimacy of the Constitutional Convention that fail even this rudimentary "standard of care" for scholarship. Law review authors and editors alike bear responsibility for the naked assertions and plain errors that have marked numerous references to the Philadelphia Convention. Even if a scholar ultimately determines that the Anti-Federalist attacks on the legitimacy of the Convention were accurate, there is a clear duty to point to the fact that James Madison, John Marshall, and many others, who are normally considered authorities with substantial credibility, took the opposite view. Academic integrity demands at least this much.

Law reviews are littered with the naked assertion that Congress called the Convention for the "sole and express purpose of amending the Articles of Confederation" and that the Convention went beyond its authority by creating a whole new docu-

372. *Id.* at 247 (Clinton Rossiter ed., 1961).

ment.[373] Scholarly writers have not been satisfied with merely repeating this perfunctory canard and many have made assertions concerning the Constitutional Convention that are objectively false by any measure.[374] Two articles state that the Annap-

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373. *See, e.g.*, Warren E. Burger, *Foreword*, 56 GEO. WASH. L. REV. 1 (1987); Robert C. Byrd, *Remarks by U.S. Senator Robert C. Byrd: The Constitution in Peril*, 101 W. VA. L. REV. 385, 388 (1998) (reciting that "the Framers went beyond the purposes for which Congress had called the convention"); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 545 (1994); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 20–25, n.45 (1995) ("The Continental Congress's charge to the Convention was far narrower than the work the Convention undertook from the beginning"); Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 728 (2011) (claiming that the Convention "grossly exceeded" the charge given to it by the "Continental Congress"); Lash, *supra* note 15, at 523 ("The Philadelphia Convention ignored that mandate and drafted an entirely new Constitution."); Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 869–70 (2006) ("[T]he delegates decided to deviate from these instructions "); Benjamin A. Geslison, *What Were They Thinking? Examining the Intellectual Inspirations of the Framers and Opponents of the United States Constitution*, 17 TEX. REV. L. & POL. 185, 193 (2012) (reviewing FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985) and HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981)) (The Anti-Federalists "argued persuasively that the Constitution was an illegal act completely unauthorized by the Convention"); *see also* Robert F. Blomquist, *Response to Geoffrey R. Stone and Seth Barrett Tillman, Beyond Historical Blushing: A Plea for Constitutional Intelligence*, 2009 CARDOZO L. REV. DE NOVO 244, 245; Jason A. Crook, *Toward A More "Perfect" Union: The Untimely Decline of Federalism and the Rise of the Homogenous Political Culture*, 34 U. DAYTON L. REV. 47, 50 (2008); Godbold, *supra* note 15, at 314; Kane, *supra* note 12, at 160; Maggs, *supra* note 5, at 1710–12; Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States of America*, 11 GREEN BAG 2d 217, 219–20 (2008); Smith, *supra* note 15, at 539–41; Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 763, 790 (2001); Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 506 (2009); Jonker, *supra* note 15, at 453–54; David Kow- alski, Comment, *Red State, Blue State, No State?: Examining the Existence of A Con- gressional Power to Remove A State*, 84 U. DET. MERCY L. REV. 335, 343–45 (2007).

374. *See, e.g.*, Dennis M. Cariello, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1528 (1999); John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1094–95 (1995); Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & POL. 459, 555 (2012); James Leonard, *Ubi Remedium Ibi Jus, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 367 (2004); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 67–68 (2012); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of A Presidential Power of the Purse*, 155 MIL. L. REV. 1, 152 (1998); Louis Michael Seidman, *The Secret*

olis Convention "asked Congress to call a convention."[375] The Annapolis delegates did no such thing. A copy was submitted to Congress out of mere respect with no request for action.[376] The Maine article reproduced a speech by a federal judge that claimed that the five-month gap between the "request" from Annapolis and the "call" from Congress arose because Congress could not convene a quorum[377]—a claim that is belied by hundreds of pages of congressional records in this time frame.[378]

Another writer, a bankruptcy judge, claimed: "The Federalists did not really refute the charge that the delegates to the Convention had exceeded the authority given them by their states."[379] His only citation for this proposition is the text of Article VII of the Constitution.[380] Ironically, this author's next paragraph cites John Marshall on the legitimacy of the ratification process.[381] However, he ignores Marshall's statement in defense of the Convention that "the Convention did not exceed their powers."[382]

Colonel Richard D. Rosen claims that "[t]he Convention also did not bother, as the Continental Congress had directed, to return to Congress for its approval upon completing its work."[383] We have already reviewed in detail the debates in the Confederation Congress after it received the Constitution from Philadelphia. Even Chief Justice Burger, who asserted that the

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History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation, 17 U. PA. J. CONST. L. 1, 12–14 (2014); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 198 (2004); Lynn D. Wardle, *"Time Enough": Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 938 n.308 (1989); Bruce Stein, Note, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 428–29 (1982).

375. George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 969–70 (1991); Daniel Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 ME. L. REV. 467, 472 (2011) (quoting speech of Judge Frank M. Coffin).

376. 1 ELLIOT'S DEBATES, *supra* note 23, at 118.

377. Wathen & Riegelhaupt, *supra* note 375, at 472 (quoting speech of Judge Frank M. Coffin).

378. 24 JOURNALS OF CONGRESS, *supra* note 70, at 261–62.

379. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 147 (2003).

380. *Id.*

381. *Id.*

382. Virginia Convention Debates (June 10, 1788) *reprinted in* 9 DHRC, *supra* note 4, at 1092, 1118.

383. Rosen, *supra* note 374, at 66 n.367.

Constitution was illegally adopted, recognized that "the Constitution was sent back to the Continental Congress."[384]

A few scholars have chronicled a more complete version of the events surrounding the call of the Philadelphia Conven- tion.[385] However, completeness does not always equate with his- torical accuracy. Shawn Gunnarson makes the forgivable error of saying that only four states "responded" to Virginia's call for the Annapolis Convention.[386] Nine states (counting Virginia) appointed delegates, but only four others joined Virginia in a timely manner. However, Gunnarson makes the far more egregious error of claiming that Virginia's subsequent call for the Philadelphia Convention "languished until New York presented a motion in Congress."[387] This assertion ignores the fact that five other states joined the Virginia call for the Philadelphia Convention before New York's motion was ever presented in Congress. Moreover, New York's motion did not even launch the discussion of the Annapolis Convention in Congress. A congressional committee had already recommended that Congress endorse the Philadelphia Convention prior to New York's motion.[388]

Gunnarson follows with the standard, but inaccurate, claim that Congress authorized the Convention, which he follows with the utterly unsupportable assertion that "the delegates decided to exceed the express terms of their congressional mandate."[389] He offers no evidence to support the notion that the Convention believed that it had been called pursuant to a mandate by Congress or that the delegates agreed that they had violated their actual mandates from their respective states. As we have seen, the record of the Convention shows that all sides of the debate appealed to the authority of their state appointments as the issue of the scope of their authority; moreover, the Federalists vigorously defended the legitimacy of their actions.

Other scholars who have written more extensive critiques of the legitimacy of the Convention generally base their core arguments and conclusions on the faulty premise that Congress

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384. Burger, Remarks, *supra* note 3, at 79.

385. *See, e.g.*, Shawn Gunnarson, *Using History to Reshape the Discussion of Judicial Review*, 1994 B.Y.U. L. REV. 151, 160–62 (1994).

386. *Id.*

387. *Id.* at 161.

388. *See supra* notes 80–82 and accompanying text.

389. Gunnarson, *supra* note 385, at 162.

called the Convention for the sole purpose for amending the Articles of Confederation.[390] Such conclusions would be far more academically palatable if there was some level of acknowledgement that this premise of infidelity is disputed.[391]

Brian C. Murchison's article bears mentioning because of his selective editing of the historical record. He casts doubt on fidelity of the actions of the delegates at the Convention by first suggesting that the Convention "arguably went beyond 'revising' the Articles" and that it "proposed an entirely new government."[392] He ends by proclaiming that the "Convention's product was 'bold and radical' not only for its extraordinary content but for the independent character of its creation."[393] Murchison posits the view the Convention acted without legal authority. His central thesis is that Madison justified this knowingly revolutionary action with language that paralleled Jefferson's Declaration of Independence.[394]

Murchison's entire argument is premised on the contention that the delegates' formal authority came from a combination of the Annapolis Convention report and the February 21st resolution of Congress. As we have seen earlier, the overwhelming evidence from the historical record supports Madison's contention in *Federalist No. 40* that "[t]he powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents."[395] Murchison actually quotes the first part of this sentence—putting a period after the word "determined."[396] By

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390. *See e.g.*, Finkelman, *supra* note 11, at 1174.

391. *Compare id.*, *with* Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take A Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 839 (1993) (noting, in passing, that Bruce Ackerman contends that the delegates were unfaithful to their call while James Madison in *Federalist No. 40* takes the opposite position) (citing Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989)).

392. Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 976 (1992).

393. *Id.*

394. *Id.* at 975–81.

395. THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961).

396. *Id.* at 975 ("He devotes *Federalist No. 40* to answering this objection, posing the question as 'whether the convention were authorized to frame and propose this mixed Constitution,' and conceding, 'The powers of the convention ought, in strictness, to be determined.'").

omitting the second half of the sentence, Murchison turns Madison's defense of the Convention's action into a concession of questionable behavior. Murchison's pedantic analysis seeks to fit Madison's arguments into a Procrustean Bed—lopping off key words on the one hand, while stretching superficial comparisons with the Declaration of Independence into a full- blown claim that *Federalist No. 40* was a clever ruse attempting to justify a revolutionary convention. The superstructure of his theory is built on the discredited foundation that the delegates knowingly exceeded the limits flowing from their congression- al appointment—facts he asserts without discussion or proof.

Two scholars have looked at the question of the call of the Convention and reached the conclusion that it did not come from Congress.[397] Unsurprisingly, both of these scholars reach this conclusion by an actual examination of the relevant documents.

Julius Goebel, Jr., recites the history that "some of the states . . . had authorized the appointment of delegates to a convention long before Congress was stirred to action "[398] Moreover, "Congress when it finally did recommend a convention" did so "by resolve, a form to which no statutory force may be attributed."[399] "Congress on February 21, 1787, had endorsed the holding of a convention."[400]

Robert Natelson devotes six pages of a 2013 law review article to the defense of the fidelity of the delegates to their commissions.[401] By examining the texts of the credentials from each state, he concludes that "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."[402] However, he concludes that it is reasonable to question the fidelity of New York's Alexander Hamilton and Massachusetts' Rufus King and Nathaniel Gorham—all of whom signed the Constitution.[403]

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397. *See* Julius Goebel, Jr., *Melancton Smith's Minutes of Debates on the New Constitution*, 64 COLUM. L. REV. 26, 30 (1964); Natelson, *supra* note 91, at 674–79.

398. Goebel, *supra* note 397, at 30.

399. *Id.*

400. *Id.*

401. Natelson, *supra* note 91, at 674–79.

402. *Id.* at 679.

403. *See id.* at 678.

While Natelson correctly analyzes the historical facts and the legal conclusions on the whole, I take issue with his use of the signing of the Constitution as the test for fidelity of these delegates. Signing was largely symbolic and was, at most, a personal pledge of support. This was at the end of a convention where every vote was made by states as states. The vote to approve the Constitution at the very end was counted by states, not by delegates. No delegate ever took official action as an individual. The Massachusetts delegates were either faithful or unfaithful to their commissions by casting dozens of votes in the process—especially the ultimate vote to approve the Constitution. As acknowledged by Natelson,[404] the charge is less credible against Hamilton because he never voted after Lansing and Yates left in July.[405] Hamilton's personal endorsement of the Constitution by signing it was not an act for the state of New York. Moreover, both the legislature of New York and the ratification convention in Massachusetts rejected the contention that the Convention had violated the directions given by the states.[406] Despite these relatively minor disputes with Natelson regarding these specific delegates, his article is singularly noteworthy for looking at the correct documents and reasoning to sound conclusions therefrom.

B. Answering Ackerman and Katyal

Professors Bruce Ackerman and Neal Katyal[407] stand nearly alone[408] among legal scholars for having undertaken a

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404. *See id.* at 678 n.414.

405. Natelson, however, questions whether Hamilton should have continued as a commissioner after the departure of his two New York colleagues. *Id.* at 722.

406. *See* Assembly Proceedings (Jan. 31 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 704; 16 DHRC, *supra* note 4, at 68.

407. Katyal was a third-year student at Yale Law School at the time of publication. He is now a professor at Georgetown University Law Center.

408. Professor Akhil Amar has responded twice to the arguments of Ackerman and Katyal. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter *Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988) [hereinafter *Philadelphia*]. As the titles of both articles suggest, his discussions of the legality of the adoption of the Consti- tution are made in service of his argument that there are paths to amend the Con- stitution that are outside of Article V. *See* Amar, *Consent*, *supra*, at 494–508; Amar, *Philadelphia*, *supra*, at 1072–76. Moreover, his defense of the legality of the Constitution is much more like an affirmative defense in a criminal case than a true de-

comprehensive review of the legality of the adoption of the Constitution.[409] An earlier article, not cited by Ackerman and Katyal, makes very similar arguments.[410] Ackerman and Katyal's premises and conclusions are concisely described in their fourth paragraph:

> Our main task, however, is to confront the problem raised by the *Federalists' flagrant illegalities*. Movements that *indulge in systematic contempt for the law* risk a violent backlash. Rather than establish a new and stable regime, *revolutionary acts of illegality* can catalyze an escalating cycle of incivility, violence, and civil war. How did the Federalists avoid this dismal cycle? More positively: How did the Founders manage to win acceptance of their claim to speak for the People at the same moment that *they were breaking the rules of the game*?[411]

This excerpt is typical of the highly charged language that pervades their work. The illegality of the adoption of the Constitution is not treated as a close question—the process of adopting

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fense. He essentially argues that while there is a facial inconsistency with Article XIII of the Articles of Confederation, the Constitution was lawfully adopted because the Articles were a treaty that had been breached by the states. Amar, *Consent*, *supra*, at 465–69. Thus, having been breached, the states were at liberty to write a new document that would otherwise be illegal. While we certainly find elements of international law parallels in the arguments of the Federalists, his concession that there is a facial violation is a much different defense than is ar- gued here. His thesis that there is an extra-constitutional method of amending the Constitution takes the contention outside of anything that would amount to an originalist or textualist defense of the Constitution. It is a creative argument, but Ackerman and Katyal's critiques of it are powerful. *See* Ackerman & Kaytal, *supra* note 14, at 476–487. This article is the first comprehensive direct defense (as op- posed to Amar's affirmative defense) of the legality of the Constitution.

409. *See* Ackerman & Katyal, *supra* note 14.

410. Kay, *supra* note 14. Kay bases his argument on the familiar and erroneous assertion that the Annapolis Convention "proposed that Congress call another convention to be held in Philadelphia." *Id.* at 63. He fails to cite or quote the actual language of the report from the Annapolis Convention which clearly addressed its recommendations to the state legislatures to call a convention. The conven- tion's stated reasons for sending a copy to Congress was to demonstrate courtesy. He then asserts the common claim that Congress called the Convention and lim- ited their authority to the revision of the Articles. *Id.* at 63–64. Kay embellishes on this claim by stating "the Congressional resolution calling the convention, as well as the instructions to a number of state delegations, restricted the convention's mission to 'revising the Articles '" *Id.* at 64. He fails to examine the actual language of any state's delegation, nor does he consider the argument made by Madison in *Federalist No. 40* that the actual call of the Convention came from the states.

411. *See* Ackerman & Katyal, *supra* note 14, at 476–77 (emphasis added).

the Constitution was "flagrant[ly]" illegal.[412] The Founders demonstrated "systematic contempt for the law."[413] They committed "revolutionary acts of illegality."[414] They were not merely "breaking the rules of the game"—Madison, Hamilton, and Washington were doing so with deliberate disdain.[415]

Ackerman and Katyal purport to paraphrase the Founders' justification for this unscrupulous maneuvering:

> Granted, we did not play by the old rules. But we did something just as good. We have beaten our opponents time after time in an arduous series of electoral struggles within a large number of familiar lawmaking institutions. True, our repeated victories don't add up to a formal constitutional amendment under the existing rules. But we never would have emerged victorious in election after election without the considered support of a mobilized majority of the American People. Moreover, the premises underlying the old rules for constitutional amendment are deeply defective, inconsistent with a better understanding of the nature of democratic popular rule. We therefore claim that our repeated legislative and electoral victories have already provided us with a legitimate *mandate from the People* to make new constitutional law. Forcing us to play by the old rules would only allow a minority to stifle the living voice of the People by manipulating legalisms that have lost their underlying functions.[416]

This paraphrase was unsupported by any citation to the actual words of the Federalists. Statements can be found from Madison and other Federalists that support the claim that they believed their actions were morally justified,[417] but nothing at all can be found to support the overall tone and thesis of this effort at historical ventriloquism. The Federalists defended both the legal and moral basis of their actions. They would at times argue these defenses in the alternative. But absolutely nothing can be found from the Framers that demonstrates that they believed their actions were clearly illegal and revolutionary and were nonetheless justified.

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412. *Id.* at 476.

413. *Id.*

414. *Id.*

415. *See id.* at 476–77.

416. *Id.* at 478.

417. *See, e.g.*, THE FEDERALIST NO. 40, at 252–54 (James Madison) (Clinton Rossiter ed., 1961).

Ackerman and Katyal allege "three legal obstacles" that purportedly demonstrate the illegality of the Founders' conduct:

- Problems with the Articles of Confederation
- Problems with the Convention
- Problems with State Constitutions[418]

The professors allege ten distinct violations under these three categories.[419] However, their "three legal obstacles" and ten specific allegations are not well-organized. A more logical organization of the professors' legal arguments would be:

- The process was illegal from beginning to end because Article XIII provided the exclusive method for amending the form of governance of the United States.
- The delegates went beyond the call of the convention containing their controlling instructions.
- The method of ratification chosen violated both Article XIII and several state constitutions.[420]

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418. Ackerman & Katyal, *supra* note 14, at 475–487.

419. *See id.* at 478–486. The violations are as follows: (1) the Constitution invited secession; (2) the Constitutional Convention ignored the role the Articles "expressly assigned to the Continental Congress" for approving subsequent amendments; (3) the Founders cut the state legislatures out of the ratifying process; (4) the entire process was done "in the face of the Articles' express claim to specify the exclusive means for its revision;" (5) the Convention was a secessionist body; (6) Delaware's delegation "recognized that it was acting in contempt of its commission;" (7) the delegates had been "charged" by the "Continental Congress" to meet "for the sole and express purpose of revising the Articles" and the delegates went "beyond their legal authority when they ripped up the Articles and pro- posed an entirely new text;" (8) the delegations from New York, Connecticut, and Massachusetts clearly violated their commissions; (9) all states that gave instructions as to the mode of ratification specified approval by Congress followed by approval of the state legislatures—which was not followed; and (10) the Supremacy Clause of the Constitution created an implied conflict with and de facto change in several state constitutional amendments. Thus, the process for obtain- ing amendments to state constitutions was applicable and was not followed. *Id.*

420. One of their arguments does not fit this outline but can be easily dismissed. The contention that the Convention was secessionist is nothing more than a political criticism and does not rise to the level of a serious legal argument. Moreover, it is a stretch to contend that it is a secessionist act to invite all states to a convention to discuss possible changes to the form of government. The fact that one state chose not to attend does not alter the nature of the Convention. If Rhode Island had been excluded by the others from the drafting convention it would plausibly raise the specter of secessionism. Describing Rhode Island's refusal to attend the Convention as an act of secession by the other twelve states is facially without merit.

1. The Contention that the Whole Process Was Illegal under the Articles of Confederation May Be Summarily Dismissed

Although the professors' argument that the entire process was done "in the face of the Articles' express claim to specify the *exclusive* means for its revision"[421] made the list of their ten specific illegalities, a reader must hunt diligently through the remainder of their article for any supporting argumentation. Random statements in support of this argument are sprinkled throughout the article, but if this theory is to be considered seriously, it demands robust development and careful consideration rather than scattered and disjointed assertions.[422]

The longest single presentation of this theory is a mere two sentences that refer to the Annapolis Convention:

> The commissioners had taken upon themselves the right to propose a fundamental change in constitutional law. While Article XIII had confided exclusive authority in Congress to propose amendments, Annapolis was making an end run around the existing institution by calling for a second body, the convention, unknown to the Confedera- cy's higher lawmaking system.[423]

Ackerman and Katyal critique their rival Akhil Amar for making claims unsupported by evidence from the contemporaneous debates.[424] Amar's theory (alleging a breach of treaty obligations) should be rejected, they say, because there wasn't "any evidence that Americans took Amar's argument seriously."[425] However, in their own article, despite their self-described exhaustive research,[426] they cite very slender evidence that anyone at the time

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421. Ackerman & Katyal, *supra* note 14, at 480.

422. If this theory was advanced in this manner in an appellate brief, it is clear that it would be dismissed under the familiar standard for undeveloped claims. *See* Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 59 F.3d 284, 293–94 (1st Cir. 1995) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."); United States v. Hayter Oil Co., 51 F.3d 1265, 1269 (6th Cir. 1995) (finding that defendants waived issue by making conclusory statements and failing to develop their theory).

423. Ackerman & Katyal, *supra* note 14, at 497.

424. *See, e.g.*, *id.* at 488 n.35.

425. *Id.* at 539–540.

426. *Id.* at 540 ("[W]e have amassed an enormous body of evidence expressing legalistic objections to the Federalists' unconventional activities.").

even raised the argument that the entire Convention was illegal from the beginning. And they offer no evidence at all that Americans at the time took the argument seriously.

The professors' meager suggestion of contemporary support comes from a statement on the floor of the Massachusetts legislature by Rufus King:

> The Confederation was the act of the people. No part could be altered but by consent of Congress and confirmation of the several Legislatures. Congress therefore ought to make the examination first, because, if it was done by a conven- tion, no Legislature could have a right to confirm it Besides, if Congress should not agree upon a report of a convention, the most fatal consequences might follow. Congress therefore were the proper body to propose alterations [427]

But King stopped well short of the argument advanced by Ackerman and Katyal. He did not say that it was illegal to call a convention of states to draft amendments. Rather he began with the premise that nothing could be finally altered except by the consent of Congress and all of the states. In light of the legal requirement for ratification, King makes a political argument that it is wiser to have Congress make the proposed alterations in the first place.

This explanation of King's argument makes much more sense in light of the fact that he was the co-author the success- ful motion in Congress to endorse the Constitutional Conven- tion on February 21st, 1787.[428] The professors acknowledge King's role in the congressional resolution[429] but shrug it off without explanation—as if King had somehow been swept into the vortex of Madison and Hamilton's grand revolutionary conspiracy. If King believed it was illegal for a convention to be called, he was a hypocrite of the first order by making the motion. But a wise politician can change his views on the practicality of a particular approach without duplicity. The better reading of King's words and actions leads to the conclusion that he believed it was illegal to adopt changes without ap- proval of Congress and the states.

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427. *Id.* at 501 (quoting *Proceedings of Government, Boston, October 12*, WORCESTER MAGAZINE, 3rd week of Oct. 1786, at 353).

428. Ackerman & Kaytal, *supra* note 14, at 503.

429. *See id.* at 501.

Moreover, in the footnote citing the original source of King's speech in the Massachusetts legislature, the professors quote Nathan Dane on this topic.[430] Dane, also speaking in the state legislature, said:

> [A] question arises as to the best mode of obtaining these alterations, whether by the means of a convention, or by the constitutional mode pointed out in the 13th article of the confederation. In favour of a convention, it is said, that the States will probably place more confidence in their doings, and that the alterations there may be better adjusted, than in Congress.[431]

Far from arguing that Article XIII was the exclusive path for changes, Dane clearly posits a convention as a legitimate alternative. The criteria for choosing one or the other, Dane suggests, is simply political expediency.

