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**AMENDING THE CONSTITUTION  
BY CONVENTION:  
*A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN***

Written by Robert G. Natelson  
Senior Fellow

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# AMENDING THE CONSTITUTION BY CONVENTION: A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN

## EXECUTIVE SUMMARY

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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.

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## 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.

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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.<sup>2</sup>

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The Founders included the state-application-and-convention process because they recognized that Congress might become irresponsible or corrupt and refuse to propose needed changes—particularly if those changes might restrain the power of Congress.<sup>3</sup> 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.<sup>4</sup> 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,<sup>5</sup> 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.

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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.<sup>6</sup>

## SOME ESSENTIAL BACKGROUND

### TERMINOLOGY

This Issue Paper uses several specific terms to refer to groups of people.<sup>7</sup> 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 Framers, Ratifier, and a leading Federalist, while Elbridge Gerry was a Framers 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.<sup>8</sup>

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## 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.<sup>9</sup> 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."

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 he raise his authorized price. This is only a recommendation; it has no legal force of any kind.

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,

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as the one or the other Mode of Ratification may be proposed by the Congress. . . .<sup>10</sup>

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.

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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,<sup>11</sup> researchers for federal agencies,<sup>12</sup> and lawyers<sup>13</sup> and students<sup>14</sup> publishing in legal journals have composed essays and articles. Most of the authors, however, have been law professors.<sup>15</sup> There is also a good book on the subject, *Constitutional Brinkmanship*,<sup>16</sup> 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. With the notable exception of Mr. Caplan, most writers have made only very superficial use of this material.<sup>17</sup> 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.<sup>18</sup> Strong bias coupled with weak historical support<sup>19</sup> 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.

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## 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.<sup>20</sup> Congress received power to initiate amendments because the Framers believed that Congress's position would enable it readily to see defects in the system.<sup>21</sup> If Congress refused to adopt a needed amendment, however—particularly one to curb its own power<sup>22</sup>—the states could initiate it.<sup>23</sup> 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.”<sup>24</sup>

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

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of the government, if upon trial it should be found they had given too much.<sup>25</sup>

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

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will 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**.<sup>26</sup>

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.”<sup>27</sup>

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.<sup>28</sup>

## 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,<sup>29</sup> and that as such it would have limitless power to re-write the Constitution at will.<sup>30</sup> Some have even claimed that a Convention for proposing amendments could repeal the Bill of Rights, restore slavery, and work other fundamental changes.<sup>31</sup>

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

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century,<sup>32</sup> 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*<sup>33</sup>

defined a "convention" as—

1. The act of coming together; union; coalition
2. An assembly.
3. A contract; an agreement for a time.<sup>34</sup>

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.<sup>35</sup> 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."<sup>36</sup> Timothy Cunningham's 1783 *Law-Dictionary*<sup>37</sup> 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.<sup>38</sup> Similar definitions for both "convention" and "convention parliament" appeared in Giles Jacob's *New Law Dictionary*,<sup>39</sup> 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."<sup>40</sup>

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. 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.<sup>41</sup>

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,<sup>42</sup> replicating a common practice among sovereigns in international relations.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> They also were subject to instructions from the officials who sent them.<sup>46</sup> 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.

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These conventions elected their own officers, adopted their own rules, and seem to have decided matters by the principle of “one state, one vote.”<sup>47</sup>

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.”<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> The Georgia

Constitution of 1777 prescribed a procedure that may well have inspired the convention procedure in Article V:<sup>51</sup>

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.<sup>52</sup>

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.

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.<sup>53</sup>

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.<sup>54</sup> It

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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.<sup>55</sup>

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.

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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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

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.