I have found two contemporary critics of the Constitution who did in fact make the argument advanced by Ackerman and Katyal. In the New York ratification convention, Abraham Yates unleashed a scattershot attack on the legality of the entire process. He argued that on February 19th, 1787, the New York legislature violated the state constitution when it instructed its delegates in Congress to move an act recommending the convention.[432] Moreover, Congress violated Article XIII when it passed its resolution of approval on February 21st.[433] Congress again violated Article XIII, on September 28th, when it sent the Constitution to the state legislatures.[434] And the New York legislature violated its Constitution when it approved the calling of the ratification convention in February 1788.[435] The best read- ing of Yates is that he was an ardent Anti-Federalist and that he was willing to make shotgun attacks that were a mix of politi- cal and legal rhetoric designed to serve his political viewpoint. Treating Yates as a legal purist—or even as someone who mer- its consideration as a serious legal critic—overstates both his arguments and his importance.

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430. *See id.* at 501 n.72.

431. *Id*. (quoting Nathan Dane, Speech to Massachusetts House of Representatives, *in Proceedings of Government*, NEWPORT MERCURY, Nov. 17, 1786).

432. *Sydney,* N.Y.J., June 13–14, 1788, *reprinted in* 20 DHRC, *supra* note 4, at 1153, 1156.

433. *Id.*

434. *Id*. at 1157.

435. *Id.*

Moreover, the standard that Ackerman and Katyal raise against Amar is truly appropriate: did Americans at the time pay any serious attention to these arguments? Yates' position was never confirmed by the vote of any convention or legisla- tive body. Not Congress, not the Constitutional Convention, not any ratification convention, and not any state legislature. New York, Massachusetts, Rhode Island, and North Carolina all had problems with the adoption of the Constitution at one time or another. Not even in any of these states was there ever a successful resolution that condemned the very calling of a Convention from its inception.

The void-from-the-beginning position did have one other contemporary source of support not mentioned by the professors. The Town Meeting of Great Barrington, Massachusetts approved the following resolution as an instruction to their delegate to the state ratification convention:

> First as the Constitution of this Commonwealth Invests the Legslature [sic] with no such Power as sending Delligates [sic] To a Convention for the purpose of framing a New Sys- tem of Fedderal [sic] Government—we conceive that the Constitution now offered us is Destituce [sic] of any Constituenal [sic] authority either states or fodderal [sic].[436]

The small town in Massachusetts, relying primarily on its state constitution, took the position that the legislature had no power to appoint delegates to the Constitutional Convention. The additional contention that the proposed Constitution was "Destituce" of any federal "Constituenal" authority was summarily made. This paragraph represents the pinnacle of contemporary acceptance of the Ackerman/Katyal theory. Such scant evidence fails to meet their own standard requiring evidence that "Americans took [their] argument seriously."[437]

There was nearly universal acceptance of the idea that a Convention was a proper alternative to Congress for drafting proposed changes, as Dane's state legislative speech demonstrates. Moreover, no one believed that the Convention had any power to make law. They merely had the power to make a recommendation. As James Wilson said:

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436. Draft Instructions (Nov. 26, 1787), *reprinted in* 5 DHRC, *supra* note 4, at 959.

437. Ackerman & Katyal, *supra* note 14, at 539.

> I think the late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen.[438]

Second, the overwhelming understanding was that the states—which were clearly in possession of ultimate political power—had the power to convene a convention if they wished. In fact, the clear supremacy of the states was the very reason a new Constitution was needed. The States created the Union. The States created the Articles of Confederation. The States appointed the members of Congress. The state legislatures could and did issue binding directions to their members in Congress. Indeed, the February 21st, 1787, resolution by Congress approving the Convention was the result of a process started by the New York congressional delegation who were acting in obedience to directions received from their legislature.[439]

The States called the Convention. The States appointed delegates to the convention and gave them instructions on the scope of their authority and quorum rules for casting the single vote of their state. Natelson records that from "1774 until 1787, there were at least a dozen inter-colonial or interstate conventions."[440] Convening conventions of the states to recommend solutions for problems was common political practice. The argument that it was a violation of Article XIII for the states to convene a convention to propose changes in the Constitution was made by a scant few at the time and accepted only by the single town of Great Barrington. Ackerman and Katyal's contention that the convention was *void ab initio* cannot bear up under focused scrutiny.

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438. Convention Debates, A.M. (Dec. 4, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 483.

439. *See* 19 DHRC, *supra* note 4, at xl; 32 JOURNALS OF CONGRESS, *supra* note 70, at 72.

440. Robert Natelson, *James Madison and the Constitution's "Convention for Proposing Amendments"*, 45 AKRON L. REV. 431, 434 (2012).

2. *Conspiracy Theories and Character Attacks: Exploring the Legality of the Delegates' Conduct*

Ackerman and Katyal paint a picture of the Federalists as "dangerous revolutionaries"[441] who "lacked the legal authori- ty . . . to make such an end run"[442] around the existing legal requirements. Yet, here again, the professors make a scattershot attack, failing to ever engage in a focused analysis of the questions of: (a) who called the convention; and (b) what were the instructions given to the delegates. Some of their analytical difficulty seems to arise from the professors' failure to make any distinction between informal measures that suggest, support, or endorse a convention and formal "calls" for a convention.[443]

a. The Call

The professors claim that in "calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet 'for the *sole and express* purpose of revising the Articles.'"[444] Later, they say that the Continental Congress "join[ed] the call for the convention."[445] In other places, they say that the "commercial commissioners" at the Annapolis Convention called the Convention.[446] Then later, they describe the Annapolis Convention with a bit more nuance: "[T]he commissioners did not take decisive action unilaterally. They merely called upon Congress and the thirteen state legislatures to issue such calls."[447] The report language from Annapolis clearly contradicts even this version of their assertion. The Annapolis delegates asked their state legislatures to appoint commissioners with broader powers and to use their good offices to get other states to do the same.[448] They sent copies of

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441. Ackerman & Katyal, *supra* note 14, at 495.

442. *Id.* at 487.

443. *See*, *e.g.*, *id.* at 486 (describing the Federalists' general plan for ratification as the "Federalists' call for ratifying conventions"); *id.* at 498 (describing Hamilton's recommendation at Annapolis as a "dramatic call").

444. *Id. a*t 481; *see also id.* at 501 ("[King and Dane] would be the authors of the congressional resolution calling upon the states to send delegates to Philadelphia.").

445. *Id.* at 483.

446. *Id.* at 496.

447. *Id.* at 497.

448. 1 ELLIOT'S DEBATES, *supra* note 23, at 118.

their report both to Congress and to the Governors "from motives of respect."[449] By Ackerman and Katyal's logic, it would be equally valid to suggest that the Annapolis delegates asked the thirteen governors to call a convention.

The professors review the historical sequence leading up to the Convention without ever trying to conclusively answer the question: Who formally called the convention? In their sequential narrative, Ackerman and Katyal begin with efforts to amend the Articles in 1781, move on to the Mount Vernon Conference between Virginia and Maryland, then to the Annapolis Convention, then to a discussion of the impact of Shay's Rebellion, onto the February, 1787 resolution by Congress, a protest from Rhode Island, and finally to the Constitutional Convention itself.[450]

There is a significant gap in this sequence. Ackerman and Katyal do not give any consideration to the actions of the legislatures in actually calling for the Philadelphia Convention. This failure is no mere oversight, since *Federalist No. 40* expressly contended that the delegates' authority did not come from either the Annapolis Convention or the resolution from the Confederation Congress—but from the several states.[451] Moreover, the professors themselves noted that the Annapolis Convention had "called upon" both Congress and the thirteen state legislatures to call the Convention.[452] They duly discuss the role of Congress but inexplicably fail to discuss the role of the state legislatures. Avoiding this inconvenient set of facts relieves them of the difficulty of explaining how Congress could issue the official call for a convention when in fact, before Congress acted, six states had already named the time and place, chosen delegates, set the agenda, and had issued instructions to con- trol their delegates' actions in Philadelphia.

While this is the professors' principal failure in describing the sequence of events, their reference to "Rhode Island's Protest" is

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449. *Id.*

450. Ackerman & Katyal, *supra* note 14, at 489–514.

451. *See* THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961) ("[B]y the assent . . . of the legislatures of the several states . . . a convention of delegates, who shall have been appointed by the several states "); *see also id.* at 249 ("The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation.").

452. Ackerman & Katyal, *supra* note 14, at 497.

simply odd. It is the only state action that is reviewed in this sequence of events. And this discussion is placed prior to the discussion of the Convention itself. Rhode Island's "protest" was issued September 15th, 1787, just two days before the conclusion of the Convention.[453] Moreover, Ackerman and Katyal fail to note that Rhode Island's protest was itself protested by the towns of Newport and Providence.[454] Yet, in their discussion of Rhode Island's protest, the professors give yet another explanation for the call of the Convention. They note that "the Philadelphia Convention was a creature of state legislatures."[455] However, three pages later Ackerman and Katyal return to their claim that Congress called the convention and gave the delegates their instructions—a claim repeated at least twice thereafter.[456]

The best explanation for this shifting cloud of confusion is that the professors simply did not think through the difference between a formal call and various informal suggestions, endorsements, and encouragements. The full historical record and documents give us the correct answer: Virginia called the Convention and this formal call was joined by eleven other states.

b. The Delegates' Authority

Ackerman and Katyal continue their inconsistent analysis with respect to the source of the delegates' instructions and authority. At times they argue that "Congress had charged the delegates" to only amend the Articles.[457] They favorably recite Anti-Federalist claims that the federalist proposals "were simply beyond the convention's authority."[458] And yet, they be-

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453. Nearly every mention of Rhode Island in the debates of the Philadelphia Convention and the subsequent ratification conventions was pejorative in nature. *See, e.g.*, The Virginia Convention Debates (Jun. 25, 1788), *reprinted in* 10 DHRC, *supra* note 4, at 1515, 1516 (Benjamin Harrison V stated that "Rhode-Island is not worthy of the attention of this House—She is of no weight or importance to influence any general subject of consequence." Harrison was a signer of the Declara- tion of Independence and former Governor of Virginia).

454. Newport and Providence's Protest of Rhode Island General Assembly's Letter to Congress, (Sept. 17, 1787), *reprinted in* 24 DHRC, *supra* note 4, at 21, 21–23.

455. Ackerman & Katyal, *supra* note 14, at 505.

456. *Id.* at 508–509, 514.

457. *Id.* at 481.

458. *Id.* at 508.

grudgingly admit, often in footnotes, that the instructions from the states actually mattered.[459] The following passage is crucial:

> In calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet "for the *sole and express* purpose of revising the Articles." Given this explicit language, did the delegates go beyond their legal authority when they ripped the Articles up and proposed an entirely new text?
>
> This charge was raised repeatedly—and justifiably in the cases of Massachussetts [sic], New York, and Connecticut, where legislatures had expressly incorporated Congress's restrictive language in their own instructions to delegates. Other state delegations, however, came with a broader mandate, allowing them to make any constitutional proposal they thought appropriate. Thus, while some key delegates may well have acted beyond their commission, this was not true of all.[460]

While the strong inference is raised that all delegates were bound by the "explicit language" from Congress, Ackerman and Katyal make the curious claim that the delegates from Massachusetts, New York, and Connecticut were justifiably accused of violating their instructions *from their own state legislatures.* The professors do not explain how New York's delegation could be accused of violating their instructions by voting for the Constitution since New York cast no vote one way or the other. Yet, they inexplicably contend that New York's dele- gates are "justifiably" charged of going "beyond their commis- sion" when they "ripped the Articles up and proposed an en- tirely new text."[461]

As to Connecticut, the professors fail to quote or consider the actual legislative language appointing the delegates. As we have already seen, while the Connecticut resolution re- fers to the congressional resolution, its delegates were ulti- mately given much broader authority.[462] Connecticut more properly belongs in the category of states essentially follow- ing the Virginia model, granting broad authority to their

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459. *See, e.g., id.* at 482 n.18, 483 n.20.

460. *Id.* at 481–83 (footnotes omitted).

461. *Id.* at 482–83.

462. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 216.

delegates. The charge against the Massachusetts delegation is facially more plausible. However, there are two significant factors, previously reviewed, that place this claim in a differ- ent light.[463] The professors fail to mention that the Massachu- setts legislature debated the question of whether the Con- vention had "assum[ed] powers not delegated to them by their commissions."[464] Despite this contention, that legisla- ture agreed to call the state ratification convention by a vote of 129 to 32.[465] Moreover, the Massachusetts convention, by a vote of "90 & od to 50 & od," expressly rejected the argu- ment that their delegates had violated their instructions.[466] Moreover, James Madison strongly defended the legality of the actions of the delegates from those states that adopted the congressional language in their instructions.[467] In their review of *Federalist No. 40*, the professors summarily pro- nounce Madison's legal analysis of the instructions as "strained" without the benefit of further discussion.[468] Thus, we are left with the choice of accepting the conclusions of the Massachusetts legislature, ratifying convention, and James Madison or the undeveloped assertions of two leading modern scholars in pursuit of a grand theory that the Feder- alists were unconventional revolutionaries.

But we should not lose sight of the fact that Ackerman and Katyal make an important admission regarding the other nine states. As to the charge that the delegates from these states violat- ed their commissions, the professors pronounce judgment: "this was not true."[469] Notwithstanding this begrudging exoneration of the actions of delegates from nine states, the balance of the article proceeds on the basis of a cloud of assumed impropriety by all delegates. "Illegality was a leitmotif at the convention from its

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463. *See supra* notes 229–33 and accompanying text.

464. *Speech of Dr. Kilham*, MASS. CENTINEL, Oct. 27, 1787, *in* 4 DHRC, *supra* note 4, at 135.

465. MASS. CENTINEL (Oct. 27, 1787) *reprinted in* 4 DHRC, *supra* note 4, at 135, 138.

466. Letter from Nathaniel Gorham to Henry Knox (Mar. 9, 1788), *reprinted in* 7 DHRC, *supra* note 4, at 1673, 1674.

467. *See* THE FEDERALIST NO. 40, at 248–55 (James Madison) (Clinton Rossiter ed., 1961).

468. Ackerman & Katyal, *supra* note 14, at 544.

469. *Id.* at 483.

first days to its last."[470] Musical imagery is no substitute for actual evidence nor does it resolve the professors' numerous internal inconsistencies on this issue. We have previously reviewed the full historical record on this subject. The claim that recognized and deliberate illegality was the overriding theme of the Convention is without merit.

c. The Delaware Claim

The professors make the particular claim that Delaware's delegation "recognized that it was acting in contempt of its commission."[471] This assertion is supported by a footnote with a variety of citations—not one of which supports the claim that the Delaware delegates recognized that they were violating their commissions.[472] The first citation is nothing more than Merrill Jensen's reproduction of the commission by the Dela- ware legislature.[473] Ackerman and Katyal then say that the "Delaware problem was broadly recognized by the delegates to Philadelphia."[474] For this assertion, they cite the minutes of Convention when the Delaware credentials were first read.[475] This was a mere notation that Delaware's delegates had been directed by their legislature to not support a form of voting in Congress that failed to recognize the equality of states. They offer no explanation of the specific actions taken by the Delaware delegates that were in violation of their commissions. The professors do not quote a single statement by any source from Delaware. Such a citation should be the bare minimum when asserting that the Delaware delegates "recognized" their "contempt" for their instructions. The final citation in this footnote is a comment by Luther Martin, an Anti-Federalist who claimed in his own Maryland ratifying convention that Dela- ware's delegates had violated their instructions.[476] Not one piece of evidence is offered which demonstrates that the Dela- ware delegates themselves knew or believed they were violat- ing their instructions.

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470. *Id.* at 506.
471. *Id.* at 481.
472. *See id.* at 481 n.16.
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*

The preservation of the equality of the states was indeed a major topic at the Constitutional Convention. Delaware's delegates supported the Great Compromise which created our bicameral system with the House based on equality of population and the Senate based on the equality of States.[477] This compromise was consistent with the tenor of Delaware's instructions to preserve the equality of the states in Congress. The opinion of a single Anti-Federalist from Maryland does not prove Ackerman and Katyal's assertion that Delaware's delegates knowingly violated their instructions. And the ultimate proof of the delegates' fidelity is found in the fact that Delaware was the first state to ratify the Constitution.[478] Its vote was unanimous.[479]

3. The Legality of the Ratification Process

a. Article XIII

Ackerman and Katyal's principal attack on the legality of the adoption of the Constitution rests on the alleged improprieties of the ratification process. This is logical given that, at least occasionally, they admit that the vast majority of delegates were faithful to their instructions. Thus, they focus the majority of their article on the more complex and plausible issue that the ratification process was improper.

The professors make a straightforward legal argument.[480] Article XIII required all amendments to be first proposed by Congress and then ratified by all thirteen state legislatures. The new Constitution itself was not approved by Congress, nor by the state legislatures—thus the ratification process was illegal.

Ackerman and Katyal make three fundamental errors in their ratification argument. First, they fail to identify the correct source for the rule that ratification was to proceed first to Congress and then to the state legislatures. Second, they fail to consider the legal implications arising from the "Ratification and Transition" Resolution of the Philadelphia Convention.[481]

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477. *See* 1 FARRAND'S RECORDS, *supra* note 107, at 664.

478. 3 DHRC, *supra* note 4, at 41.

479. *Id.*

480. Kay's arguments on this point are essentially parallel to those of Ackerman and Katyal. *See* Kay, *supra* note 14, at 67–70.

481. Kay does reference this second act of the Convention in his arguments on ratification. However, he inaccurately classifies this act as a letter. *See id.* at 68. Kay

Third, they fail to acknowledge that the new process itself was, in fact, approved by Congress unanimously and then by all thirteen state legislatures.

It is only by ignoring the full documentary and historical record that Ackerman and Katyal so easily reach their conclusion that the change in the ratification process was unsanctioned. But the plain facts are that the states set the expectation for the ratification process in their appointments of delegates, and the states were free to lawfully change this process provided that Congress and all thirteen legislatures agreed. And this is what actually happened.[482]

The professors make much ado about the political and mor- al arguments raised by Madison to justify for the new process. From such statements by Madison, they contend that he ar- gued that the end of obtaining the Constitution was so im- portant that it justified illegal and revolutionary means to achieve this end.[483] Two things are abundantly clear from the historical record about these contentions. First, the supporters of the Constitution genuinely believed that a government based on the consent of the governed was morally superior to a government assented to only by elected legislators. All polit- ical legitimacy rested on this standard. Second, it is beyond legitimate debate that the Founders would have proceeded with the new process and entered into the government under the new Constitution even if one or more state legislatures refused to endorse the new process for ratification. The Fram- ers clearly believed that the nation was on the verge of col- lapse and that moral and political legitimacy, based on the direct consent of the governed, was more important than le- galistic correctness.[484] However, proof that the Founders were willing, if it had become necessary, to take such steps is not proof that they acted illegally. We judge the legality of their

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gives no consideration to the legal effects of the approval of the process set forth in these resolutions by both the Confederation Congress and all thirteen state legislatures.

482. *See* Journals of Congress (Sept. 28, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 340, 340.

483. Ackerman & Katyal, *supra* note 14, at 488.

484. *See* THE FEDERALIST NO. 40, at 252–55 (James Madison) (Clinton Rossiter ed., 1961).

actual actions, not what they probably (or even certainly) would have done if the legally proper method failed.

Thus, Ackerman and Katyal's recitation of the Federalists' moral arguments and appeals to popular sovereignty are historically interesting and demonstrate that our country came very close to making a quasi-revolutionary decision in the ratification process. But, in the end they found a path that was not revolutionary. They asked Congress and all thirteen state legislatures to approve the new ratification process and they did. Thus, there is no need for either an apology or a moral justification from the Framers nor forgiveness from their political descendants. Congress and all thirteen legislatures gave legal sanction to the new process.

b. State Constitutions

Ackerman and Katyal make a second argument as to the illegality of the ratification process. They contend that several state constitutions contained a required process for amend- ments thereto.[485] And since the Supremacy Clause in Article VI represented a *de facto* amendment to these state constitutions, these states were required to follow that process first.[486] Each state constitution would have to be amended to authorize the legislature to call a ratification convention for a Constitution that proclaimed itself to be supreme over the states in matters delegated to the new central government.[487]

This argument borders on frivolousness, ignoring, as it does, the text of Article XIII. The first sentence of that Article contained a supremacy clause: "Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them."[488] Nothing in Article VI of the Constitution says any- thing materially different.[489] The Constitution and all laws made in furtherance of the Constitution are supreme over in- consistent state laws and state constitutions. The provisions of the Articles of Confederation and the Constitution on the ques-

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485. Ackerman & Katyal, *supra* note 14, at 484.
486. *See id.*
487. *See id.* at 484–87.
488. ARTICLES OF CONFEDERATION OF 1781, art. XIII.
489. *See* U.S. CONST. art. VI, cl. 1.

tion of supremacy are functionally identical. Moreover, if the state constitutions of these select states required the use of the state amending process to adopt a supremacy clause, then that requirement was equally applicable to the adoption of the Articles of Confederation. No state did this, of course, which underscores the absurdity of this argument.

Although Ackerman and Katyal never mention it, this argument was made and answered during the ratification debates. The Republican Federalist argued that the Massachusetts constitution would be effectively amended by the new federal constitution.[490] Accordingly, prior to ratification, permission would have to be obtained by first following the provisions of the Massachusetts state constitution.[491] This suggestion was never given serious consideration in either the Massachusetts legislature or its ratification convention.

This theory was also argued by the town of Great Barrington, Massachusetts in proposed instructions to their original delegate to the state ratification convention, William Whiting.[492] He was one of the Common Pleas judges from Great Barrington, Massachusetts who was convicted of sedition for his role in Shay's Rebellion.[493] A Federalist writer answered such arguments by pointing out that, if true, they would equally demonstrate that the Articles of Confederation had been illegally adopted:

> [I]f we put the credentials of our rulers in 1781 to the test; if we dare to try the extent of their authority by the criterion of *first principles*; if in our researches after truth on this point we follow *these* whithersoever they will guide us, may it not be safely and fairly asserted that the States of South Carolina Virginia, New Jersey, Connecticut, Rhode-Island and New Hampshire even from the date of Independence to that of the confederation to which we are objecting, never invested their respective Legislatures with sufficient powers perma- nently to form and ratify such a compact.[494]

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490. *The Republican Federalist III*, MASS. CENTINEL, Jan. 9, 1787, *reprinted in* 5 DHRC, *supra* note 4, at 661–65.

491. *See id.*

492. *See* Draft Instructions (Nov. 26, 1787), *reprinted in* 5 DHRC, *supra* note 4, at 959.

493. *See id.* at 958.

494. Letter from John Brown Cutting to William Short London (Jan. 9, 1788), *reprinted in* 14 DHRC, *supra* note 4, at 493–94.

As Ackerman and Katyal suggest, we must ask if there is evidence that there was broad agreement as to the validity of the argument among Americans at the time. The answer is clearly no. The professors cite no contemporary evidence in support of their interpretation of the interplay between state constitutions and Article VI's Supremacy Clause. And the supporting evidence this article has discovered and cited above hardly rises to the level of general contemporary agreement.

Moreover, we cannot escape the parallel between the supremacy clause in Article XIII of the Articles of Confederation and the one in Article VI of the Constitution. No serious contention was ever made that state constitutions had to be revised before either of these provisions should be adopted. Ackerman and Katyal's argument in this regard is much like the contention by the plaintiffs in *Leser v. Garnett*.[495] There, the plaintiffs sought to strike the names of women voters from the list of eligible voters on the ground that the 19th Amendment was improperly adopted.[496] One of their arguments was that the state legislatures were without power to approve a constitutional amendment allowing women to vote if the state constitution prohibited such voting.[497] The plaintiffs contended that legislators who voted for the 19th Amendment in states where suffrage was limited to males "ignored their official oaths [and] violated the express provisions" of their state constitutions.[498] The Court quickly and unanimously rejected this contention.[499] State constitutions do not have to be first amended to allow the legislature to vote to ratify amendments that impliedly contravene provisions thereof.

4. The Professors' Real Agenda

The reason that Ackerman and Katyal advance their theory that the Constitution was adopted by a revolutionary and illegal process is revealed in their article's final section. They contend that such revolutionary actions—changes in the governing structure without adherence to the proper processes—are appropriate whenever the need is sufficiently great to justify ille-

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495. 258 U.S. 130 (1922).

496. *Id.* at 135.

497. Brief for Petitioner at 100, Leser v. Garnett, 258 U.S. 130 (1922) (No. 553).

498. *Id.* at 110.

499. *See Leser*, 258 U.S. at 137.

gal means.[500] They contend that the constitutional revolutions of Reconstruction and those of the era of judicial activism are just as valid as the Constitution itself:

> In justifying their end run around state-centered ratifica- tion rules, nineteenth-century Republicans and twentieth- century Democrats not only resembled eighteenth-century Federalists in asserting more nationalistic conceptions of We the People than their opponents. They also sought to give new meaning to the idea of popular sovereignty by making it far more inclusionary than anything contemplat- ed by the eighteenth century.[501]

They contend that there has been a tacit approval of all of these revolutionary changes by the votes of the people in sub- sequent national elections.[502] However, this attempt at equiva- lency fails on at least two levels. First, the Constitution was ap- proved by ratification conventions directly elected by the people.[503] These elections provide the moral justification for the claim that the Constitution was adopted by the consent of the governed. Moreover, no state was bound by the new Constitu- tion until the people of that state actually consented. The actual consent of the governed was obtained.

The judicial revolution praised by Ackerman and Katyal has no such parallel reflecting the consent of the governed. In fact, just the opposite is true. The direct votes of the people are often overturned by judicial rulings as was the case in *Lucas v. Forty-Fourth General Assembly of Colorado*.[504] Judges cannot consent for the people. Subsequent elections for Congress or the White House and the passage of time do not constitute the consent of the governed for judicial revisionist rulings. Thomas Paine, who understood a few things about revolutions and moral consent said:

> All power exercised over a nation must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed

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500. *See* Ackerman & Katyal, *supra* note 14, at 568–73.

501. *Id.* at 570–71.

502. *See id.* at 571–72.

503. *See* Journals of Congress (Sept. 28, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 340, 340.

504. 377 U.S. 713 (1964).

> power is usurpation. Time does not alter the nature and quality of either.[505]

The parallel fails. First, the Constitution was lawfully adopted. Second, the Constitution was approved by the direct vote of the people before anyone was obligated by it. Nothing in this history provides a parallel to establish an aura of legal or moral legitimacy for judges who wish to exercise the self-created prerogative to regularly rewrite the Constitution starting the first Monday of every October.

IV. CONCLUSION

When we raise our hands to swear allegiance to the Constitution and promise to defend it against all enemies foreign or domestic, we can do so with a clean conscience. The Constitutional Convention was called by the states. The delegates obeyed the instructions from their respective legislatures as to the scope of their authority. The new method for ratification was a separate act of the Constitutional Convention that was approved by a unanimous Congress and all thirteen legisla- tures. The consent of the governed was obtained by having special elections for delegates to every state ratifying conven- tion. No state was bound to obey the Constitution until its peo- ple gave their consent. Moral legitimacy and legal propriety were in competition at times. But in the end, the Framers found a way to satisfy both interests.

The Constitution of the United States was validly and legally adopted.

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505. THOMAS PAINE, THE RIGHTS OF MAN, *reprinted in* 2 THE WRITINGS OF THOMAS PAINE, at 265, 428 (Moncure Daniel Conway ed., 1894).

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Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"

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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.

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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.[2]

Press, Da Capo Press Reprint ed. 1970) (1905) [hereinafter BROWN].
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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.[3] They also have posed the question of whether it is essentially (to use James Madison's dichotomy)[4] 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?[5]

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.[6] 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.[7] Other questions derive from the ahistorical error of assuming that an *amendments* convention is the same thing as a *constitutional* convention,[8] despite clear historical differences between the two.[9]

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[10] 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[11] and another eleven between 1776 and 1786.[12] 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.[13]

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.[14] 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.[15] 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."[16]

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[17] 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[18] and (when Congress so determines) the task of ratifying or rejecting proposed amendments.[19] Article V assigns to a *general* convention power to propose amendments.[20]

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."[21] 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.[22] When the document emerged from the Committee of Style, it appeared to give Congress *exclusive* power to propose amendments for state ratification.[23] 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.[24] 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.[25] 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.[26]

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

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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.[27] 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,[28] and that Congress could be bypassed, if appropriate.[29] 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.*[30]

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.[31] 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.[32] A 1689 convention Parliament had adopted the English Bill of Rights, declared the throne vacant, and invited William and Mary to fill it.[33] 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.[34]

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.[35] After Independence, conventions wrote

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.[36]

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."[37] The Massachusetts Constitution of 1780 provided for amendment by convention.[38] 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.[39]

Conventions within individual colonies or states represented the people, towns, or counties.[40] Another sort of "convention" was a

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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.[41] 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.[42] After Independence, they were more often called "conventions,"[43] presumably to avoid confusion with the Continental and Confederation Congresses. But both before[44] and after[45] 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.[46] In 1695, the Crown created the Dominion of New England, a unified government imposed on New England, New York, and New Jersey.[47] 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[d] [*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.[48] An example from outside the Northeast was the meeting of five governors held at Alexandria, Virginia in 1755.[49] 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.[50] 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.[51] A similar gathering occurred in 1693 in New York, this time under Crown auspices.[52] Other defense conventions were held in New York City in 1704,[53] Boston in 1711,[54] Albany in 1744 and 1745,[55] and New York City in 1747.[56] The New England colonies held yet another in 1757.[57]

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.[58]

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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.[59] 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).[60] 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).[61] There also were abortive calls for multi- state conventions in Fredericksburg, Virginia, Charleston, South Carolina, and elsewhere.[62]

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.[63] 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.[64] Failure to understand why a convention for proposing

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.[65]

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.[66] The powers of the other multi-government conventions ranged from the very broad (the Springfield Convention of 1777,[67] the 1787 Constitutional Convention)[68] to the very narrow (e.g., the Providence Convention of 1781).[69]

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,"[70] also could be called a "convention of committees"[71] or a "convention of committees of the several states."[72]

Each participating colony or state empowered its representatives by documents called *commissions*, sometimes referred to also as *credentials*.[73] Although a representative could be referred to informally as a "delegate," the formal title was *commissioner*.[74] 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.[75] *Instructions* might supplement the commission.[76] Unlike commissions, instructions were not usually reproduced in the convention journal, and might be secret.[77] 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.[78]

Like other agents, commissioners were expected to remain within the limits of their authority, and *ultra vires* acts were not legally binding.[79] 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*.[80] 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.[81] Each colony or state paid its own delegates.[82]

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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.[83]

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.[84] Although the immediate call came from James DeLancey, the royal lieutenant governor of New York,[85] DeLancey was acting as a proxy for the British Lords of Trade.[86] Thus, the Albany Congress was different from future conventions in that the British government was represented. Moreover, as the representative of the Crown,[87] 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.[88] The specified topic was improving relations with the Iroquois and signing an inter-colonial treaty with them.[89]

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.[90]

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.[91] In Maryland, the governor made the selection.[92] In the other four colonies, the legislature elected the commissioners.[93]

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84. *See* 6 N.Y. RECORDS, *supra* note 1, at 866.

85. DeLancy 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.[94] 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.[95]

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 precedency of the Colonies," they always were ordered in the minutes from north to south.[96]

Sixth, the Albany Congress kept an official record of its proceedings, which it denominated the *minutes*.[97]

Seventh, the gathering elected a non-delegate, Peter Wraxall, as secretary (in later conventions sometimes entitled "clerk"), and he was put on oath.[98]

Finally, the group established its own committees, and elected members to staff them.[99]

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 the 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.[100] 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.[101] This reception assured that the Plan was never introduced in Parliament.[102]

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.[103]

This convention (as in other cases, the word was used interchangeably with "congress")[104] was called by the lower house of the Massachusetts legislature "to Consult togather [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 Parliment [sic]," particularly the Stamp Act.[105] 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. "[106] 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.[107] In Delaware, out-of-session lawmakers chose the commissioners.[108] 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."[109] Eliphat Dyer of Connecticut, for example, served in four subsequent Founding Era conventions.[110] 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.[111] 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.[112] Each colony paid its own committee,[113] and issued credentials and instructions.[114] Some of these authorized their delegates only to consult,[115] while the rest empowered them to join in any proposed course of action.

The convention adopted its own rules and chose its own committees.[116] It selected a commissioner, Timothy Ruggles of Massachusetts, as President,[117] and a non-commissioner, John Cotton, as Secretary.[118] It elected those two gentlemen by ballot, but then

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.[119] It also kept a journal.[120] 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.[121]

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.[122] The gathering was a general rather than a partial convention, since all the colonies were invited.[123]

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.[124]

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

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 (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 (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.[125]

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. "[126] Pennsylvania bestowed authority "to form *and adopt* a plan for the purposes of obtaining redress of American grievances,"[127] and New Jersey used the general formula, "to represent the Colony of New Jersey in the said general congress."[128] 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.[129] Variants on "pledge the faith" appear in the proceedings of several later multi-state conventions.[130]

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,[131] 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.[132] 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.[133] [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.[d] Mr. Duché be desired to open the Congress tomorrow morning with prayers, at the Carpenter's Hall, at 9 o'Clock.[134]

These rules were adopted by the Second Continental Congress as well.[135]

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."[136] The body then dissolved itself.[137]

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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.[138] 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 "[139]

On November 21, the Rhode Island general assembly accepted the call and appointed its own committee.[140] 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.[141]

Initially, the Massachusetts Council voted to proceed with the convention "the foregoing letter notwithstanding,"[142] 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.[143] President Bowdoin expressed the belief, however, that "this matter will be taken up again."[144]

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*."[145] Just three days after that, Trumbell 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.[146]

With the Massachusetts House then in recess, the Council, through Bowdoin, responded warmly. Bowdoin assured Trumbull that

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.[147]

After that communication, all the invited states acted quickly. On December 18, for example, Massachusetts delegate Tristram Dalton acknowledged receiving his orders,[148] and on the same day the Connecticut legislature appointed its delegates and defined their authority.[149] 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).[150] 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.[151]

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

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."[152] Connecticut granted authority to address public credit and "every measure . . . necessary for the common defense."[153] The authority of the Rhode Island committee was similar.[154] Only New Hampshire issued narrower credentials, which encompassed military matters but did not mention currency or public credit.[155]

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 [156]

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,[157] also appeared in the credentials and in the proceedings: The latter repeatedly referred to convention resolutions as "representations" or "applications" (in a precatory sense).[158]

The convention elected its own officers, initially choosing Hopkins as president.[159] When Hopkins left midway through the proceedings, the convention replaced him with William Bradford, also from Rhode

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 "exhorbitant [*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.[160] As clerk, the delegates selected Rowse J. Helme, a non-delegate.[161]

The Providence Convention of 1776–1777 issued a wide range of recommendations, covering prices, auctions, and an embargo of luxury goods.[162] Its final proposal—a "Day of Fasting, Public Humiliation, and Prayer"[163]—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*.[164] 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.[165]

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.[166] That discussion spread over several days in late January and the first half of February, 1777.[167] 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.[168]

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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."[169] 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[.][170]

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[.][171]

The Charleston convention apparently was never held.[172] 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.[173] However, eighteen commissioners from New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia had convened in York Town by March 26.[174] The committees from each state ranged in size from two commissioners to five.[175] 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."[176]

The York Town Price Convention elected Lewis Burwell, a Virginia commissioner, as chairman, and Thomas Annor, a non-commissioner, as clerk.[177] Like other gatherings of the type, the convention appointed committees,[178] particularly a ways-and-means committee, to recommend a scheme of price controls for the consideration of the entire assembly.[179]

The York Town minutes reveal that the delegates fully understood that their role was only to propose to state legislatures, not to decide.[180] 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.[181] A motion to amend the plan was voted down five states to one.[182]

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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.[183] 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.[184]

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.[185] The legislature disseminated the call in a circular letter sent to the other four states.[186] The designated location was Springfield, Massachusetts.[187] 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.[188] 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."[189]

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."[190] 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.[191]

On July 30, eleven commissioners from all five states had appeared.[192] 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.[193] 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.[194] 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.[195] In Massachusetts the legislature had chosen its committee by the two chambers voting seriatim.[196] In New York, the council of safety selected the delegates, and in Connecticut the governor and council of safety.[197]

As the Providence Convention had done, the Springfield gathering elected Stephen Hopkins as President. It chose William Pynchon, Sr., a non-commissioner, as clerk.[198]

It is a shame that more historical work has not been done on the Springfield Convention,[199] 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.[200] 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."[201] These recommendations formed the basis for extensive congressional debate and further recommendations

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,[202] although not all recommendations were effectuated.[203]

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.[204] Congress requested that the eight northernmost states meet at New Haven, Connecticut on January 15, 1778; that

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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, Pensylvania [*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.[205]

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."[206] 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.[207] One reason may be that its journal was so thin.[208] 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.[209] Except for the New York committee, all had been elected by their state legislatures,[210] 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.[211]

The convention elected Thomas Cushing of Massachusetts, a veteran of both the First Continental Congress and of Providence and

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.[212] 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.[213]

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.[214] Like other such assemblies, the convention appointed its own committees.[215]

The official journal tells us little of the proceedings. It does reproduce the lengthy text of the principal resolution,[216] which in accordance with the call is purely recommendatory.[217] The journal likewise includes a formal letter to Congress,[218] a letter to the absent state of Delaware,[219] 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.[220]

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.[221]

The gathering apparently adjourned on February 1.[222] Congress received its recommendations on February 16.[223] The convention proposals were the subject of later congressional debate and some implementation,[224] 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.[225] Those price controls were soon repealed on the recommendation of Congress, but adopted to an extent on the local level.[226]

H. *The Hartford Convention of 1779*[227]

As the Revolutionary War continued, the value of paper money nosedived and trade wars grew among states.[228] 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.[229] Massachusetts invited New York and the other New England states to meet at Hartford, Connecticut on October 20.[230] 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 . . ."[231] 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."[232]

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

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."[233] 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.[234] Rhode Island authorized its commissioners only to "meet" with the other delegates.[235] Connecticut empowered its delegates to "deliberate and consult,"[236] and New York empowered its commissioners to "consult and confer" on the subjects identified by Massachusetts as well as any others that might arise.[237] 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.[238] In New Hampshire, they were appointed by the committee of safety, charged with the affairs of state during legislative recess.[239]

The proceedings opened promptly on October 20, 1779. The more notable figures present included three Connecticut commissioners: Eliphat Dyer, veteran of three prior conventions;[240] 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.[241] 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.[242] 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

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. Hezakiah Wyllys.[243]

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.[244] 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.[245]

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, Connecticutt [*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.*[246]

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.[247]

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."[248] Another possible reason is that those states may have been even more skeptical about price controls

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.[249] Recall that all those states had refused to honor the two congressional calls for price conventions at Charleston.[250]

After issuing its recommendations, the gathering adjourned, probably on October 28.[251] Its proceedings seem to have been generally approved in Congress,[252] and the convention's price recommendations served as the basis for some of Congress's own price edicts.[253]

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.[254] The Philadelphia Price Convention was fated to be the final chapter in the sorry history[255] of Revolutionary-Era interstate price controls.

Of the ten states invited, seven attended.[256] They were Massachusetts, New Hampshire, Rhode Island, Connecticut,

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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.[257]

State legislatures had elected all these delegates.[258] In Massachusetts, and perhaps in other states, the two chambers acted by joint ballot rather than *seriatim.*[259] Unicameral Pennsylvania required, of course, only the vote of one house.[260]

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,"[261] New Jersey to "consult and agree" and "confer and agree,"[262] and Massachusetts "to pledge the faith of this government."[263] 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.[264] Additionally, Rhode Island empowered its delegates to urge the convention to recommend repeal of state embargoes.[265]

Initially, hopes had been high. In preparation for the convention, some commissioners conferred during early January of 1780.[266] Formal proceedings began on January 29, 1780 in the Pennsylvania state house,

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.[267] 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.[268] 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."[269]

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.[270] In addition, they wrote to New York and Virginia, which also were absent.[271]

Most of the delegates believed that without the participation of Virginia and New York, any general price-fixing agreement would fail.[272] 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),[273] but when Congress later asked Virginia to convene with neighboring states at Fredericksburg, it failed to do so.[274] During the Philadelphia gathering a New Jersey congressional delegate complained that "Virginia seems to hang back; no members have attended frm [*sic*] thence, and as far as I can learn none have been appointed."[275] 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 "[276] 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.[277]

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 necessaries to no purpose. It was attempted in Eng[d] 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[r] 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.[278]

At the time, Rush's views had been seconded by such leading figures as James Wilson, Jonathan Witherspoon, and John Adams.[279]

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.[280] So by the time the Philadelphia convention met, "[e]nthusiasm for [price] regulation was on the wane."[281] 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.[282]

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.[283] What is clear is that the following day the assembly adjourned until April 4, apparently never to re-convene.[284]

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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.[285] Contemporaries sometimes referred to it as "the Committee from the New England States"[286] or the "Eastern Convention."[287] It has received slightly more scholarly attention than most of the other Founding-Era conventions.[288]

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.[289] 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.[290]

The convention call came from Connecticut, and was addressed to the other three New England states.[291] It was initiated in a letter dated July 14, 1780 from Governor Jonathan Trumbull to Governor William Greene of Rhode Island in which Trumbell sought the support of Rhode Island for the meeting.[292] 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

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.[293]

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.[294] In Rhode Island, the governor referred the request to the general assembly,[295] which elected William Bradford.[296]

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.[297]

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.[298] The group elected him president, and a non-delegate,

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.[299]

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.[300]

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."[301]

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.[302] 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."[303] 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."[304]

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.[305] It adjourned on August 9.[306]

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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.[307] 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."[308] 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."[309]

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.[310]

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.[311] Among them was Rhode Island's William Bradford who also had been elected to the Boston Convention, but had been unable to attend.[312] The convention elected Bradford as its

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 Hezakiah Wyllys, a non-delegate, as secretary.[313] Wyllys had served as secretary at the Hartford gathering the previous year.[314] During the proceedings, his father George (the Connecticut secretary of state)[315] replaced him for a time,[316] but Hezekiah returned for the end.[317]

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."[318] 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 "[319] 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.[320] 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."[321] Congress adopted the department proposal rather

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.[322] The convention further recommended that states "pledge their faith" to legally enforce congressional fund-raising decisions.[323] 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.[324]

This proposed grant of near dictatorial authority to George Washington proved controversial,[325] 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.[326]

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.[327] The subject would be military affairs, and the gathering would include representatives of the French military stationed in Providence.[328] 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.[329] Governor Trumbull accordingly wrote to the other states announcing the expanded subject matter.[330] In the same letter, he fixed a meeting date of April 12,

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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.[331]

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."[332]

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.[333] 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."[334] 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.[335]

This second Providence Convention made several supply recommendations, and disbanded after its second day.[336]

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.[337] 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

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.[338]

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. [339]

John Hancock, now occupying the newly-created office of governor, extended the formal invitation to the other states.[340]

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.[341] This may explain the subsequent response: Although in recess of the legislature, the governor and council of safety of Connecticut appointed three commissioners,[342] New Hampshire and Rhode Island simply refused to do so. Massachusetts rescinded the call the following month.[343]

Undaunted, on May 31, 1785, Massachusetts Governor James Bowdoin addressed the state's lawmakers, urging them to promote a

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.[344] 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.[345] In its accompanying circular letter to the other states, the legislature designated this action as "[making] *application to the* United States *in Congress assembled*."[346] 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."[347]

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 indispensibly 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."[348] The legislature issued formal instructions to Massachusetts' congressional delegates to promote the application.[349]

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 Schuykill Rivers,[350] and Marylanders wished to improve the navigability of the Susquehanna.[351] Pennsylvanians also discussed connecting Susquehanna and Schuylkill River navigation by digging a canal across what is now called the Delmarva Peninsula,[352] 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.[353]

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 negociation [*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.[354]

On November 23, the assembly authorized the Supreme Executive Council to open negotiations.[355] On November 25, the council president, Benjamin Franklin, sent a letter of invitation to the governor of Maryland.[356] The next day, the council vice president, Charles Biddle (who seems to have been carrying much of the burden for the aged

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.[357] 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.'"[358] 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.[359]

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."[360] On the same day, a joint legislative session elected its commissioners: Samuel Chase, Samuel Hughes, Peregrine Lethrbury, William Smith, and William Hemsley.[361]

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.[362]

In March, 1786, the Maryland legislature authorized its Navigation Convention delegates to discuss interstate tariffs.[363] 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.[364]

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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.[365] As its Navigation Convention committee, Delaware lawmakers chose William Killen; Gunning Bedford, Jr.; John Jones; Robert Armstrong, and Eleazar McComb.[366] 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."[367]

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 negociation [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]."[368] 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.[369]

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.[370] 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.[371]

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."[372]

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.[373] In March, Governor Bowdoin excitedly relayed the news to Massachusetts lawmakers,[374] and three months later those lawmakers elected four delegates[375] and fixed their compensation.[376] Shortly thereafter, they empowered the governor and council to fill any vacancies.[377]

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.[378]

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.[379] New York's Egbert Benson had been at Hartford in 1780.[380] 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.[381]

The delegates' credentials closely tracked the call,[382] 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."[383]

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.[384] 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*

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 (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.[385]

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.[386] 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."[387] 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.[388]

The Annapolis Convention adjourned on September 14, and Chairman Dickinson's letter on its behalf was read in Congress on September 20.[389] On October 11, Congress referred the letter to a committee for consideration.[390] 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.[391]

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. "[392] 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.[393]

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.[394] 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.[395]

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][396] 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.[397]

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."[398] 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

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.[399] 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.[400] All granted them broad power to propose reform, and none limited them to merely proposing changes in the Articles.[401] 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."[402] 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."[403] 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.

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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.[404] However, Massachusetts then successfully obtained a postponement, and offered a substitute resolution.[405] This resolution was adopted.[406]

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.[407]

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.[408] If the states decided to convene, as a matter of law they—not Congress—fixed the scope of their delegates' authority.[409] 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.[410] Only Massachusetts and New York restricted their commissions to amending the Articles.[411] 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,[412] and why two of the three New York delegates left early.[413] Of the 39 delegates who signed the Constitution, only three—Rufus King and Nathaniel Gorham of Massachusetts and Alexander Hamilton of New York[414]—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."[415] 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,"[416] 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.[417] 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."[418]

The Philadelphia Convention of 1787 was the largest meeting its kind since the First Continental Congress, including 55 commissioners from 12 states.[419] It also lasted more than three and a half months, longer than any other American eighteenth century multi-government convention.[420] 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.[421] 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.[422] 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.[423]

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.[424] In accordance with established custom also, the Constitutional Convention

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.[425] 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,[426] kept its own journal, established and staffed its own committees,[427] 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.[428] 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.*[429] 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)[430]—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

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 Miflin, Edmund Randolph, and William Samuel Johnson. These veterans influenced the Constitution to a degree disproportionate to their numbers,[431] and most were leaders in the ratification debates.

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 Tristam Dalton (first Providence) served as delegates to the Massachusetts ratifying convention.[432] 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

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."[433] 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."[434] 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

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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."[435] 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.[436]

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.[437] 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.[438]

The italicized language reveals the assumption that an amendments convention was state-based, and was similar to language that long had

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.[439] 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").[440] 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.[441]

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*.[442] This remained for many years a common method of designating an amendments convention.[443] Over four decades later, the Supreme Court still referred to such a gathering an as "a convention of the states."[444]

I have been able to find no Founding-Era evidence suggesting that a convention for proposing amendments was anything else.

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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.[445] 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.[446]

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.[447] 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.[448] Neither the record of Founding Era conventions nor the ratification debates offer significant support for the modern claim[449] 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 Medison 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.[450] 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.[451] 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[452] suggests that Article V applications and calls also may be made conditional or rescinded.[453] 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.[454] 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.[455] 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.[456]

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.[457] 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.[458] 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,[459] 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.[460]
- 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.[461]
- 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.[462]
- 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.[463]

(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.[464]

Thus do text and history fit together to guide us in the use of Article V.

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	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
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		X						
Basset, Richard	DL													X	X
Bayard, William	NY		X												
Bedford, Gunning, Jr.	DL														X
Benson, Egbert	NY											X		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	York-town	Spring-field	New Haven	Hart-ford	Phila	Bos-ton	Hart-ford	Provi-dence	Anna-polis	Phila
		1754	1765	1774	1776/77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Brearly, 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									
Condurt, Silas	NJ									X					
Coxe, Tench	PA													X	
Crane, Stephen	NJ			X											
Cruger, John	NY		X												
Cunningham, Jas.	PA							X							
Curtenius, Peter T.	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	1776/ 77	1777	1777	1778	1779	1780	1780	1780	1781	1786	1787
Cushing, Thomas	MA			X	X		X	X	X		X	X			
Dalton, Tristam	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

		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
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					
Goldsborough, 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			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					
Lattemore, Jas	DL					X									
Law, Richard	CN				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
Lee, Richard H	VA			X											
L'Hommedieu, 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					

		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
Morris, Gouverneur	PA														X
Morris, Robt	PA														X
Morton, John	PA		X	X											
Mumford, Paul	RI						X								
Murdock, William	MD		X												
Murray, Joseph	NY	X													
Neilson, John	NJ							X							
Norris, Isaac	PA	X													
Ogden, Robert	NY		X												
Orne, Azor	MA				X							X			
Osgood, Samvel	MA									X					
Otis, James	MA		X												
Paca, Wm	MD			X						X					
Paine, 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

		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
Pinckney, Chas	SC														X
Pinckney, Chas C	SC														X
Pitkin, William	CN	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													

		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
Spaight, Richard Dobbs	NC														X
St. Thos Jenifer, Daniel	MD														X
Strong, Caleb	MA														X
Sullivan, John	NH			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					
VanRennselaer, 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													
Wentworth, 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													
Wytha, 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 Samuel	CN		X												X
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			
Wolcott, Roger	CN	X													
Basset, 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					
Read, Geo	DL			X										X	X
Rodney, Caesar	DL		X	X		X									
VanDyke, Nicholas	DL									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, Tristam	MA				X										
Ely, Justin	MA												X		
Gerry, Elbridge	MA									X					X
Gorham, Nathaniel	MA								X		X				X
Hutchinson, Thomas	MA	X													
King, Rufus	MA														X
Lowell, John	MA										X				
Orne, Azor	MA				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
Osgood, Samuel	MA									X					
Otis, James	MA		X												
Paine, Robt Treat	MA			X			X	X							
Partridge, Geo	MA											X			
Partridge, Oliver	MA	X	X												
Phelps, Oliver	MA												X		
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					
Goldsborough, 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
Murdock, 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											
Weave, Meshee	NH	X													
Wentworth, Joshua	NH								X						
Wibbird, Richard	NH	X													
Borden, Joseph	NJ		X												
Brearly, David	NJ														X
Clark, Abraham	NJ													X	
Condurt, 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

		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
Kinsey, 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 Cleves	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												
Curtenius, 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												
Sands, Comfort	NY							X							
Smith, William	NY	X													
VanRennselaer, 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, Tench	PA													X	
Cunningham, Jas.	PA							X							
Fitzsimons, Thomas	PA														X
Franklin, Benjamin	PA	X													X
Galbreath, Bertram	PA					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
Galloway, Joseph	PA			X											
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			

		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
Ellery, Wm	RI									X					
Green, William	RI							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											
Madison, James	VA													X	X
Mason, Geo	VA														X
McClurg, 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

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AMENDING THE CONSTITUTION BY CONVENTION:

A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN

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AMENDING THE CONSTITUTION BY CONVENTION: A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN

EXECUTIVE SUMMARY

Americans increasingly are realizing they have lost control of their federal government. Not only has that government broken nearly all constitutional restraint, but it has saddled future generations with deficits and a debt of third-world proportions.

Americans increasingly are realizing they have lost control of their federal government. Not only has that government broken nearly all constitutional restraint, but it has saddled future generations with deficits and a debt of third-world proportions.

Citizens have attempted various strategies to recover their government with only indifferent success. But they have not yet triggered the constitutional tool the Founders intended to be used in such crises: Amending the Constitution to save it, using the state-application-and-convention process.

The Founders included in the Constitution two methods of proposing amendments to the states for ratification: proposal by Congress and proposal by a "convention for proposing amendments"---essentially a drafting committee designed to put into acceptable form amendments suggested by the state legislatures. As this paper shows, the Founders included the latter method to enable the people to correct the system when Congress was unwilling or unable to do so.

Unfortunately, access to the state-application-and-convention process has been hampered by inadequate information and misinformation. This paper seeks to solve that problem with the most comprehensive survey of the historical evidence ever published. It explains just how the process was supposed to work.

One key finding is that a convention for proposing amendments is not a "constitutional convention," nor does it enjoy wide powers, as apologists for the federal government often claim. It is a drafting committee, for most purposes an agent of the state legislatures and answerable to them. It may consider only items on the state-imposed agenda, and its proposals become part of the Constitution only if three fourths of the states approve.

We thank and acknowledge the Goldwater Institute for publishing an earlier version of this paper.

INTRODUCTION: WHEN INACTION LEADS TO DISASTER

A growing number of Americans have become deeply concerned by the inability of the federal government, particularly Congress, to operate within constitutional or financial limits. As a result, a movement is welling up throughout America to amend the Constitution either to clarify the scope of federal power or to impose some restrictions upon its exercise. An ultimate goal would be to revive the Founders' view of the federal government as a fiscally-responsible entity that protects human freedom.

A growing number of Americans have become deeply concerned by the inability of the federal government, particularly Congress, to operate within constitutional or financial limits.

The use of the amendment process to promote the Founders' vision for America is well-established. Most of the twenty-seven amendments adopted to date served this purpose. All of the first eleven amendments were designed largely or entirely to enforce on the federal government the terms of the Constitution as represented by its advocates during the debates over ratification. The Twenty-First Amendment restored the control of alcoholic beverages to the states. The Twenty-Second Amendment restored the two-term presidential tradition established by George Washington, Thomas Jefferson, James Madison, and James Monroe. The Twenty-Seventh Amendment, limiting congressional pay raises, had been drafted by Madison and approved by the first session of the First Congress (1789). In addition, several other amendments that changed the Founders' political settlement did so in ways that furthered fundamental Founding principles. An example is the Thirteenth Amendment, abolishing slavery.

Article V of the Constitution provides that either Congress or a convention for proposing amendments may propose amendments to the states. A convention for proposing amendments (also called an "amendments convention," an "Article V convention" and a "convention of the states") arises when two thirds of the states send "applications" to Congress directing it to call such a convention. Whether proposed by Congress or by convention, an amendment must be approved by three fourths of the states before it becomes effective.[2]

The Founders included the state-application-and-convention process because they recognized that Congress might become irresponsible or corrupt and refuse to propose needed changes—particularly if those changes might restrain the power of Congress.[3] In the state-application-and-convention process, the states play much the same role in curbing abuses at the federal level as citizens do when curbing abuses through citizen initiatives at the state level. Increasingly, Americans are recognizing the current situation in our country is *precisely* the kind for which the convention method was designed.

States have sent hundreds of convention applications to Congress over the years. On several occasions, these have arisen from widespread efforts to solve serious problems that the federal government seemed unable to solve. None of these efforts have succeeded in triggering a convention. A mid-19th-century campaign to call a convention to reconcile North and South was blocked by dithering politicians.[4] Efforts to call a convention to force direct election of senators ended when the Senate finally yielded and Congress submitted to the states the proposal that became the Seventeenth Amendment. Efforts to call a convention since that time have been torpedoed largely by fears that the state-application-and-convention method would create a "constitutional convention" that could exercise total power to re-write or otherwise destroy the Constitution.

No doubt we are better off without some of the amendments promoted by those seeking to use the state-application-and-convention process. But the failures of two of the broader-based movements ended in tragedy, because the serious problems that provoked them persisted after efforts for a convention were stymied. The failure of the 19th-century reconciliation movement helped bring on the Civil War. The failure of the 20th-century balanced budget movement left Congress still unable to balance its budget,[5] resulting in a loss of political legitimacy and a federal debt now almost as large as the entire annual economy. Sometimes the cost of inaction is higher than the cost of action. But before the risks and rewards of the state-application-and-convention process can be considered, one must first determine how the process was supposed to operate. That is the subject of this Issue Paper.

Sometimes the cost of inaction is higher than the cost of action.

This Paper outlines the findings of an historical investigation into the Founders' understanding of how the state-application-and-convention process was supposed to operate. The investigation was conducted as objectively as possible, and irrespective of whether the author or anyone else might care for the results. This Paper does not purport to resolve every issue on the process—only those issues that can be resolved with Founding-Era evidence.[6]

SOME ESSENTIAL BACKGROUND

TERMINOLOGY

This Issue Paper uses several specific terms to refer to groups of people.[7] The *Framers* were the 55 men who drafted the Constitution at the federal convention in Philadelphia between May 29 and September 17, 1787. The *Ratifiers* were the 1,648 delegates at the 13 state-ratifying conventions meeting from late 1787 through May 29, 1790. The *Federalists* were participants in the public ratification debates who argued for adopting the Constitution. Their opponents were *Anti-Federalists*. The *Founders* comprised all who played significant roles in the constitutional process, whether they were Framers, Ratifiers, Federalists, or Anti-Federalists. Also among the Founders were the members of the Confederation Congress (1781-89) and its leading officers, as well as 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.

As used in this Issue Paper, the *original understanding* is the Ratifiers' subjective understanding of a provision in the Constitution—what those who voted for ratification actually understood the Constitution to mean. The *original meaning* (or "original public meaning") is the objective meaning of a provision to a reasonable person at the time—the understanding of a provision that would be provided by consulting the relevant definition in a contemporaneous dictionary. *Original intent* is the subjective intent and understanding of the Framers. During the Founding Generation, legal documents were interpreted according the original understanding of the makers, if available, and otherwise by the original meaning. The original intent served as evidence of original understanding and original meaning.[8]

THE FOUNDERS' THEORY OF "FIDUCIARY GOVERNMENT"

To understand the rules in the Constitution and how they were supposed to operate, one *must* understand the Founders' concept of fiduciary government.

A "fiduciary" is a person acting on behalf of, or for the benefit of, another, such as an agent, guardian, trustee, or corporate officer. The rules governing fiduciaries in the 18th century were strict, and much like those existing today.[9] A document creating the fiduciary relationship could, and still may, modify those rules somewhat.

Central to Founding-era political theory was that rightful government was (in John Locke's phrase), a "fiduciary trust." The Founders frequently described public officials by names of different kinds of fiduciaries, such as "trustees" and "agents." The Founders believed that public officials were, or should be, bound, always morally but often legally, to meet fiduciary standards. They did not see this as merely an ideal, but rather as a principle of public law. This principle was to be enforced in several ways, including but not limited to removal from office by impeachment, the traditional Anglo-American remedy for breach of fiduciary duty—or, as it then usually was called, "breach of trust."

The Founders believed that public officials were, or should be, bound, always morally but often legally, to meet fiduciary standards.

During the Constitution's framing and ratification process, actions and proposals frequently were measured in public discourse by the fiduciary standard. People discussed whether the delegates to the federal convention had exceeded their authority as fiduciaries. They discussed whether, and how, the Constitution would promote the rules of fiduciary government.

The branch of fiduciary law most relevant to the state-application-and-convention process is the law of *agency*. Three rules applying to agents, both then and now, are particularly important for our purposes:

- The wording of the instrument by which the principal (employer) empowers the agent, read in light of its purposes, defines the scope of the agent's authority.
- An agent is required to remain within the scope of this authority, and if he undertakes unauthorized action, he is subject to legal sanctions and the unauthorized action usually is invalid.
- If under the same instrument an agent serves more than one person (as when a manager serves a business owned by three partners), the agent is required to treat them all equally and fairly—or, in the language of the law, "impartially."

The rule that an agent should not perform an unauthorized action does not (and did not) prevent the agent from *recommending* the action to his principal. For example, suppose an agent is authorized to purchase some land at a price of not more than $300,000. If the agent contracts to buy the land for $350,000, he has exceeded his authority and (unless certain legal exceptions apply) the principal generally is not bound to the contract. On the other hand, after sizing up the situation the agent may *recommend* to the principal that the he raise his authorized price. This is only a recommendation; it has no legal force of any kind.

The rule that an agent should not perform an unauthorized action does not (and did not) prevent the agent from recommending the action to his principal.

If the agent does exceed his authority and agree to pay $350,000 for the land without pre-approval, the principal still may decide to accept the deal. If he accepts it while on notice of all relevant facts, then the action becomes valid, and the principal is bound—as if the agent's authority were expanded retroactively. In the law of agency, this is called *ratification*. However, this use of the word "ratification" is not quite the same as its use in the Constitution.

As this Issue Paper proceeds, we shall see how agency rules apply to the various actors in the state-application-and-convention procedure.

THE CONSTITUTIONAL TEXT

Article V of the U.S. Constitution states in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof,

as the one or the other Mode of Ratification may be proposed by the Congress. ... [10]

Thus, the text specifies two ways of *proposing* amendments:

- Proposal by two-thirds of each house of Congress, and
- proposal through the state-application-and-convention process.

Under the latter procedure, two-thirds of the states (34 of the current 50) file "Applications" with Congress, after which Congress "shall" call a convention for proposing amendments. That convention then may propose one or more amendments.

Although this text seems clear, uncertainties arise unless it is read against a Founding-era background.

There also are two ways of *ratifying* amendments: (1) approval by three-fourths of the state legislatures and (2) approval by three-fourths of state conventions. Congress selects the ratification method used in each case. Under either ratification method, no proposed amendment becomes part of the Constitution unless approved by 38 of the 50 states.

Although this text seems clear, uncertainties arise unless it is read against a Founding-era background. Some of the uncertainties pertaining to the state-application-and-convention are as follows:

- Would a convention for proposing amendments be (or could it become) a "constitutional convention" with unlimited power to change (or even re-write) the Constitution?
- May states applying for a convention for proposing amendments limit the subject-matter the convention may consider?
- If there are sufficient applications, must Congress call such a convention?
- Do state governors have a role in the application process?
- How should Congress count the applications to meet the two-thirds threshold—that is, are all applications aggregated, or are they separated by subject matter?
- May Congress determine the rules and composition of the convention?
- Does the President share in the congressional duties—by, for example, signing or vetoing convention calls?
- Is Congress obliged to send a convention's proposals to the states for ratification?

Previous Writing on the Subject

The Convention for proposing amendments has attracted a moderate amount of writing, although perhaps less than one might expect in light of its importance. U.S. Senators,[11] researchers for federal agencies,[12] and lawyers[13] and students[14] publishing in legal journals have composed essays and articles. Most of the authors, however, have been law professors.[15] There is also a good book on the subject, *Constitutional Brinkmanship*,[16] published in 1988 by Russell L. Caplan, then a lawyer with the U.S. Justice Department.

Reconstructing the original force of a constitutional provision often requires one to consider 18th-century word meanings, previous history, Founding-era education, previous documents of constitutional stature, the records of the federal convention, the records of the state ratifying conventions, the public debate over ratification, and relevant eighteenth-century law.

Reconstructing the original force of a constitutional provision often requires one to consider 18th-century word meanings, previous history, Founding-era education, previous documents of constitutional stature, the records of the federal convention, the records of the state ratifying conventions, the public debate over ratification, and relevant eighteenth-century law. With the notable exception of Mr. Caplan, most writers have made only very superficial use of this material.[17] Moreover, many of the articles (particularly those by law professors) show signs of being written primarily to build a case rather than to arrive at the truth.[18] Strong bias coupled with weak historical support[19] therefore renders much of this material almost worthless as a guide to the Founders' views on Article V issues. *Constitutional Brinkmanship* is evenhanded, but it suffered from the fact that only a few volumes of the Wisconsin Historical Society's *Documentary History of the Ratification of the Constitution* were then available. The *Documentary History* is now much more nearly complete, and since has become as standard source.

The imperfect condition of the literature has tended to perpetuate uncertainty about the state-application-and-convention procedure.

THE PURPOSE OF THE STATE-APPLICATION-AND-CONVENTION PROCEDURE

The Founding-era record suggests that the two procedures for proposing amendments were designed to be equally usable, valid, and effective.[20] Congress received power to initiate amendments because the Framers believed that Congress's position would enable it readily to see defects in the system.[21] If Congress refused to adopt a needed amendment, however—particularly one to curb its own power[22]— the states could initiate it.[23] As one Anti-Federalist writer predicted, "We shall never find two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance."[24]

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 powers of the government, if upon trial it should be found they had given too much.[25]

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 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; 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*.[26]

Madison stated it more mildly in Federalist No. 43: 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."[27]

Thus, the state-application-and-convention process was inserted for specific reasons, and it was designed to be used. We may have personal doubts on whether the process is a good idea, but the Founders thought it was.[28]

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THE LIMITED NATURE OF THE CONVENTION FOR PROPOSING AMENDMENTS

THE UBIQUITY OF LIMITED-PURPOSE CONVENTIONS IN THE FOUNDING ERA

The fame of the 1787 Constitutional Convention has encouraged us to think of any convention created for constitutional purposes as a "constitutional convention." Further, we tend to think of a "constitutional convention" as an assembly with plenipotentiary (limitless) power to draft or re-draft the basic law of a nation or state.

These habits of thought have led some writers to assume that a Convention for proposing amendments is a constitutional convention,[29] and that as such it would have limitless power to re-write the Constitution at will.[30] Some have even claimed that a Convention for proposing amendments could repeal the Bill of Rights, restore slavery, and work other fundamental changes.[31]

This was not the way the Founders thought of it. The notion that a national convention is inherently plenipotentiary was primarily a product of the 19th

century,[32] not of the 18th. In the Founders' view, conventions might be plenipotentiary, but most of them enjoyed only restricted authority.

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Originally, "convention" meant merely a meeting or assembly, or an agreement that might arise from a meeting or assembly. As late as the 1780s, the majority of general purpose dictionaries did not include a political meaning for the word. For example, the 1786 edition of Samuel Johnson's *Dictionary*[33] defined a "convention" as—

1. The act of coming together; union; coalition
2. An assembly.
3. A contract; an agreement for a time.[34]

A political meaning had, however, arisen in England before the Founding Era. It referred to certain political bodies that met or conducted themselves in a manner outside usual legal procedures.[35] For example, the anonymous *Student's Law Dictionary* of 1740 said that a convention, "in general, signifies an Assembly or Meeting of People, and in our Law is applied to the Case where a Parliament is assembled, and no Act passed, or Bill signed."[36] Timothy Cunningham's 1783 *Law-Dictionary*[37] similarly defined a convention as "where a parliament is assembled, but no act is passed, or bill signed."

One way a political body met outside the usual legal procedure, and therefore was called a "convention," was if it met in disregard of a requirement that it be convened by royal writ. Parliaments not called by royal writ had gathered in 1660 and 1689 to fix the succession to the throne, and they often were called "convention parliaments." Thus, Cunningham's dictionary defined "convention parliament" as the "assembly of the states of the kingdom" that put William and Mary on the throne in 1689.[38] Similar definitions for both "convention" and "convention parliament" appeared in Giles Jacob's *New Law Dictionary*,[39] then the most popular in America.

Perhaps the most complete set of definitions for "convention" appeared in Ephraim Chambers' massive *Cyclopaedia* of 1778. Separate sections outlined the usages of the word to mean (1) a session of Parliament without legislative product, (2) a treaty or other agreement, (3) a covenant, and (4) an assembly of the "states of the realm, held without the king's writ."[40] Neither Chambers' definitions—nor any others—contained any suggestion that a convention had to be an assembly plenipotentiary or constitutive in nature.

During the period leading up to the American revolution, colonial assemblies often met without the formal authorization of the royal governor or after having been dissolved by him.

During the period leading up to the American revolution, colonial assemblies often met without the formal authorization of the royal governor or after having been dissolved by him. Based on British usage, it was natural to refer to unauthorized meetings of colonial legislative bodies as "conventions." In Britain, the convention parliaments of 1660 and 1689 had assumed plenipotentiary, constitutive roles. In America, as Independence became a reality, some colonial conventions assumed that role as well, erecting and writing the constitutions for new, republican governments.[41]

On the other hand, the Founding Generation also made repeated use of conventions for limited purposes. During the period between Independence and the writing of the Constitution, states frequently sent delegates or "commissioners" with limited powers to conventions to address specific problems,[42] replicating a common practice among sovereigns in international relations.[43] Between 1776 and 1787, interstate or "federal" conventions were held in Providence, Rhode Island; New Haven Connecticut; York, Pennsylvania; Hartford, Connecticut (twice); Springfield, Massachusetts; Philadelphia, Pennsylvania (in 1780) and Annapolis, Maryland. None was a plenipotentiary convention; all were convened to focus on one or more specified problems, such as commercial relationships and wartime profiteering.[44] The delegates or commissioners were agents of the governments that deputized or commissioned them. As such, their powers were fixed by the "credentials" or "commissions" that empowered them, and they could not exceed those powers.[45] They also were subject to instructions from the officials who sent them.[46] Any actions in excess of authority generally were invalid. As was true of other agents, however, the agent always could recommend to his principal that his authority be expanded or that the principal authorize an action not previously contemplated. Such recommendations had no legal force unless accepted.

These conventions elected their own officers, adopted their own rules, and seem to have decided matters by the principle of "one state, one vote."[47]

The most famous of these limited-purpose conventions was the gathering in Annapolis in 1786. The delegates were commissioned by their states to focus on "the trade and Commerce of the United States."[48] Just before it met, James Madison explicitly distinguished this gathering from a plenary or (to use the word he apparently borrowed from diplomatic usage) a *plenipotentiary* convention.[49] The Annapolis Convention did not garner sufficient attendance to accomplish its purpose, but is famous for a recommendation it made:

> Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs, may be found to require.

Under the rules of agency law, the Annapolis Convention could make such a recommendation. Under the same rules, it was *only* a recommendation, and had no legal effect.

Among other purposes that limited-purpose conventions served was the drafting of constitutional amendments. The Pennsylvania Constitution of 1776 and the Vermont Constitution of 1786 both provided for limited amendments conventions, each restricted in authority by a charge from the state "council of censors," while the Massachusetts Constitution provided for conventions to consider amendments proposed by the towns.[50] The Georgia Constitution of 1777 prescribed a procedure that may well have inspired the convention procedure in Article V:[51]

Among other purposes that limited-purpose conventions served was the drafting of constitutional amendments.

> 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.[52]

Thus, all four of these state constitutions provided for a method by which general ideas for amendment were referred to a limited-purpose convention, which then undertook the actual drafting.

To summarize: A reference to a "convention" in an 8th-century document did not necessarily mean a convention with plenipotentiary powers, even if the reference was in a constitution. Although it *might* refer to an assembly with plenipotentiary powers, it was *more likely* to denote one for a limited purpose. If a limited-purpose convention chose to adopt a resolution outside the scope of its charge, it could do so; but the resolution was recommendatory only, and utterly without legal force.

Does the History of the Federal Convention Prove that a Limited-Purpose Convention is Impossible?

It commonly is argued that a convention for proposing amendments must be plenipotentiary, because the convention could frustrate any attempts to limit it. If the convention chose to exceed the scope of its call, it could do so, and there would be no recourse. Some have suggested it might establish itself as a junta and re-write the Constitution. (How it would do so without control of the military is not clear.) Or, more realistically, it might send to the states for ratification amendments not contemplated by the call.

It commonly is argued that a convention for proposing amendments must be plenipotentiary, because the convention could frustrate any attempts to limit it.

The premier illustration offered in support of this view is the 1787 federal convention, which (it is said) was called "for the sole and express purpose of revising the Articles of Confederation," but which proved to be a "run-away," scrapping the Articles and writing an entirely new Constitution instead.[53]

In order to assess the validity of this illustration, we must determine whether the authority of the delegates to the 1787 convention really was limited to revising the Articles, or whether it was more nearly plenipotentiary.

The Annapolis Convention had asked that Congress call a plenipotentiary convention. However, the Annapolis resolution was merely a recommendation, outside that assembly's powers. As such, it had no legal force.[54] It

could not be the source of the power for delegates at the Philadelphia Convention.

In response to the Annapolis recommendation, Congress resolved as follows:

> *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.[55]

This resolution contemplated a convention of narrower scope ("the sole and express purpose of revising the Articles of Confederation"). However, as its wording suggests, it also was recommendatory only. Under the strictly limited terms of the Articles, Congress had no power to call such a convention or fix the scope of the call.

Because the congressional resolution was without legal force, states could participate or not as they wished and under such terms as they wished, and if they did so, *they* would fix the scope of their delegates' authority. In other words, whether or not the Philadelphia delegates exceeded their authority is to be determined by the terms of their state commissions, not by the terms of the congressional resolution.[56]

Because the congressional resolution was without legal force, states could participate or not as they wished and under such terms as they wished, and if they did so, *they* ***would fix the scope of their delegates' authority.***

One state, Rhode Island, elected not to participate. Two states decided to participate, but restricted their delegates' commissions to the scope recommended by Congress. Massachusetts was one of these. Not surprisingly, therefore, it was a Massachusetts delegate, Elbridge Gerry, who raised the question early in the convention as to that body's authority to recommend changes extending beyond amendment of the Articles.[57] Likewise, the New York commissions limited the three New York delegates to acting

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several Legislatures, such alterations and Provisions therein, as shall, when agreed to in Congress, and confirmed by the several States, render the federal Constitution adequate to the Exigencies of Government, and the preservation of the Union.[58]

So it was not surprising that, when it became apparent that the 1787 convention was proceeding beyond the scope of the New York commissions, two of the three New York delegates left early and never signed the Constitution.

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The commissions issued by the other 10 states were much broader. They did not limit the delegates to considering alterations in the Articles, but additionally empowered them to consider general revisions of the "federal Constitution" so as to render it "adequate to the exigencies of the union."[59] 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.[60] 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.[61]) In other words, the commissions of 10 states authorized the delegates to discuss changes necessary to render the federal *political system* "adequate to the exigencies" of the union.

What of the delegates from Massachusetts and New York? One Massachusetts delegate, Caleb Strong, left early, although he later supported the Constitution. Elbridge Gerry refused to sign, although he had (arguably in violation of his commission) participated in the drafting. He could defend himself by pointing out that without his participation the document would have been even further from an amendment of the Articles than it turned out to be.[62] Two Massachusetts delegates, Rufus King and Nathaniel Gorham, and one New Yorker, Alexander

Hamilton, signed the document.

In addition, the credentials of the Delaware delegates, 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."[63] Because the new Federal Congress was a very different entity with a very different role than the Confederation's "United States in Congress Assembled," the Delaware delegates remained within the strict letter of their commission, although they likely exceeded its spirit. Concluding, however, that eight of 39 signers exceeded their authority leaves one well short of the usual charge that the Philadelphia convention as a whole was a "run-away."

More important, the recommendations of the convention were just that: recommendations—totally non-binding and utterly without independent legal force. As we have seen, any agent was entitled to make such recommendations. The convention did not impose its handiwork on the states or on the American people. States could approve or not as they liked, with no state bound that refused to ratify.[64] 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. James Wilson summed up the delegates' position: "authorized to conclude nothing, but . . . at liberty to propose any thing."[65]

The convention did not impose its handiwork on the states or on the American people.

The Limited Nature of Conventions Authorized by the Constitution

Whether or not the 1787 convention was plenipotentiary, the conventions authorized by the Constitution all were limited. They were three kinds: (1) state conventions for ratifying the Constitution, (2) state conventions for ratifying amendments, and (3) federal conventions for proposing amendments. Just as no one would suggest that a state ratifying convention also has inherent authority unilaterally to re-write the state constitution, no one should conclude that convention for proposing amendments has any authority unilaterally to re-write the U.S. Constitution. As its name indicates, it is a convention for proposing amendments, and therefore a limited convention.

Madison made this clear while ratification was still pending. In a November, 1788 letter to George Lee Turberville, he distinguished between a convention that considers "first principles,"[66] which "cannot be called without the unanimous consent of the parties who are to be bound to 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."[67]

It seems to have escaped notice from almost everyone writing on this topic[68] that the federal convention delegates actively considered including in the Constitution a provision for future plenipotentiary conventions—and specifically rejected that approach.

It seems to have escaped notice from almost everyone writing on this topic[68] that the federal convention delegates actively considered including in the Constitution a provision for future plenipotentiary conventions—and specifically rejected that approach. Edmund Randolph's initial sketch in the Committee of Detail[69] and the first draft of the eventual Constitution by that committee[70] both contemplated plenipotentiary conventions that would prepare and adopt amendments. During the proceedings, the delegates opted instead for a convention that would merely propose. Later on, Roger Sherman moved to revert to a plenipotentiary convention, but his motion was soundly rejected.[71]

Principal credit for replacing a plenipotentiary convention with a convention for proposing amendments belongs to Elbridge Gerry. He objected to a draft authorizing the convention to modify the Constitution without state approval.[72] 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-quarters.[73] The final wording came primarily from the pen of James Madison.[74]

As noted earlier, while ratification was still pending, Madison explained the difference between a plenipotentiary convention and a limited one: the former is based on "first principles," and unanimous consent is necessary of all states to be bound, while the latter is held under the Constitution, so unanimity is not necessary. Madison's ally at the Virginia ratifying convention, future Chief Justice John Marshall, also distinguished between the former plenipotentiary convention held in Philadelphia and

the more narrow amending procedure: "The difficulty we find in amending the Confederation will not be found in amending this Constitution. Any amendments, in the system before you, will not go to a radical [i.e., fundamental] change; a plain way is pointed out for the purpose."[75] Another ally, George Nicholas, distinguished between plenipotentiary constitutional conventions and limited-purpose conventions. Limited-purpose conventions had "no experiments to devise; the general and fundamental regulations being already laid down."[76] In the same vein, James Iredell, a Federalist leader who later sat on the U.S. Supreme Court, emphasized that proposals from an amendments convention had to be approved by three-fourths of the states.[77]

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So it is clear that a Convention for Proposing Amendments is a limited-purpose assembly, and not a plenipotentiary or "constitutional" convention. Ann Stuart Diamond writes:

> 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.[78]

WHAT IS 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." Donaldson's dictionary of 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. . . ."[79]

Other dictionary definitions of "application" and "apply" were not greatly different.[80] Nathaniel Bailey's dictionary[81] defined the word as "the art of applying or addressing a person; also care, diligence, attention of the mind." 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."

Thus, a state legislature's "Application" to Congress is the legislature's address to Congress requesting a convention.

IS THE GOVERNOR'S APPROVAL NECESSARY?

In most states today, unlike in 1787, governors must sign, and may veto, bills and resolutions adopted by their legislatures. 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." This raises the question of whether the "Legislature" includes the governor in states requiring his signature on other legislative measures.

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Russell Caplan makes a strong case for the answer being "no." He points out that because of the bitter colonial experience with royal governors, the Framers would have had strong reason to use the word "Legislature" to refer only to each state's representative assembly.[82] He further observes that the Constitution elsewhere (in Article IV, Section 4, the Guarantee Clause) separately designates "Application[s] from "the Legislature" from those originating from "the Executive."[83] He might have added that the Constitution also assigns other federal functions to state "Legislature[s]" as distinct from state executives: they had different responsibilities pertaining to the election of U.S. Senators.[84] Reflecting this understanding, the 1789 amendment applications from New York and Virginia both lacked the governor's signature.[85]

One might respond that since neither the governor of New York nor the governor of Virginia enjoyed a veto, they had no share in the legislative power—and that this might explain 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,[86] yet the council's approval of the application seems not to have been necessary.[87] Furthermore, in Massachusetts, the governor acting alone enjoyed a qualified veto,[88] and in soon-to-be-admitted Vermont, the governor's council had a suspensive veto.[89] If the Founders had wished to require assent by all legislative actors rather than merely the

representative assemblies, they easily could have said so.

The essential plan of Article V is that it grants amendment-related powers to four different kinds of assemblies—Congress, state legislatures, state conventions, and the Convention for proposing amendments—not in their normal role as law-makers or agents of state or federal governments, but as distinct and self-contained assemblies for proposal and ratification. Hence, formalities normally associated with the lawmaking process, such as executive signature, are simply not part of the process. Further explanation of this point appears in the second and third Issue Papers in this series.

MAY THE APPLICATION LIMIT THE CONVENTION AGENDA?

Perhaps no Article V question has been agitated so much, on so little proof, as the question of whether states may apply for a convention limited to particular subject-matter. The Founding-era record suggests strongly that they can.

Perhaps no Article V question has been agitated so much, on so little proof, as the question of whether states may apply for a convention limited to particular subject-matter.

As we have seen,[90] during the Founding Era most interstate or "federal" conventions were limited in subject matter, and states sending delegates to a conventions had the universally-recognized prerogative of restricting their delegates' authority. Moreover, the amendments conventions under the existing constitutions of Vermont, Pennsylvania, and Georgia were explicitly limited (and those of Massachusetts impliedly limited); and the Georgia procedure seems to have been the basis for the analogous process in Article V.

Given the prevalence of limited conventions and the recognized prerogative of restricting delegates' authority, the evidentiary burden should be placed on those arguing that a convention for proposing amendments was somehow different. In reviewing the historical record for this Issue Paper, I found little indication that a convention for proposing amendments was different. On the contrary, I found a surprising amount of evidence[91] that such conventions could be limited—and, indeed, that the Founders expected them to be limited more often than not.

First: The purpose of the state-application-and-convention procedure was to serve as an effective congressional bypass. 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. This would undercut the value of the procedure, and therefore impair its principal purpose.

Second: Comments from Federalists promoting the Constitution during the ratification debates emphasized 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." 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."[92] The "Native" of course 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.

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. Still, the Federalist representations of equality suggest that in construing Article V preference should be given to interpretations that raise the states toward the congressional level and that treat the convention as their joint assembly. This, in turn, suggests that if Congress may specify a subject when it proposes amendments, the states may do so as well.

This, in turn, suggests that if Congress may specify a subject when it proposes amendments, the states may do so as well.

Third: The ratification-era records reveal a prevailing understanding that states could—in fact, usually would—specify particular subject-matter at the beginning of the process. As early as the Philadelphia convention 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."[93] In other words, Madison referred to the states "appl[ying] for" amendments," with either the convention or congress being "bound to propose" them.[94]

Similarly, in *Federalist* No. 85, Hamilton wrote that

> . . . 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.

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-quarters necessary to ratify the convention's proposals. Later in the same report, he referred to "two thirds or three fourths of the State legislatures" uniting in particular amendments.[95]

George Washington understood that applying states would specify the convention subject-matter.

George Washington understood that applying states would specify the convention subject-matter. 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."[96] 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.[97]

Cox thereby revealed an understanding 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:

> . . . the 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. . "[98]

("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:"[99]

Delegates to the state ratifying convention also believed that the states, more often than not, would determine the subject matter to be considered in the convention.

Delegates to the state ratifying convention also believed that the states, more often than not, would determine the subject matter to be considered in the convention. In Rhode Island, convention delegate Col. William Barton celebrated Article V by saying that it "ought to be written in Letters of Gold" because there was a "Fair Opportunity furnished" of "Amendments provided by the states."[100] In Virginia, Anti-Federalists argued that before the Constitution was ratified a new plenipotentiary constitutional convention should be called to re-write the document and add a bill of rights. 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.[101]

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." That there

would be such an agenda was confirmed by what Nicholas said next:

> 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.* [i.e., by a future plenipotentiary convention]. 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 [plenipotentiary] Convention. No experiments to devise; the general and fundamental regulations being already laid down.[102]

There seems to have been little dissent to the understanding that the applying states would fix the agenda.[103] 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 previous extract quoted. 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."[104] 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 [i.e., call an amendments convention] for having them carried into effect.[105]

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That the Framers and Ratifiers 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.[106] As a first step, seven states (although through their ratifying conventions rather than their legislatures) adopted sample amendments for consideration by a later proposing body. Sam Adams urged this step to the Massachusetts ratifying convention, saying the states should "particularize the amendments necessary to be proposed."[107] Second, an Article V convention—or Congress, if it acted quickly enough (as it did)—would choose among the state suggestions,[108] draft the actual amendments, and send them to the states for ratification or rejection. Third, the states would either ratify or reject.

Finally: One of the two first state applications for a convention for proposing amendments may have been intended to ask only for a limited convention, even though commentators have characterized both applications as plenipotentiary. New York's clearly was plenipotentiary, 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."[109] It is very possible the intent behind this application was for the convention to select its proposals from among the topics suggested by the ratifying conventions.

...the evidence strongly suggests that the states legally could limit the scope of a convention for proposing amendments, and that the Founders expected this to happen more often than not.

This historical evidence pretty well disproves the view of a few writers[110] that state applications referring to subject-matter are void. It also disables those arguing that amendments conventions cannot be limited from carrying the burden of proving that those conventions were to be governed by rules different from those applied to other conventions. On the contrary, the evidence strongly suggests that the states legally could limit the scope of a convention for proposing amendments, and that the Founders expected this to happen more often than not.

CONVENTION AND CONGRESS AS FIDUCIARIES

THE CONVENTION AND ITS DELEGATES AS AGENTS OF THE STATES

The Founders' understanding was that in the state-application-and-convention process, the convention for proposing amendments would be a fiduciary institution. One can think of the convention as an agent of the state legislatures or as a meeting-place of delegates who are agents of their respective state legislatures. Several pieces of evidence support this conclusion. First, until the ratification there had been many interstate conventions, and all had been composed of delegations from the states, acting as agents of the states. The Continental

and Confederation Congresses, the limited-purpose conventions in Annapolis and elsewhere, and the 1787 Philadelphia convention all fit this description.

While the Constitution changed many things, other evidence suggests that within the state-application-and-convention procedure, this practice was to remain unaltered. The numerous Founding-Era writings cited in the previous section show a general understanding that the state-application-and-convention method would be a state-driven process, with the state legislatures having power to control the convention agenda.

The numerous Founding-Era writings cited in the previous section show a general understanding that the state-application-and-convention method would be a state-driven process, with the state legislatures having power to control the convention agenda.

James Madison, writing in *Federalist* No. 43, asserted that the Constitution's amendment procedure, "equally enables the general and the State governments to originate the amendment of errors. . . ." 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 have the power to propose directly (which they do not) or that the convention be their agent. There is no third alternative.

The first two state applications for an amendments convention reflect the same understanding. These were the 1789 applications by Virginia and New York, submitted after the federal government was in existence but before all of the original thirteen states had ratified.[111] The Virginia application provided in part:

> The 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.[112]

The New York application sent the same message:

> We, 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.[113]

Thus, the convention for proposing amendments is a creature—or, in the words of a former assistant U.S. Attorney-General, the "servant"[114]—of the state legislatures. Its delegates are the agents of state legislatures they represent.

CONGRESS AS A (LIMITED) AGENT OF THE STATES

Under both the Articles of Confederation and the Constitution, Congress was a fiduciary institution. Under the Confederation, Congress generally was the fiduciary (specifically, the agent) of the *states*. Under the Constitution, Congress generally is the agent of the American *people*.[115]

However, the congressional role in the state-application-and-convention procedure differs importantly from its usual role as an agent of the people. In calling the convention and sending the convention's proposals to the states, Congress acts as an agent of the *state legislatures*.[116] In this respect, the Framers retained the Confederation way of doing things. They did so in the interest of allowing the states to bypass Congress.

During the 1787 convention, the initial Virginia Plan called for an amendments convention to be triggered only by the states, leaving Congress without the right to call one on its own motion.

During the 1787 convention, the initial Virginia Plan called for an amendments convention to be triggered only by the states, leaving Congress without the right to call one on its own motion. The delegates altered this to allow only Congress to call an amendments convention.[117] George Mason then pointed out that if amendments were made necessary by Congress's own abuses, Congress might block them unless the Constitution contained a way to circumvent Congress.[118] 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."[119] If the proper number of states applied, Congress had no choice in the matter; it was constrained to do their bidding.[120]

As an agent, Congress was expected to follow rules of fiduciary law, except as otherwise provided by the Constitution.[121] These included honoring its duties as outlined in the empowering instrument (the Constitution) and treating all of its principals (the state legislatures) impartially. As explained in the next section, some of these rules are deducible from the text independently of fiduciary principles, and they corroborate the conclusion that the congressional role in this process is as an agent of the state legislatures.

Because the state-application-and-convention procedure was designed to bypass congressional discretion, the congressional discretion had to be strictly limited.

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."[122] On this point, Professor William W. Van Alstyne summarized his impressions of the history of Article V:

> 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.[123]

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."[124]

Copious evidence supports the conclusion that Congress may not refuse to call a convention for proposing amendments upon receiving the required number of applications.[125] When some Anti-Federalists suggested that Congress would not be required to call a convention,[126] Hamilton, writing in *Federalist* No. 85 affirmed that the call would be mandatory.[127] Numerous other Federalists agreed, among them James Iredell,[128] John Dickinson,[129] James Madison,[130] and Tench Coxe. 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.[131]

The ministerial nature of congressional duties and the requirement that it call a convention at the behest of two-thirds of the state legislatures supports the conclusion in the previous section that in the state-application-and-convention process, Congress acts primarily as their agent. From the nature of that role, it follows that Congress may not impose rules of its own on the states or on the convention. For example, it may not limit the period within which states must apply. Time limits are for principals, not agents, to impose: if a state legislature believes its application to be stale, that legislature may rescind it.[132] During the constitutional debates, participants frequently noted with approval the Constitution's lack of time requirements for the amendment process.[133]

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.

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. 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. This conclusion is buttressed by historical evidence already adduced[134] tending to show 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 convention, but to group them according to subject matter.

In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two-thirds needed for convention, but to group them according to subject matter. Whenever two-thirds of the states have applied for a convention based on the same general subject-matter, Congress must issue the call for a convention for proposing amendments related to that subject-matter.[135] Congress may not expand the scope of the convention beyond that subject-matter.[136] A recent commentary summarized the process this way:

> Applications 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.[137]

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.[138]

The Role of the President

For reasons similar to those excluding the governors from the state application and ratification process (discussed in the section "Is the Governor's Approval Necessary?"), the President has no role in calling a convention for proposing amendments. This is consistent with the state-application-and-convention process as a procedural "throw-back" to pre-constitutional practice.[139] It also is consistent with representations made by Federalist Tench Coxe during the ratification battle,[140] and with early 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 it should be.[141]

The Composition and Role of the Convention for Proposing Amendments

The Composition of the Convention

In the 1960s, Sen. Sam Ervin of North Carolina introduced legislation to govern the election and proceedings of any future convention for proposing amendments[142]—the first of several congressional bills on the matter.[143] Under Ervin's revised proposal, delegates would have been selected among the states in proportion to their strength in Congress.[144]

The idea of a convention weighted in this way, or even more purely according to population, has inherent appeal. Because the procedure is initiated by the state legislatures and proposed amendments are ratified by state legislatures or conventions, there is an attractiveness to interjecting a more popular approach at the convention stage. Unfortunately, Senator Ervin's proposed legislation would have undercut the congressional-bypass goal of the state-application-and-convention procedure.[145] It also would have violated Congress's fiduciary duty to treat all state legislatures impartially. Congress may not discriminate among the its principals by assigning some more votes than others.

How delegates are to be selected is for principals, not agents, to decide. Congress may not determine how delegates shall be chosen, what districts they are to represent, or how many a state can send.[146] *Nor may Congress establish rules under which the convention is to operate.*

From its agency role, it follows that Congress may not fix the rules by which the convention for proposing amendments is elected, organized, or governed. How delegates are to be selected is for principals, not agents, to decide. Congress may not determine how delegates shall be chosen, what districts they are to represent, or how many a state can send.[146] Nor may Congress establish rules under which

the convention is to operate.

Support for these conclusions independent of fiduciary principles comes from the purpose of the state-application-and-convention procedure: It would not be an effective bypass if Congress could set (or gerrymander) the convention's composition or rules. It also comes from Founding-era practice: although in *intra-state* conventions, representation generally was apportioned in some way related to population,[147] in *interstate* conventions, each state decided as a separate sovereignty how its own delegates were selected. All conventions, inter- or intra-state, established their own rules.[148]

Although a convention for proposing amendments is free to adjust its rules of suffrage however it wishes, the initial vote on such matters would have to be based on one-state, one-vote.[149]

Although a convention for proposing amendments is free to adjust its rules of suffrage however it wishes, the initial vote on such matters would have to be based on one-state, one-vote.[149] This, at first blush, this would seem to contradict Madison's explanation of the Constitution's creation of a government "neither wholly national nor wholly federal," since the states would control the application, convention, and ratification processes without inputs from national population majorities. To quote Madison:

> We find [the amendment process] neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention, is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character. In rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal* and partakes of the *national* character.[150]

A careful reading of this passage shows that to be "partly national" it is not necessary for popular votes to be counted directly. All that is necessary is that the supermajority of states be high enough to render it probable that the supermajority represents a majority of the American people.[151] Two-thirds (nine states) was the supermajority used to ratify the Constitution itself. The Constitution's initial allocation of Representatives among states shows that, mathematically, even the least populous two-thirds would represent a popular majority.[152]

Since the 18th century, population disparities among states have become greater, although presently there is a small trend back toward more population equality among states. It is now theoretically possible for even three-quarters of the states (38) to represent a minority of the population. Yet, as Professor Paul G. Kauper pointed out in 1966 (when the disparities were greater than they now are) political differences among states of similar populations are such that, as a practical matter, ratification by states representing only a minority of citizens is almost impossible.[153] Political realities are such that no amendment can be ratified without wide popular support. The "national" interest in the amendment process is thereby protected.

Political realities are such that no amendment can be ratified without wide popular support. The "national" interest in the amendment process is thereby protected.

The Role of the Convention for Proposing Amendments

Because the convention for proposing amendments is the state legislatures' fiduciary, it must follow the instructions of its principals—that is, limit itself to the agenda, if any, that states specify in their convention applications. 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."[154]

However, the obligation of an agent to submit to the principal's instructions may be altered by governing law. In this instance, the Constitution is the governing law. The Constitution assigns to the convention, not the states, the task of "proposing" amendments. This implies that the convention has discretion over drafting.[155] If two-thirds of the states could dictate the precise language of an

amendment, there would be no need for a convention.

Additionally, a power to "propose" an amendment implies a power *not* to propose if the convention, upon deliberation, decides that the subject-matter of the state applications requires no action. In a letter written before all the states had ratified, Madison explicitly recognized the convention's prerogative of proposing nothing at all.[156] He was confirmed by the Anti-Federalist writer "An Old Whig," who observed shortly after the Constitution became public, "the convention may agree to the [states-suggested] amendments or not as they think right. ...."[157]

Additionally, a power to "propose" an amendment implies a power not to propose if the convention, upon deliberation, decides that the subject-matter of the state applications requires no action.

As noted earlier,[158] the resulting procedure closely parallels how the first 10 amendments actually were adopted: The states suggested a number of amendments to become part of a Bill of Rights. Working almost entirely from that list, Congress (here, acting much as an amendments convention would) selected some of these, performed the actual drafting, and sent its proposals back to the states for ratification.

The Role of Congress after the Convention Adjourns

What has been said so far should answer some questions about the obligation of Congress after the convention adjourns. Recall that Congress is the agent for the state legislatures in this process. If the convention has proposed no amendments, Congress has no obligation. If the convention does propose amendments, Congress must send on to the states those within the convention's call.[159] This is just what Congress did after the 1787 convention, when it transmitted the convention's work to the states for ratification or rejection.

As noted earlier, prevailing law may alter the obligations of an agent to his principal, and in this situation the *Constitution* is prevailing law. Article V alters the normal obligations[160] by determining that Congress, not the state legislatures, will decide on whether ratification is by state legislatures or by state conventions.

Like other agents, the convention for proposing amendments is free to make recommendations in addition to its formal proposals. Those recommendations may be taken up by Congress or by the state legislatures at a different time. Congress should not designate a ratification process for, nor transmit to the states, any recommended amendments outside the convention's call.[161] To see why this is so, consider the following illustration:

> The United States has 50 states, for purposes of this illustration numbered 1-50. States 1-34 (amounting to two-thirds of the 50) make applications for a convention for proposing amendments pertaining to term limits for Congress. Congress calls the convention, which meets and recommends both a term limits amendment and an amendment requiring a balanced budget. States 1-30 and States 41-48 (amounting to three-quarters of the 50) approve each of these.

In this scenario, the term limits amendment has been properly adopted, even though some of the states that applied for the convention found it unacceptable. This is because by applying for a convention to consider term limits, a state triggers the process on that issue and thereby accepts the risk that the convention will draft, and 38 of its fellow states will approve, an amendment on the subject worded differently from what the state would prefer.

However, the balanced budget amendment was not properly adopted, and Congress should not have submitted it. This is because it was never properly "proposed" in the constitutional sense of the term used in Article V. It was not properly "proposed" because doing so was outside the call, as limited by the applications of the two-thirds of the states applying. It was merely an *ultra vires* recommendation, with no legal force, offered for consideration at another day.

...the balanced budget amendment was not properly adopted, and Congress should not have submitted it.

One might argue that if *all* the applying states ratified the balance budget amendment, then the amendment might become law under the agency law doctrine (as opposed to the constitutional doctrine) of "ratification"—that is, if a principal approves the unauthorized actions of his agent while on notice of the facts, the principal retroactively validates those actions.[162] I have not uncovered indications from the Founding-era record as to whether this is true, but it is irrelevant as a practical matter because there are

at least 34 principals (the applying states) and probably 50. Certainly non-approval by even one applying state (or perhaps by another state) prevents agency-law ratification. In the illustration, four applying states (31 through 34) and two non-applying states (49 and 50) have declined to approve.[163]

SUMMARY OF PRINCIPAL FINDINGS

The following list summarizes what the Founding-era record tells us of the state-application-and-convention process of Article V:

- During the Founding Era, a "convention" did not necessarily—or even usually—refer to a plenipotentiary constitutional convention. Limited-purpose conventions were quite common, and several state constitutions employed them in their amendment procedures.

- During the 1787 federal convention, the Framers considered, but rejected, drafts that contemplated amendment by what people of their time called a plenary or "plenipotentiary" convention. The Framers substituted instead a provision for a limited-scope assembly they called a "convention for proposing amendments." This is one of *three* limited-scope conventions the Constitution authorizes for specific purposes.

- It is erroneous to label a convention for proposing amendments a "constitutional convention" or to conclude that it has any power beyond proposing amendments to the states for ratification. Any amendments it does propose are of no effect unless ratified by three-fourths of the states.

- A state legislature's "Application" is its address to Congress requesting a convention. The state governor has no required role in this process.

- The almost universal Founding-era assumption was that legislatures applying for a Convention for proposing amendments usually would guide the convention by specifying particular subject-areas for amendment.

- The convention for proposing amendments is made up of delegates who are agents of their respective state legislatures, and the convention in the aggregate represents those legislatures in the aggregate. As such, the convention must remain with the scope of its call. If the convention opts to suggest amendments outside its call, those suggestions are not legal proposals but merely recommendations for later action under some future procedure.

- Although the Constitution generally provides for Congress to act as the agent of the people rather than of the states, for the state-application-and-convention procedure, the Founders retained the Articles of Confederation model. In other words, during that procedure, the state legislatures are the principals and Congress and the convention for proposing amendments are their agents.

- As the agent of the state legislatures, Congress must call a convention for proposing amendments if two-thirds of the states apply for one, must treat all states equally during the process, and must obey any common restrictions imposed by the states in their applications. The states, not Congress, are to determine how delegates are selected.

- The President has no constitutional role in the state-application-and-convention process.

- The convention establishes its own rules, including its voting rules. The initial default rule is "one state, one vote."

- Because the Constitution grants the convention, not the states, power to "propose amendments," the states cannot require the convention to adopt a particular amendment or dictate its language. The convention is required to stay within any state-specified subject-matter, but the actual drafting is the convention's prerogative.

- The Constitution imposes a limit on the power the state legislatures have over Congress in this process: Congress, not the states, selects among the two modes of ratification. As the agent of the state legislatures, however, Congress should not designate a ratification procedure for convention resolutions outside the convention's call. Such recommendations are merely recommendations for some future consideration; they are not legal proposals.

RECOMMENDATIONS

Americans considering a convention for proposing amendments should weigh both potential advantages and disadvantages. But they should consider only *real* advantages and disadvantages, not fictional ones. Clearly, the risks of doing nothing are very great: the federal government is at the point (if not already beyond it) of shattering all constitutional restraints on its power—of, in effect, converting American citizens into mere subjects and spending the country into bankruptcy.

Clearly, the risks of doing nothing are very great: the federal government is at the point (if not already beyond it) of shattering all constitutional restraints on its power—of, in effect, converting American citizens into mere subjects and spending the country into bankruptcy.

On the other hand, as this Issue Paper demonstrates, some of the claimed disadvantages of calling a convention are entirely, or almost entirely, fictional. Among these is the claim that the mechanics of the state-application-and-convention process are inherently unknown and unknowable. In fact, the Constitution's text and its Founding-era history tell us a great deal about the process. That claim, therefore, can safely be disregarded.

Similarly, assertions that a convention for proposing amendments is inherently plenipotentiary and cannot be limited conflict with the overwhelming weight of the evidence. Those claims, too, should be disregarded.

Indeed, the statements of some alarmists are so at odds with the constitutional text and the historical record as to suggest they undertook little or no good faith investigation before making their claims. Any of their future assertions should, therefore, be treated with great caution.

The Founding-era evidence also contains some lessons as to how promoters of an Article V convention should proceed. Promoters should minimize potential legal objections by conforming procedure to the Founders' understanding of how the state-application-and-convention process should work. This is particularly important when addressing such questions as how delegates are selected, when Congress must call a convention, who sets the convention rules, how states should vote, and whether state applications may limit the convention to an up-or-down vote on specific language. As this Issue Paper shows, the answers to those questions are as follows: (1) Each state legislature determines (consistently with the Fourteenth Amendment and other parts of the Constitution) how delegates from its state are selected; (2) Congress must call a convention when 34 or more states have applied for a convention addressing a particular subject matter; (3) The convention sets its own rules; (4) Each state initially has one vote, although the convention may alter that standard; (5) State applications may bind the convention to specific subject-matter, but may not draft the amendment. (The last of these rules was employed very effectively early in the 20th century by states when petitioning for direct election of Senators.)

The author plans to issue additional Issue Papers, based on post-Founding evidence, that offer further recommendations.

CONCLUSION

Although public sentiment for a convention for proposing amendments has occasionally been high, recent efforts to use the state-application-and-convention procedure have been derailed partly by questions regarding the scope of the convention's power. Unlike other forms of life, doubts thrive in a vacuum, and opponents of reform frequently have found doubts about this process to be very convenient.[164] This Issue Paper has resolved some of those doubts.

Although public sentiment for a convention for proposing amendments has occasionally been high, recent efforts to use the state-application-and-convention procedure have been derailed partly by questions regarding the scope of the convention's power.

It is interesting to note that some of the fears expressed in modern times actually date back to Anti-Federalist charges first raised, and rejected, more than two centuries ago. For example, the claim that the convention could impose any amendments it wanted to, and perhaps even assume control of the government, originated with some of the Anti-Federalists.[165] The claim was rejected then, not only by supporters of the Constitution,[166] but by the Anti-Federalist leadership itself.[167]

More realistic have been questions about whether Congress would have to honor state applications and whether the applying states could constrain the convention by specifying the subject matter of the call. Although the Founding-era evidence does not support all the conclusions reached by the late Sam Ervin—Senator,

constitutional scholar, and later folk hero of the Watergate hearings—, it does support his assertions that

> the role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V. [The states] could not, however, define the subject so narrowly as to deprive the convention of all deliberative freedom.[168]

Regarding the role of Congress in the process, he might have added that it has primarily the humble, but ennobling, one of the faithful servant who smoothes the way for others.

ENDNOTES

[1] Robert G. Natelson, the author of The Original Constitution: What It Actually Said and Meant, is a constitutional historian. He is a Goldwater Institute Senior Fellow as well as a Senior Fellow in Constitutional Jurisprudence at the Independence Institute, and served as Professor of Law at the University of Montana for a quarter of a century. He is best known for his studies of the Constitution's original understanding, and for bringing formerly-neglected sources of evidence to the attention of constitutional scholars. His works are listed at www.umt.edu/law/faculty/natelson.htm. Natelson's training is in law, history, and classics.

The following abbreviations are used throughout the footnotes:

DOCUMENTARY HISTORY—THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976).

ELLIOT'S DEBATES—JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols; 1941 ed. inserted in 2 vols.) (2d ed. 1836).

FARRAND'S RECORDS—THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937).

JCC—JOURNALS OF THE CONTINENTAL CONGRESS (34 vols., various dates).

[2] Specifically, Article V of the U.S. Constitution reads,

> 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.

[3] *Cf.* St. George Tucker, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 306 (1803) (Clyde N. Wilson, ed. 1999) ("Both of these [methods of amendment] appear excellent. Of the utility and practicality of the former, we have already had most satisfactory experience. The latter will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy.").

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

[5] In the 65 years since World War II, Congress has balanced the budget only 12 times.

[6] The author plans future papers discussing post-Founding evidence and law, including the impact of such cases as Coleman v. Miller, 307 U.S. 433 (1939).

[7] *See* Robert G. Natelson, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT 9-11 (2010) [hereinafter NATELSON, ORIGINAL CONSTITUTION].

[8] Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 Ohio St. L.J. 1239 (2007).

[9] I have written extensively on this subject, and my conclusions have not been contested by other scholars. For general support for this section, see *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004) (documenting the Founders' belief in fiduciary government); *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239 (2007) (describing the general content of eighteenth-century fiduciary law); THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (with Lawson, Miller & Seidman) (Cambridge University Press) (forthcoming 2010) and *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 NATELSON, ORIGINAL CONSTITUTION, *supra* note 7.

[10] U.S. Const. art. V.

[11] Everett McKinley Dirksen, *The Supreme Court and the People*, 66 Mich. L. Rev. 837 (1967-1968), *reprinted in* THE ARTICLE V CONVENTION PROCESS: A SYMPOSIUM 1 (1968); Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875 (1967-1968), *reprinted in* SYMPOSIUM, *supra*, at 39.

[12] *E.g.*, Thomas M. Durbin, *Amending the U.S. Constitution: by Congress or by Constitutional Convention*, Congressional Research Service (1995); John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 OP. OFF. LEGAL COUNSEL 390 (1979).

[13] Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. Rev. 355 (1979); Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 Mich. L. Rev. 921 (1967-1968) *reprinted in* SYMPOSIUM, *supra* note 11, at 85; 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); American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (1974) [hereinafter "ABA Study"].

[14] James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARVARD J.L. & PUB. POL'Y 1005 (2007); Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions*, 58 TEX. L. REV. 131 (1979); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARVARD L. REV. 1612 (1972); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARVARD L. REV. 1067 (1957).

[15] Some of the principal academic writings are, in alphabetical order by author, as follows:

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

Charles L. Black, *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)

Arthur E. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1967-1968) *reprinted in* SYMPOSIUM, *supra* note 11, at 113.

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 (1978-79)

Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 THE STATE OF AM. FEDERALISM 113-46 (1980)

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), *reprinted in* SYMPOSIUM, *supra* note 11, at 67.

Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 74 (2009)

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

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)

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. LJ. 627 (1979)

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

There are various other discussions of the amendment process. *See, e.g.*, Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUMBIA L. REV. 121 (1996) and Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993-1994).

[16] Caplan, *supra* note 4.

[17] An obvious explanation for some authors is the unavailability of historical materials before the days of the Internet. This does not explain the same dearth in articles written by professors at universities with some of the best libraries in the world.

[18] If anything, Ann Stuart Diamond was guilty of understatement when she referred to "the tendency" of these professors to "take sides on questions of procedure according to one's position on the issue at hand." Diamond, *supra* note 15, at 134. *See also id.* at 139-40.

[19] An example of how contestants have dueled with empty pistols appears in *Black's Amending the Constitution, supra* note 15, where the author assailed a congressional bill to implement the state-application-and-convention procedure. On the issue of whether states can limit the scope of the convention, Black charged that "The Senate Report says that 'history' supports its conclusion..... but fails so much as to cite any relevant history." Black then excuses his own failure to present relevant history on the ground that "there is no relevant history." *Id.* at 201-02. In fact, however, there is a great deal. *See generally infra.*

[20] *Cf.* Ervin, *supra* note 11, 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.") *See also* Diamond, *supra* note 15, at 114 & 125; *Letters from the Federal Farmer to the Republican*, Letter IV, Oct. 12, 1787, *reprinted in* 19 DOCUMENTARY HISTORY 231, 239 ("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).

[21] 2 FARRAND'S RECORDS 558 (Sept 10, 1787) (paraphrasing

Alexander Hamilton as stating, "The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments. . .").

[22] *E.g.*, A Plebeian, *An Address to the People of the State of New York,* Apr. 17, 1788, *reprinted in* 20 DOCUMENTARY HISTORY 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.

[23] 3 ELLIOT'S DEBATES 101, quoting George Nicholas at the Virginia ratifying convention as saying

> [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 *id.* 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.

[24] An Old Whig II, 13 DOCUMENTARY HISTORY 316, 377. *See also* 1 FARRAND'S RECORDS 202-03 (June 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 amendment.

Mason was backed up on this point by Edmund Randolph. *Id.*

[25] 23 DOCUMENTARY HISTORY 2522 (Feb. 4, 1789). 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.

[26] "A Friend of Society and Liberty," PA. GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY 277, 283. Coxe made the same points in *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY 1139, 1142. Coxe had been Pennsylvania's single delegate to the Annapolis convention.

[27] THE FEDERALIST NO. 43. 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 for proposing 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 at 178.

[28] Charles L. Black, *Amending the Constitution, supra* note 15, for example, essentially argued for replacing the Founders' judgment with his own when he belittled congressional efforts to implement the state-application-and-convention procedure because the congressional-initiation method "would seem prima facie adequate to every real need." *Id.* at 201. Similarly, Professor William F. Swindler was so upset that the possibility that the state-application-and-convention procedure might be used to adopt "alarmingly regressive" amendments that he suggested that the procedure simply be read out of the Constitution! Swindler, *supra* note 15.

[29] I have made that error in oral discussions of the Constitution. I have been in very good company. *See, e.g.*, Connely, *supra* note 15, at 1014, 1015, 1017 and *passim*; Ervin, *supra* note 11, at 877, 879, 881 and *passim*; Gunther, *supra* note 15 (*passim*); Paulsen, *supra* note 15, at 738; Rogers, Note, *The Other Way to Amend, supra* note 14 (in the title and *passim*); Tribe, *supra* note 15 (in the title and *passim*).

[30] For an example of this approach, see Carson, *supra* note 13, at 922-24.

[31] Caplan, *supra* note 4, at vii-viii (quoting various public figures), 146-47 (quoting Theodore Sorensen).

[32] *Id*. at xi-xv, 44, 47, 56, 60.

[33] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE

(8th ed., 1786) (unpaginated).

[34] See also Francis Allen, A Complete English Dictionary (1765); Alexander Donaldson, An Universal Dictionary of the English Language (1763); Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789); William Kenrick, A New Dictionary of the English Language (1773) (all unpaginated).

[35] Caplan, *supra* note 4, at 5.

36 Anonymous, The Student's Law-Dictionary (1740) (unpaginated).

[37] Timothy Cunningham, A New and Complete Law-Dictionary (1783) (unpaginated).

[38] Nathaniel Bailey's 1783 dictionary included the following: "An assembly of the States [i.e., various social orders] of the Realm." Nathaniel Bailey, A Universal Etymological English Dictionary (1783) (unpaginated). In Britain, the relevant orders were King, Peers, and Commons. Caplan, *supra* note 4, at 5.

[39] GILES JACOB, A NEW LAW DICTIONARY (1782) (unpaginated).

[40] 1 EPHRAIM CHAMBERS, CYCLOPAEDIA, or AN UNIVERSAL HISTORY OF ARTS AND SCIENCES (unpaginated). *See also* 2 ENCYCLOPAEDIA BRITTANICA at 2238 (2d ed. 1778) (containing only Chambers' second and third definitions).

[41] Caplan, *supra* note 4, at 5-9 describes the process by which the plenipotentiary Anglo-American political convention developed.

[42] For a summary of special purpose conventions, see *id*. at 17-21, 96. Although not all these meetings were labeled "conventions," some, such as the Hartford Convention of 1780, certainly were. *See* 19 JCC 155 (Feb. 16, 1781). Some thought of the First Continental Congress as a convention. 1 *id.* at 17 (June 3, 1774) (stating that Connecticut sent delegates to a "congress, or convention of commissioners, or committees of the several Colonies in British America"). There was also a "convention of committees." 17 *id*. at 790 (Aug. 29, 1780). The journals of the Providence, Springfield, New Haven, Hartford (1778), and Philadelphia (1780) conventions are reproduced in The Public Records of the State of Connecticut - From October, 1776, to February, 1778, Inclusive 585-620 (Charles J. Hoadley, ed., 1894) and The Public Records of the State of Connecticut - From May, 1778, to April, 1780, Inclusive 562-79 (Charles J. Hoadley, ed., 1895).

[43] Caplan, *supra* note 4, at 95-96 (citing Emer Vattel's then-popular work on international law).

[44] The Springfield convention had the broadest power, being charged with dealing with certain economic matters and other topics not repugnant to the powers of Congress. The other conventions were given one, two, or three subjects to address -- subjects such as monetary inflation, war issues, and trade. *See, e.g.*, The Public Records of the State of Connecticut - From October, 1776, to February, 1778, Inclusive 585-620 (Charles J. Hoadley, ed., 1894) and The Public Records of the State of Connecticut - From May, 1778, to April, 1780, Inclusive 562-79 (Charles J. Hoadley, ed., 1895).

[45] *Id. See also* section on "The Founders' Theory of 'Fiduciary Government'". *See also* Theodore Fosters' Minutes of the Convention Held at South Kingston, Rhode Island, in March, 1790 at 78 (Robert C. Cotner & Verner W. Crane eds., 1929) (1970 reprint) (quoting Federalist delegate Henry Marchant as stating at the first sitting of the Rhode Island ratifying convention, "If we look into the Act by which we met we shall find why & how we met here. We have no Legislative Power. Have no other Powers than as Trustees for the Busin[ess]").

[46] *See, e.g.*, the instructions to the Rhode Island delegate to the 1780 Philadelphia convention, reproduced in The Public Records of the State of Connecticut - From May, 1778, to April, 1780, Inclusive 584 (Charles J. Hoadley, ed., 1895).

[47] *See,* The Public Records of the State of Connecticut - From October, 1776, to February, 1778, Inclusive 589 (Charles J. Hoadley, ed., 1894) (reporting on Providence Convention adopting a convention rule and electing its own president and clerk); id. at 611 (reporting New Haven convention adopting a "one state, one vote" rule) and The Public Records of the State of Connecticut - From May, 1778, to April, 1780, Inclusive 577 (Charles J. Hoadley, ed., 1895) (reporting the 1780 Philadelphia as adopting a rule and electing its own president and secretary).

[48] *Proceedings of Commissioners to Remedy Defects of the Federal Government* (Annapolis, Sep. 11 , 1786), available at http://avalon.law.yale.edu/18th_century/annapoli.asp. Because only five states were present, the delegates voted not to proceed with their charge and suggested to Congress that it call a convention with a broader charge. Cf. Harmon, *supra* note 12 (pointing out that the Annapolis Convention was limited in nature).

[49] CAPLAN, *supra* note 4, at 23. On this usage, see also *id*. at xx-xxi (explaining usage), 20 (quoting Hamilton).

[50] PA. CONST. (1776), § 47:

> 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.

See also VT. CONST. (1786), art. XL (similar language) and MASS. CONST. (1980), Part II, Chapter 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 [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. . . .

[51] There was a close similarity in language between the Georgia instrument and the Committee of Detail's initial draft of the U.S. Constitution. Caplan, *supra* note 4, at 95.

[52] GA. CONST. (1777), art. LXIII. The Georgia procedure may have been inspired by the "circular letters" of the Revolutionary era committees of correspondence, used to coordinate strategies among different communities and locations. Caplan, *supra* note 4, at 99.

[53] *E.g.,* Voegler, *supra* note 13, at 393.

[54] See discussion *supra* "The Founders' Theory of 'Fiduciary Government.'"

[55] 23 JCC 73 (Feb. 21, 1787).

[56] *Accord*: CAPLAN, *supra* note 4, at 97. *See also* THE FEDERALIST NO. 40 (Madison); *id.* NO. 78 (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.").

[57] 1 FARRAND'S RECORDS at 43.

[58] 3 *id*. at 579-80.

[59] The wording of each commission varied somewhat, with some phrases repeating themselves. The relevant wording of each of these 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" 3 FARRAND'S RECORDS 585 (italics added).

Delaware: "deliberating on, and discussing, such Alterations and further Provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union." 3 *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.

Maryland: "considering such Alterations and further Provisions as may be necessary to render the Foederal 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.

North Carolina: "for the purpose of revising the Foederal 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.

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 foederal Constitution fully adequate to the exigencies of the Union"). *Id.* at 565-56.

South Carolina: "devising and discussing all such Alterations, Clauses, Articles and Provisions, as may be thought necessary to render the Foederal 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 Foederal Constitution adequate to the Exigencies of the Union." *Id.* at 560.

[60] For example (and these are only examples), 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" while the political definitions in the 1789 edition of Thomas Sheridan's dictionary were almost identical.

[61] *E.g.*, DEL. CONST. (1776) ("Constitution, or System of Government"); MD. CONST. 1776 ("Constitution and Form of Government "); MASS. CONST. (1780) ("declaration of rights and frame of government as the constitution"); VA CONST. (1776) ("Constitution or Form of Government").

[62] Gerry usually supported state over federal prerogatives at the convention.

[63] 3 FARRAND 574-75.

[64] U.S. CONST. art. VII.

[65] 1 FARRAND'S RECORDS 253. Wilson's use of "proposed" here means "recommend." This should not be confused with the technical term employed in Article V. *See* discussions *infra* "May the Application Limit the Convention Agenda?," "The Role of the Convention for Proposing Amendments," and "The Role of Congress after the Convention Adjourns."

[66] 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. 2 FARRAND'S RECORDS 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).

[67] James Madison to George Lee Turberville, Nov. 2, 1788, 11 THE PAPERS OF JAMES MADISON 330-31 (Robert A. Rutland & Charles F. Hobson, eds. 1977), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=03/mjm03.db&recNum=773&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm023394))).

[68] *But see* Harmon, *supra* note 12, at 399.

[69] 2 FARRAND'S RECORDS 148 (Randolph 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>).

[70] *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.").

[71] *Id.* at 630:

> 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.]

[72] *Id.* at 557-58 (Madison, Sept. 10):

> 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–

[73] *Id.* at 558-59:

> On the motion of Mr. Gerry to reconsider
> N. H. divd. Mas. ay-- Ct. ay. N. J-- no. Pa ay. Del. ay. Md. ay. Va. ay. N-- C. ay. S. C. ay. Geo. ay. [Ayes -- 9; noes -- 1; divided -- 1.]
> ****
> Mr. Sherman moved to add to the article "or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States"
> Mr. Gerry 2ded. the motion
> Mr. Wilson moved to insert "two thirds of" before the words "several States" -- on which amendment to the motion of Mr. Sherman
> N. H. ay. Mas. <no> Ct. no. N. J. <no> Pa. ay-- Del-- ay Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes -- 5; noes -- 6.]
> Mr. Wilson then moved to insert "three fourths of" before "the several Sts" which was agreed to nem: con:

[74] *Id.* at 559:

> Mr. Madison moved to postpone the consideration of the amended proposition in order to take up the following,
> "The Legislature of the U-- S-- whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S:"
> Mr. Hamilton 2ded. the motion.

* * * *

> On the question On the proposition of Mr. Madison & Mr. Hamilton as amended
> N. H. divd. Mas. ay. Ct. ay. N. J. ay. Pa. ay. Del. no. Md. ay. Va ay. N. C. ay S. C. ay. Geo. ay. [Ayes -- 9; noes -- 1; divided -- 1.]

[75] 3 ELLIOT'S DEBATES 234.

[76] *Id.* at 102. Nicholas was referring specifically to state ratifying conventions, but the same principle governs conventions for proposing amendments.

[77] 4 *id.* at 177 (quoting Iredell at the North Carolina ratifying convention).

[78] Diamond, *supra* note 15, at 137.

[79] ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763).

[80] *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed., 1786); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (both unpaginated).

[81] NATHANIEL BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1783) (unpaginated).

[82] CAPLAN, *supra* note 4, at 104.

[83] *Id.* The Constitution also assigned another task to state legislatures, independent of any requirement for signature or veto: election of U.S. Senators.

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

the Senate). One must distinguish those federal functions from the Constitution's references to the role of the state "legislatures" role in ordinary law-making, as in the Times, Places and Manner Clause. *Id*., art. I, §4, cl. 1.

[85] CAPLAN, *supra* note 4, at 104-05; 1 ANNALS CONG. 29-30 (reproducing New York's application).

[86] N.Y. CONST. (1777), art. III.

[87] 1 ANNALS CONG. 29-30 (reproducing New York's application).

[88] MASS. CONST. (1780), ch. I, §I, art. II.

[89] VT. CONST. (1786), ch. II, §XVI.

[90] See discussion *supra* "The Ubiquity of Limited-Purpose Conventions in the Founding Era."

[91] Surprising because of previous writers' assurances that there was little historical evidence on the point. See, e.g., Black, *Amending the Constitution, supra* note 15, at 201-02 (claiming "there is no relevant history").

[92] 9 DOCUMENTARY HISTORY 655, 689.

[93] 2 FARRAND'S RECORDS 629-30. *Accord*: Harmon, *supra* note 12, at 398-401 (discussing this remark in wider context).

[94] Professor Walter E. Dellinger has argued that letters from Madison to Philip Mazzei and George Eve suggested the states could not limit the convention subject matter. Dellinger, *supra* note 15, at 1643 n.46. The letters, which appear at 11 THE PAPERS OF JAMES MADISON 388 & 404 (Robert A. Rutland & Charles F. Hobson, eds. 1977), actually say nothing about the issue; they merely express fear that delegates hostile to the Constitution might abuse the convention.

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. 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.

[95] Charles Jarvis at the Massachusetts ratifying convention 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 116-17 (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.

[96] George Washington to John Armstrong, April 25, 1788, *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.

[97] *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, reprinted in 20 DOCUMENTARY HISTORY 1139, 1142 (italics in original).

[98] An Old Whig I, Phila. INDEPENDENT GAZETTEER, 12 October, 1787, *reprinted in* 13 DOCUMENTARY HISTORY 376, 377.

[99] Abraham Yates, Jr., to William Smith, Sept. 22, 1788, *reprinted in* 23 DOCUMENTARY HISTORY 2474.

[100] Theodore Fosters' Minutes of the Convention Held at South Kingston, Rhode Island, in March, 1790 at 57 (Robert C. Cotner & Verner W. Crane eds., 1929) (1970 reprint).

[101] 3 ELLIOT'S DEBATES 101-02.

[102] *Id*. at 102.

[103] CAPLAN, *supra* note 4, at 139-40, reproduces three comments from the latter part of 1788 suggesting that it would be better for Congress than a convention for proposing amendments, because latter might run out of control. Two were anonymous pieces in Maryland newspapers appearing within three days of each other (by the same author, perhaps?), designed to combat Anti-Federalist demands for a second convention. The second convention the Anti-Federalists were advocating would have been plenipotentiary or, if held under Article V, unrestricted by subject-matter. The third item was a letter from Paris by Thomas Jefferson, referring specifically to New York's efforts, reflected in a circular letter from Governor George Clinton, for an unrestricted convention.

[104] 3 ELLIOT'S DEBATES 49. *See also* 3 Farrand's Records 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").

[105] Cassius VI, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* 5 DOCUMENTARY HISTORY 511, 512.

[106] 2 FARRAND'S RECORDS 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."). *See also id*. at 561 (in which he restates his proposal, but this time with a second plenipotentiary convention having "full power to settle the Constitution finally"), restated yet again, *id*. at 564 & 631.

[107] 2 ELLIOT'S DEBATES 124.

[108] 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 plenipotentiary 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 7, at 157-58; *see also* Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 Idaho L. Rev. 489, 523 (2003).

[109] Italics added. Despite the limited nature of Virginia's

application, it has been claimed 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 15, at 1623 (citing Black *Amending the Constitution*, *supra* note 15, at 202, who does not, however, fully support the statement). Black was in error: Two state applications issued during the 1830s, although broad, appear to have been limited rather than plenipotentiary. 26 House J. 219-20 (Jan. 21, 1833) (reproducing South Carolina application); 26 House J. 361-62 (Feb. 19, 1833) (reproducing Alabama application).

[110] E.g., Charles L. Black, *Amending the Constitution, supra* note 15, at 198.

[111] North Carolina and Rhode Island still had the Constitution under advisement, waiting to see if Congress would approve a bill of rights.

[112] Italics added.

[113] Italics added.

[114] Harmon, *supra* note 12, at 409.

[115] Natelson, Original Constitution, *supra* note 7, at 41-44.

[116] *Accord*: Caplan, *supra* note 4, at 94.

[117] 2 Farrand's Records 467-68 (Madison, Aug. 30):

> 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:

[118] 2 Farrand's Records 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.

[119] *Id.*

[120] *See* discussion *infra* "Congress's Role in Calling the Convention"

[121] It is "otherwise provided" in one respect: Congress has a free choice between two ratifying procedures.

[122] *Cf.* Van Sickle & Boughey, *supra* note 13, at 41 (Congress's role must, as much as possible, be merely mechanical or ministerial rather than discretionary).

[123] Van Alstyne, *supra* note 15, at 1303.

[124] Note, *Proposed Legislation, supra* note 14, at 1633.

[125] In addition to the material in the text, see Caplan, *supra* note 4, at 115-17 and 1 Annals of Congress 258-60 (May 5, 1789), available at http://memory.loc.gov/ammem/amlaw/lwaclink.html#anchor1 (debate in first session of First Congress acknowledging lack of congressional discretion once two-thirds of the states had applied).

[126] *E.g.*, "Massachusettensis," Mass. Gazette, Jan. 29, 1788, *reprinted in* 5 Documentary History 830, 831 ("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 293, 295 ("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.").

[127] Many writers have referenced this source, e.g., Ervin, *supra* note 11, at 885; Kauper, *supra* note 15, at 906, n.4; Noonan, *supra* note 15, 642 n.3; Rogers, Note, *The Other Way to Amend, supra* note 14, at 1014, but few have discussed any of the corroborating sources discussed in this Part.

> 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 the discretion of that body.

[128] 4 Elliot's Debates at 178 ("on such application, it is provided that Congress shall call such convention, so that they will have no option").

[129] "Fabius," Letter VIII, Pa. Mercury, Apr. 29, 1788, *reprinted in* 17 Documentary History 246, 250 ("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").

[130] 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.

James Madison to Thomas Mann Randolph, Jan. 19, 1789, 11 The Papers of James Madison 415, 417 (Robert A. Rutland & Charles F. Hobson, eds. 1977), *available at* http://memory.loc.gov/master/mss/mjm/03/0800/0892d.jpg. Madison already had made the same point in another letter: James Madison to George Eve, Jan. 2, 1789, Papers, *supra*, at 404, 405, *available at* http://memory.loc.gov/cgi-bin/

ampage?collId=mjm&fileName=03/mjm03.db&recNum=881&itemLink=D?mjm:1:./temp/~ammem_Augy::

[131] "A Friend of Society and Liberty," Pa. Gazette, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY 277, 283 (italics in original). See also Richard Law, *Speech in the Connecticut Convention,* Jan. 9, 1788, *reprinted in* 15 DOCUMENTARY HISTORY 312, 316 ("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 339, 340:

> 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 unanimously opposed to each and all of them.

HUDSON WEEKLY GAZETTE, June 17, 1788, *reprinted in* 21 DOCUMENTARY HISTORY 1200, 1201.

[132] *Cf.* CAPLAN, *supra* note 4, at 108-10 (explaining that the Founding-Era record suggests states have power to rescind their applications).

[133] *Response to An Old Whig*, No. 1, MASS. CENTINEL, October 31, 1787, *reprinted in* 4 DOCUMENTARY HISTORY 179.

> 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.

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

[134] See discussion *supra* "May the Application Limit the Convention Agenda?".

[135] CAPLAN, *supra* note 4, at 105-08.

[136] *Id.* at 113.

[137] Rogers, Note, *The Other Way to Amend, supra* note 14, at 1018-19. *Accord*: Rogers, Note, *Proposing Amendments, supra* note 14, at 1072; Kauper, *supra* note 15, at 911-12; Harmon, *supra* note 12, at 407 ("Unless there is general agreement among two-thirds of the legislatures over the nature of the change, or the area where change is needed . . . the amendment process cannot go forward via the convention route.").

[138] A reviewer of this paper expressed the fear that Congress, strongly motivated to avoid a convention, may abuse this discretion. State legislatures applying for a convention and sharing this concern may wish to consider inserting protective devices in their applications, preferably in consultation with other states.

[139] *See* discussion *supra* "Congress as a (Limited) Agent of the States."

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

[141] Accord: CAPLAN, *supra* note 4, at 134-37; ABA Study, *supra* note 13, at 9.

[142] The legislation is discussed in Ervin, *supra* note 11 and Rogers, Note, *Proposed Legislation*, *supra* note 14.

[143] Discussions of later bills are found in Diamond, *supra* note 15, at 113, 130-33, 137-38; Van Sickle & Boughey, *supra* note 13, at 39. ABA Study, *supra* note 13, *passim*, also endorsed congressional legislation of this type, although without much Founding-era justification.

[144] Ervin, *supra* note 11, at 893; Kauper, *supra* note 15, at 909. See also Rogers, Note, *Proposing Amendments, supra* note 14, at 1075-76 (supporting congressional legislation to that effect).

[145] *Cf.* Diamond, *supra* note 15, 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).

[146] The Ervin legislation included provisions for congressional governance. These were supported by some writers based on views unshaped by the action ratification record. *See, e.g.*, Kauper, *supra* note 15, at 909 (suggesting that Congress could require that delegates be elected by population). Based on a fuller review of the record, CAPLAN, *supra* note 4, reaches substantially the same conclusions as I do. *Id.* at 119-23.

[147] CAPLAN, *supra* note 4, at 119.

[148] *Id.* at 123.

[149] If a state opted for district elections for delegates, the Equal Protection Clause of the Fourteenth Amendment (which the U.S. Supreme has construed as containing a "one person one vote rule") would apply within the state. CAPLAN, *supra* note 4, 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 U.S. Senate; a closer one

is the ratification of constitutional amendments by three-quarters of the states, irrespective of population.

[150] THE FEDERALIST NO. 39.

[151] MASS. CENTINEL, Jan. 26, 1788, *reprinted in* 5 DOCUMENTARY HISTORY 805 ("As this is a republican Constitution, the people can make alterations, and additions, whenever a majority of them please—and the experience of a few years, will no doubt point out the propriety of making some.").

[152] U.S. CONST., art. I, §2, cl. 3.

[153] Kauper, *supra* note 15, at 914. According to U.S. Census Bureau 2006 population estimates, if *all* the twelve largest states opposed ratification and all the rest ratified, then the ratifying states would contain only a little more than forty percent of the American people. This scenario, however, would require unanimity among the twelve largest states—which are very disparate from each other politically: They include, for example, Massachusetts and Texas, New York and North Carolina, Michigan and Georgia. It *also* would require unanimity among the thirty-eight smaller states, which include such disparate pairs as Hawaii and Wyoming, and Vermont and Colorado.

[154] Harmon, *supra* note 12, at 410.

[155] Accord: CAPLAN, *supra* note 4, at 107.

[156] James Madison to Philip Mazzei, Dec. 10, 1988, 11 THE PAPERS OF JAMES MADISON 388, 389 (Robert A. Rutland & Charles F. Hobson, eds. 1977).

[157] "An Old Whig," Letter II, Oct. 12, 1787, reprinted in 13 DOCUMENTARY HISTORY 376, 377.

[158] *See* discussion *supra* "May the Application Limit the Convention Agenda?"

[159] During the ratification fight, only one Anti-Federalist seems to have 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 678, 682; An Old Whig, Letter VIII, Phila. Independent Gazetteer, Feb. 6, 1788, *reprinted in* 16 DOCUMENTARY HISTORY 52, 53 ("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").

[160] 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. 2 Farrand's Records 630-31:

> Mr 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 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.]

[161] CAPLAN, *supra* note 4, at 147, 157. *See also id*. at 150 (providing that states can ratify only a properly-proposed amendment and a court could invalidate one not properly proposed).

[162] *See* discussion *supra* "The Founders' Theory of 'Fiduciary Government.'"

[163] One might argue that if all fifty states approved an unauthorized proposal, it would become part of the Constitution, at least by the agency rules of ratification.

[164] *Cf.* CAPLAN, *supra* note 4, at 161-62 ("The more obscure the process, the easier it is for Congress to discourage pressure by rejecting applications on technical grounds").

[165] *See, e.g.*, The Republican Federalist IV, MASS. CENTINEL, Jan. 12, 1788, 5 DOCUMENTARY HISTORY 698, 702:

> But supposing a Convention should be called, what are we to expect from it, after having ratified the proceedings of the late federal Convention? They will be called to make "amendments," an indefinite term, that may be made to signify any thing. Should Judge M'Kean, be of the new Convention, perhaps he will think a system of despotism, an amendment to the present plan, and should the next change be only to a monarchial government, the people may think themselves very happy, for bad as the new system is, it is the best they will ever have should they now adopt it. If therefore, it is the intention of the Convention of this State to preserve republican principles in the federal government, they must accomplish it before, for they never can expect to effect it after a ratification of the new system.

(Italics in original).

See also Silas Lee to George Thatcher, Feb. 14, 1788, *reprinted in* 7 DOCUMENTARY HISTORY 1699 & 16 id. at 117 ("I suppose you must mean, their commission impowers them only to amend This I have ever understood was the fact in the late federal convention").

At least one Anti-Federalist writer suggested that Congress would have the same power to unilaterally amend. "A Customer," N.Y.J., Nov. 23 1787, *reprinted in* 19 *id*. 293, 295 ("If, therefore, Congress shall think amendments necessary to be made, they will make them, and they will not think it necessary to propose them to any body of men whatever.").

[166] *E.g.*, 3 ELLIOT'S DEBATES 88 (James Madison); "Cassius," Letter VI, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* 5 DOCUMENTARY HISTORY 511, 512 ("The constitution expressly says, that any alteration in the constitution must be ratified by three fourths of the states."); "A Friend of Society and Liberty," PA. GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY 277, 283 ("all amendments proposed by such convention, are to be valid when approved by the conventions or legislatures of three fourths of the states.").

[167] *E.g.*, Patrick Henry conceded that "it appears that three fourths of the states must ultimately agree to any amendments that may be necessary." 3 ELLIOT'S DEBATES 49.

[168] Ervin, *supra* note 11, at 884.

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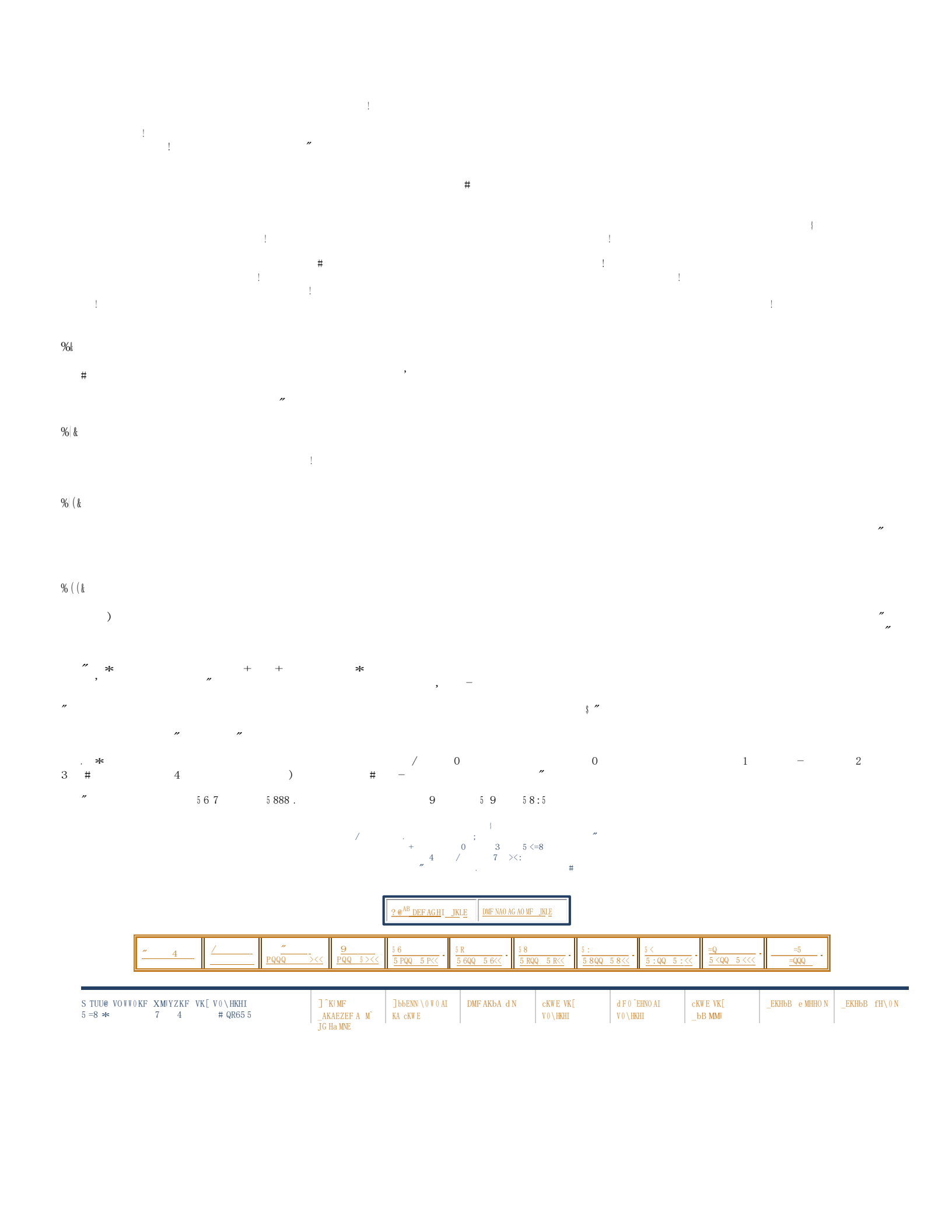

1. Virginia

Act Authorizing the Election of Delegates, 23 November 1786

An ACT *for appointing* DEPUTIES *from this Commonwealth to a* CONVENTION *proposed to be held in the City of* Philadelphia *in* May *next, for the purpose of revising the* FEDERAL CONSTITUTION.

Section I. 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 Commercial Interests of the United States, have represented the necessity of extending the revision of the Federal System to all its 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 seems preferable to a discussion of the subject in Congress, where it might be too much interrupted by the ordinary business before them, and where it would besides be deprived of the valuable counsels of sundry individuals, who are disqualified by the Constitution or Laws of particular States, or restrained by peculiar circumstances from a seat in that Assembly: And whereas the General Assembly of this Commonwealth, taking into view the actual situation of the Confederacy, as well as reflecting on the alarming representations made from time to time by the United States in Congress, particularly in their Act of the fifteenth day of February last,2 can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question, whether they will by wise and magnanimous efforts reap the just fruits of that Independence, which they have so gloriously acquired, and of that Union which they have cemented with so much of their common blood; or whether by giving way to unmanly jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared for them by the Revolution, and furnish to its enemies an eventual triumph over those by whose virtue and valour it has been accomplished: And whereas the same noble and extended policy, and the same fraternal and affectionate sentiments, which originally determined the Citizens of this Commonwealth to unite with their brethren of the other States in establishing a Federal Government, cannot but be felt with equal force now, as motives to lay aside every inferior consideration, and to concur in such further concessions and provisions, as may be necessary to secure the great objects for which that Government was instituted, and to render the United States as happy in peace, as they have been glorious in war:

Sect. II. *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 authorised 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 further provisions, as may be necessary to render the Federal 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.

Sect. III. *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 authorised 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.

Resolution Authorizing and Empowering the Delegates, 24 November 1786

Resolved, That the Honorable David Brearley, William C. Houston, William Paterson and John Neilson, esquires, commissioners appointed on the part of this state, or any three of them, be, and they hereby are authorized and empowered 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 Pennsylvania, 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 further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN---01---01---02---0006---0002---0002 [accessed 11 May 2011]
Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Act Electing and Empowering Delegates, 30 December 1786

An ACT *appointing Deputies to the Convention, intended to be held in the City of* Philadelphia, *for the purpose of revising the Foederal Constitution.*

Sect. I. Whereas the General Assembly of this Commonwealth, taking into their serious consideration the representations heretofore made to the Legislatures of the several States in the Union, by the United States in Congress assembled; and also weighing the difficulties under which the Confoederated States now labour, are fully convinced of the necessity of revising the Foederal Constitution, for the purpose of making such alterations and amendments as the exigencies of our public affairs require: *And whereas* the Legislature of the state of Virginia have already passed an act of that Commonwealth, impowering certain commissioners to meet at the city of Philadelphia, in May next, a convention of commissioners, or deputies, from the different states; and the Legislature of this state are fully sensible of the important advantages which may be derived to the United States, and every of them, from co---operating with the commonwealth of Virginia, and the other states of the confederation, in the said design.

Sect. II. *Be it enacted, and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania in General Assembly met, and by the authority of the same*, That Thomas Mifflin, Robert Morris, George Clymer, Jared Ingersoll, Thomas Fitzsimons, James Wilson and Governeur Morris, Esquires, are hereby appointed deputies from this state to meet in the convention of the deputies of the respective states of North---America, to be held at the city of Philadelphia, on the second day of the month of May next. And the said Thomas Mifflin, Robert Morris, George Clymer, Jared Ingersoll, Thomas Fitzsimons, James Wilson and Governeur Morris, Esquires, or any four of them are hereby constituted and appointed deputies from this state, with powers to meet such deputies as may be appointed and authorised 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 constitution fully adequate to the exigencies of the Union; and in reporting such act or acts for that purpose, to the United States in Congress assembled, as when agreed to by them, and duly confirmed by the several states, will effectually provide for the same.

Sect. 3. *And be it further enacted by the authority aforesaid*, That in case any of the said deputies, hereby nominated, shall happen to die, or to resign his or their said appointment or appointments, the Supreme Executive Council shall be and hereby are empowered and required to nominate and appoint other person or persons in lieu of him or them so deceased, or who has or have so resigned; which person or persons, from and after such nomination and appointment, shall be, and hereby are declared to be vested with the same powers respectively, as any of the deputies nominated and appointed by this act, is vested with by the same. *Provided always*, that the Council are not hereby authorised, nor shall they make any such nomination or appointment, except in vacation, and during the recess of the General Assembly of this state.

Signed by Order of the House,

THOMAS MIFFLIN, Speaker:

Enacted into a Law at Philadelphia, *on* Saturday, December, *the thirtieth, in the year of our Lord, one thousand seven hundred and eighty six*.
PETER ZACHARY LLOYD, Clerk of the General Assembly.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN---01---01---02---0006---0004---0001 [accessed 11 May 2011]
Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Act Authorizing the Election of Delegates, 6 January 1787

An Act *for appointing Deputies from this state, to a convention proposed to be held in the city of Philadelphia in May next, for the purpose of revising the foederal constitution.*

Whereas in the formation of the foederal compact which frames the bond of union of the American states, it was not possible in the infant state of our republics to devise a system which in the course of time and experience would not manifest imperfections that it would be necessary to reform. And whereas the limited powers which by the articles of confederation are vested in the Congress of the United States, have been found far inadequate to the enlarged purposes which they were intended to produce. And whereas Congress hath by repeated and most urgent representations, endeavoured to awaken this and the other states of the union, to a sense of the truly critical and alarming situation into which they must be unavoidably cast, unless measures are forthwith taken to enlarge the powers of Congress, that they may thereby be enabled to avert the dangers which threaten our existence as a free and independent people. And whereas this state hath been ever desirous to act upon the enlarged system of the general good of the United States, without bounding its views to the narrow and selfish object of partial convenience, and has been at all times ready to make every concession to the safety and happiness of the whole, which justice and sound policy could vindicate:

I. *Be it therefore enacted by the General Assembly of the state of* North---Carolina, *and by the authority of the same*, That five Commissioners be appointed by joint ballot of both Houses of Assembly, who, or any three of them, are hereby authorised as Deputies from this state, to meet at Philadelphia on the first day of May next, then and there to meet and confer with such Deputies as may be appointed by the other states for similar purposes, and with them to discuss and decide upon the most effectual means to remove the defects of our foederal union, and to procure the enlarged purposes which it was intended to effect, and that they report such an act to the General Assembly of this state, as when agreed to by them, will effectually provide for the same.

II. *And be it further enacted*, That in case of the death or resignation of any of the said Deputies, or of their declining their appointments, his Excellency the Governor for the time being, is hereby authorised to supply such vacancies, and the Governor is required to transmit forthwith a copy of this act to the United States in Congress assembled, and to the executives of each of the states in the union.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
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Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Act Electing and Empowering Delegates, 3 February 1787

An ACT *appointing Deputies from this State to the Convention, proposed to be held in the City of Philadelphia, for the Purpose of revising the Foederal Constitution.*

Whereas the General Assembly of this State are fully convinced of the Necessity of revising the Foederal Constitution, and adding thereto such further Provisions as may render the same more adequate to the Exigencies of the Union; and whereas the Legislature of *Virginia* have already passed an Act of that Commonwealth, appointing and authorizing certain Commissioners to meet, at the City of Philadelphia, in *May* next, a Convention of Commissioners or Deputies from the different States: And this State being willing and desirous of co---operating with the Commonwealth of *Virginia*, and the other States in the Confederation, in so useful a Design;

Sect. 1. BE IT THEREFORE ENACTED by the General Assembly of *Delaware*, That *George Read, Gunning Bedford, John Dickinson, Richard Bassett*, and *Jacob Broom*, Esquires, are hereby appointed Deputies from this State to meet in the Convention of the Deputies of other States, to be held at the City of *Philadelphia* on the Second Day of *May* next. And the said *George Read, Gunning Bedford, John Dickinson, Richard Bassett*, and *Jacob Broom*, Esquires, or any Three of them, are hereby constituted and appointed Deputies from this State, with Powers 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, such Alterations and further Provisions, as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union; and in reporting such Act or Acts for that Purpose to the United States in Congress assembled, as when agreed to by them, and duly confirmed by the several States, may effectually provide for the same: So always and provided, that such Alterations, or further Provisions, or any of them, do not extend to that Part of the Fifth Article of the Confederation of the said States, finally ratified on the first Day of *March*, in the Year One Thousand Seven Hundred and Eighty---one, which declares, that "in determining Questions in the United States in Congress assembled, each State shall have one Vote."

Sect. 2. AND BE IT ENACTED, That in case any of the said Deputies, hereby nominated, shall happen to die, or to resign his or their Appointment, the President or Commander in Chief, with the Advice of the Privy---Council, in the Recess of the General Assembly, is hereby authorized to supply such Vacancies.

Signed, by Order of the House of Assembly,

JOHN COOK, Speaker.

Signed, by Order of the Council,

GEORGE CRAGHEAD, Speaker.

Passed, at *Dover, February* 3, 1787.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.

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Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Act Electing and Empowering Delegates, 10 February 1787

AN ORDINANCE For the Appointment of Deputies from this State for the Purpose of revising the Federal Constitution.

Be it ordained by the Representatives of the Freemen of the State of Georgia, in General Assembly met, and by the authority of the same, That William Few, Abraham Baldwin, William Pierce, George Walton, William Houstoun, and Nathaniel Pendleton, Esquires, be, and they are hereby appointed commissioners, who, or any two or more of them, are hereby authorised as deputies from this state to meet such deputies as may be appointed and authorised by other states, to assemble in convention at Philadelphia, and to join with them in 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, and in reporting such an Act for that purpose to the United States in Congress assembled, as when agreed to by them, and duly confirmed by the several states, will effectually provide for the same. In case of the death of any of the said deputies, or of their declining their appointments, the Executive are hereby authorised to supply such vacancies.

By Order of the House,

WILLIAM GIBBONS, *Speaker*.

Augusta, February 10, 1787.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
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Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Confederation Congress Recommendatory Resolution After Six StatesHad Already Passed Resolutions

CONFEDERATION CONGRESS CALLS THE CONSTITUTIONAL CONVENTION, 21 February 1787

Congress assembled as before.

The report of a grand committee consisting of Mr. [Nathan] Dane, Mr. [James M.] Varnum, Mr. S[tephen] M[ix] Mitchell, Mr. [Melancton] Smith, Mr. [Lambert] Cadwallader, Mr. [William] Irwine, Mr. N[athaniel] Mitchell, Mr. [Uriah] Forrest, Mr. [William] Grayson, Mr. [William] Blount, Mr. [John] Bull, and Mr. [William] Few to whom was referred a letter of 14 September 1786 from J[ohn] Dickinson written at the request of commissioners from the states of Virginia, Delaware, Pennsylvania, New Jersey, and New York assembled at the city of Annapolis together with a copy of the report of the said commissioners to the legislatures of the states by whom they were appointed, being an order of the day was called up and which is contained in the following resolution, viz:

"Congress having had under consideration the letter of John Dickinson, Esquire, chairman of the commissioners who assembled at Annapolis during the last year, also the proceedings of the said commissioners and entirely coinciding with them as to the inefficiency of the federal government and the necessity of devising such farther provisions as shall render the same adequate to the exigencies of the Union do strongly recommend to the different legislatures to send forward delegates to meet the proposed convention on the second Monday in May next at the city of Philadelphia."

The delegates for the state of New York thereupon laid before Congress instructions which they had received from their constituents and in pursuance of the said instructions moved to postpone the farther consideration of the report in order to take up the following proposition, to wit:

"That it be recommended to the states composing the Union that a convention of representatives from the said states respectively be held at_____on_____for the purpose of revising the Articles of Confederation and perpetual Union between the United States of America and reporting to the United States in Congress assembled and to the states respectively such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union."

On the question to postpone for the purpose above mentioned the yeas and nays being required by the delegates for New York.

So the question was lost.

A motion was then made by the delegates for Massachusetts to postpone the farther consideration of the report in order to take into consideration a motion which they read in their place. This being agreed to, the motion of the delegates for Massachusetts was taken up and, being amended, was agreed to as follows:

"Whereas there is provision in the Articles of Confederation and perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several states; and whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the states and particularly the state of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probable mean of establishing in these states a firm national government.

"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."

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN-01-01-02-0005-0004 [accessed 11 May 2011]
Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

JAMES MADISON NOTES OF DEBATES IN CONGRESS, 21 February 1787

The report of the Convention at Annapolis in September 1786 had been long under consideration of a committee of the Congress for the last year; and was referred over to a grand committee of the present year. The latter committee after considerable difficulty and discussion, agreed on a report by a majority of *one* only (see the Journals) which was made a few days ago to Congress and set down as the order for this day. The report coincided with the opinion held at Annapolis that the Confederation needed amendments and that the proposed convention was the most eligible means of effecting them. The objections which seemed to prevail against the recommendation of the convention by Congress, were with some: (1) that it tended to weaken the federal authority by lending its sanction to an extra---constitutional mode of proceeding—with others (2) that the interposition of Congress would be considered by the jealous as betraying an ambitious wish to get power into their hands by any plan whatever that might present itself. Subsequent to the report, the delegates from New York received instructions from its legislature to move in Congress for a recommendation of a convention; and those from Massachusetts had, it appeared, received information which led them to suppose it was becoming the disposition of the legislature of that state to send deputies to the proposed convention in case Congress should give their sanction to it. There was reason to believe however from the language of the instruction from New York that her object was to obtain a new convention, under the sanction of Congress rather than to accede to the one on foot, or perhaps by dividing the plans of the states in their appointments to frustrate all of them.

The latter suspicion is in some degree countenanced by their refusal of the Impost a few days before the instruction passed, and by their other marks of an unfederal disposition. The delegates from New York in consequence of their instructions made the motion on the Journal to postpone the report of the committee in order to substitute their own proposition. Those who voted against it considered it as liable to the objection abovementioned. Some who voted for it, particularly Mr. Madison, considered it susceptible of amendment when brought before Congress, and that if Congress interposed in the matter at all it would be well for them to do it at the instance of a state, rather than spontaneously. This motion being lost, Mr. [Nathan] Dane from Massachusetts, who was at bottom unfriendly to the plan of a convention, and had dissuaded his state from coming into it, brought forward a proposition, in a different form, but liable to the same objection with that from New York. After some little discussions, it was agreed on all sides, except by Connecticut who opposed the measure in every form, that the resolution should pass as it stands on the Journal, sanctioning the proceedings and appointments already made by the states as well as recommending farther appointments from other states, but in such terms as do not point directly to the former appointments.

It appeared from the debates and still more from the conversation among the members that many of them considered this resolution as a deadly blow to the existing Confederation. Doctor [William Samuel] Johnson, who voted against it, particularly declared himself to that effect. Others viewed it in the same light, but were pleased with it as the harbinger of a better Confederation.

The reserve of many of the members made it difficult to decide their real wishes and expectations from the present crisis of our affairs. All agreed and owned that the federal government in its existing shape was inefficient and could not last long. The members from the Southern and Middle states seemed generally anxious for some republican organization of the system which would preserve the Union and give due energy to the government of it. Mr. [William] Bingham alone avowed his wishes that the Confederacy might be divided into several distinct confederacies, its great extent and various interests being incompatible with a single government. The Eastern members were suspected by some of leaning towards some antirepublican establishment (the effect of their late confusions), or of being less desirous or hopeful of preserving the unity of the empire. For the first time the idea of separate confederacies had got into the newspapers. It appeared today under the Boston head.Whatever the views of leading men in the Eastern States may be, it would seem that the great body of the people, particularly in Connecticut, are equally indisposed either to dissolve or divide the Confederacy or to submit to any anti---republican innovations.

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Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Assembly and Senate Authorize Election of Delegates, 26–28 February 1787

THE ASSEMBLY, 26 February

Resolved (if the honorable the Senate concur herein), That five delegates be appointed on the part of this state, to meet such delegates as may be appointed on the part of the other states respectively, on the second Monday in May next, at Philadelphia, for the sole and express purpose of revising the Articles of Confederation and reporting to Congress, and to the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the several states, render the federal constitution adequate to the exigencies of government and the preservation of the Union; and that in case of such concurrence, the two houses of the legislature will meet, on Thursday next, at such place as the honorable the Senate shall think proper, for the purpose of electing the said delegates, by joint ballot.

Ordered, That Mr. John Livingston deliver a copy of the last preceding resolution to the honorable the Senate.

THE SENATE, 26 February

Ordered, That the consideration of the said resolution be postponed until tomorrow.

THE SENATE, 27 February

Resolved, That the Senate do not concur with the honorable the Assembly in their said resolution.

Ordered, That Mr. Williams deliver a copy of the preceding resolution of nonconcurrence to the honorable the Assembly.

THE SENATE, 28 February

[A resolution was offered which copied the House resolution of 26 February, except for two changes: (1) the election was to be held on the following Tuesday instead of Thursday and (2) the delegates were to be elected in the manner provided by the state constitution [210]for the election of delegates to Congress; that is by the two houses balloting separately rather than jointly.]

Which resolution having been read, Mr. Haring moved that instead of *five*, that *three* delegates be appointed for the purposes set forth in the said resolution. Debates arose, and the question being put thereon, it was carried in the affirmative, in manner following, viz.:

For the affirmative. Mr. Yates, Mr. Tredwell, Mr. Haring, Mr. Ward, Mr. Russell, Mr. Hopkins, Mr. Swartwout, Mr. Hathorn, Mr. Humfrey, Mr. Parks, Mr. Williams.

For the negative. Mr. Stoutenburgh, Mr. Vanderbilt, Mr. Townsend, Mr. Morris, Mr. Peter Schuyler, Mr. L'Hommedieu, Mr. Philip Schuyler.

Mr. Haring then moved to expunge, after the words "Tuesday next" to the end of the resolution, and to substitute the following, viz.: "Meet at such place as the honorable the Assembly shall think proper for the purpose of electing the said delegates by joint ballot." Debates arose, and the question being put thereon, it was carried in the negative, in manner following viz.:

For the negative. Mr. Stoutenburgh, Mr. Tredwell, Mr. Vanderbilt, Mr. Townsend, Mr. Morris, Mr. Peter Schuyler, Mr. Swartwout, Mr. L'Hommedieu, Mr. Humfrey, Mr. Parks, Mr. Williams, Mr. Philip Schuyler.

For the affirmative. Mr. Yates, Mr. Haring, Mr. Ward, Mr. Russell, Mr. Hopkins, Mr. Hathorn.

Mr. Yates then moved to insert in the said resolution, after the words "and provisions therein," the following, viz.: "not repugnant to or inconsistent with the constitution of this state." Debates arose, and the question being put thereon, it was carried in the negative, in manner following, viz.:

For the negative. Mr. Stoutenburgh, Mr. Tredwell, Mr. Vanderbilt, Mr. Townsend, Mr. Morris, Mr. Peter Schuyler, Mr. L'Hommedieu, Mr. Williams, Mr. Philip Schuyler.

For the affirmative. Mr. Yates, Mr. Haring, Mr. Ward, Mr. Russell, Mr. Hopkins, Mr. Swartwout, Mr. Hathorn, Mr. Humfrey, Mr. Parks.

The Senate being equally divided upon the question, His Honor the President [Pierre Van Cortlandt] voted in the negative. Thereupon,

Resolved (if the honorable the Assembly concur herein), That three delegates be appointed on the part of this state, to meet such delegates as may be appointed on the part of the other states respectively, on the second Monday in May next at Philadelphia for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and to the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the several states, render the federal constitution adequate to the exigencies of government and the preservation of the Union; and that in case of such concurrence the two houses of the legislature will on Tuesday next, proceed to nominate and appoint the said delegates in like manner as is directed by the constitution of this state, for nominating and appointing delegates to Congress.

Ordered, That Mr. Williams deliver a copy of the preceding resolution to the honorable the Assembly.

THE ASSEMBLY, 28 February

Resolved, That the House do concur with the honorable the Senate, in the said resolution.

Ordered, That Mr. Dongan deliver a copy of the last preceding resolution of concurrence, to the honorable the Senate.

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Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN---01---01---02---0006---0009---0001 [accessed 11 May 2011]
Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

House Resolution of 7 March Repealing the Resolution of 22 February 1787

Whereas on the 22d day of February 1787, it was, by the Legislature of this Commonwealth, Resolved, that five Commissioners be appointed by the General Assembly, who, or any three of whom, were empowered to meet such Commissioners as are or may be appointed by the Legislatures of the other States in the Union at Philadelphia on the second day of May next for purposes mentioned in said resolution—

Resolved, that the said resolve, & every part thereof be, & it is hereby repealed—

Resolved, that the Secretary be, & he is hereby directed not to publish or print this, or the first mentioned resolve, any resolve or order to the contrary notwithstanding—

House Substitute of 7 March for the Resolution of 22 February

Whereas Congress did on the 21st day of February 1787 Resolve, "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 to be held at Philadelphia, for the sole & express purpose of revising the articles of Confederation, and reporting to Congress & the several Legislatures, such alterations & provisions therein, as shall when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigences of Government; & the preservation of the Union"—

And Whereas the Legislature of this Commonwealth did on the third day of this present month elect the honorable Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong esquires, Delegates, or any three of them to attend and represent this Commonwealth at the aforesaid Convention, for the sole & express purpose mentioned in the aforerecited resolve of Congress—

Resolved that his excellency the Governour be, & he hereby is requested to grant to the said Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King & Caleb Strong esqrs a commission agreably to said resolution of Congress

Senate Amendment to the House Substitute, 9 March

And it is further Resolved, that the Said Delegates on the part of this Commonwealth be, and they are hereby instructed not to acceed to any alterations or additions that may be proposed to be made in the present Articles of Confederation, which may appear to them, not to consist with the true republican Spirit and Genius of the Said Confederation: and particularly that they by no means interfere with the fifth of the Said Articles which provides, "for the annual election of Delegates in Congress, with a power reserved to each State to recal its Delegates, or any of them within the Year & to send others in their stead for the remainder of the year—

And which also provides, that no person shall be capable of being a Delegate for more than three years in any term of six years, or being a Delegate shall be capable of holding any Office under the United States for which he or any other for his benefit, receives any salary, fees, or emolument of any kind"—

Ordered that the Secretary serve the aforenamed Delegates, severally, and such others as may hereafter be appointed in their stead with an attested copy of the last foregoing resolve—

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Original source: Constitutional Documents and Records, 1776–1787, Volume I: Constitutional Documents and Records, 1776–1787

Act Authorizing the Election of Delegates, 8 March 1787

AN ACT For appointing deputies from the state of South---Carolina to a convention of the united states of America, proposed to be held in the city of Philadelphia in the month of May. one thousand seven hundred and eighty---seven for the purpose of revising the foederal constitution.

WHEREAS the powers at present vested in the united states in congress assembled, by the articles of confederation and perpetual union of the said states, are found by experience greatly inadequate to the weighty purposes they were originally intended to answer, and it is become absolutely necessary to the welfare of the confederate states that other and more ample powers in certain cases should be vested in and exercised by the said united states in congress assembled, and also that the articles of confederation and perpetual union of the united states should be revised, in order to remedy defects, which at their original formation in the time of war and general tumult could not be foreseen nor sufficiently provided against: AND WHEREAS this state is and ever hath been ready and willing to co---operate with the other states in union, in devising and adopting such measures as will most effectually ensure the peace and general welfare of the confederacy:

Be it enacted by the honorable the senate and house of representatives now met and sitting in general assembly, and by the authority of the same, THAT five commissioners be forthwith appointed by joint ballot of the senate and house of representatives, who or any three or more of them, being first duly commissioned by his excellency the governor for the time being, under his hand and the great seal of the state, by virtue of this act. shall be and are hereby authorised as deputies from this state. to meet such deputies or commissioners as may be appointed and authorised by other of the united states, to assemble in convention at the city of Philadelphia in the month of May next after passing this act. or as soon thereafter as may be, and to join with such deputies or commissioners, they being duly authorised and impowered in devising and discussing all such alterations, clauses, articles and provisions as may be thought necessary to render the foederal constitution entirely adequate to the actual situation and future good government of the confederated states, and that the said deputies or commissioners, or a majority of those who shall be present, provided the state be not represented by less than two, do join in reporting such an act to the united states in congress assembled, as when approved and agreed to by them, and duly ratified and confirmed by the several states, will effectually provide for the exigencies of the union.

In the Senate house, the eighth day of March, in the year of Lord one thousand seven hundred and eighty---seven, and in the eleventh year of the independence of the united states of America.

JOHN LLOYD, President of the Senate.

JOHN JULIUS PRINGLE, Speaker of the house of representatives.

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Act Electing and Empowering Delegates, 17 May 1787

An Act for appointing Delegates to meet in a Convention of the States, to be held at the City of Philadelphia, on the 2d. Monday of May instant.

Whereas the Congress of the United States, by their Act of the 21st of February 1787, have recommended that on the 2d Monday of May instant, a Convention of Delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole & express Purpose of revising the Articles of Confederation.

Be it enacted by the Governor Council & Representatives in General Court assembled, and by Authority of the same—

That the Honble William S. Johnson, Roger Sherman & Oliver Ellsworth Esqrs be, and they hereby are, appointed Delegates to attend the sd Convention, and are requested to proceed to the City of Philadelphia for that Purpose, without Delay, and the said Delegates, and in Case of Sickness or Accident, such one or more of them, as shall actually attend the said Convention, is and are hereby authorized and impowered to represent this State therein, & to confer with such Delegates appointed by the several States, for the Purposes mentioned in the sd 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 foederal Constitution adequate to the Exigencies of Government, and the Preservation of the Union; and they are further directed, pursuant to the said Act of Congress, to report such Alterations and Provisions, as may be agreed to, by a Majority of the united States represented in Convention, to the Congress of the United States, and to the General Assembly of this State.

passd. in the upper House

Test. George Wyllys Secrety

Concurred, in the lower House

Test. Jed Huntington Clerk

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11. Maryland

Act Electing and Empowering Delegates, 26 May 1787

An ACT for the appointment of, and conferring powers in, deputies from this state to the federal convention.

Be it enacted, *by the general assembly of Maryland*, That the honourable James McHenry, Daniel of Saint Thomas Jenifer, Daniel Carroll, John Francis Mercer, and Luther Martin, Esquires, be appointed and authorised, on behalf of this state, to meet such deputies as may be appointed and authorised by any other of the United States to assemble in convention at Philadelphia, for the purpose of revising the federal system, and to join with them in considering such alterations, and further provisions, as may be necessary to render the federal constitution adequate to the exigencies of the union, and in reporting such an act for that purpose to the United States in congress assembled, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same; and the said deputies, or such of them as shall attend the said convention, shall have full power to represent this state for the purposes aforesaid; and the said deputies are hereby directed to report the proceedings of the said convention, and any act agreed to therein, to the next session of the general assembly of this state.

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Act Electing and Empowering Delegates, 27 June 1787

An Act for Appointing Deputies from This State to the Convention, Proposed to Be Holden in the City of Philadelphia in May 1787 for the Purpose of Revising the Federal Constitution

Whereas in the formation of the federal compact, which frames the bond of union of the amirican---states, it was not possible in the infant state of our republic to devise a system which in the course of time and experiance, would not manifest imperfections, that it would be necessary to reform.

And Whereas, the limited powers, which by the articles of confederation are vested in the Congress of the united states, have been found far inadequate to the enlarged purposes which they were intended to produce.

And whereas Congress hath, by repeated and most urgent representations, endeavoured to awaken this, and other states of the union, to a sense of the truly critical, and alarming situation, in which they may inevitably be involved, unless timely measures be taken to enlarge the powers of Congress, that they may thereby be enabled, to avert the dangers which threaten our existance, as a free and independant people. And whereas, this state hath been ever desireous to act upon the liberal system of the general good of the united states, without circumscribing its views to the narrow, and selfish objects, of partial convenience; and has been at all times ready to make every concession to the safety and happiness of the whole, which justice and sound policy could vindicate—

Be it therefore enacted by the Senate and House of Representatives in general court convened, that John Langdon, John Pickering, Nicholas Gilman, and Benjamin West Esqrs be, and hereby are, appointed Commissioners; they, or any two of them, are hereby authorized, and impowered, as Deputies from this State to meet at Philadelphia said Convention, or any other place to which the said Convention may be adjourned; for the purposes aforesaid, there to confer with such deputies, as are, or may be appointed by the other States for similar purposes; and with them to discuss and decide upon the most effectual means to remedy the defects of our federal union; and to procure, and secure, the enlarged purposes which it was intended to effect, and to report such an act, 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—

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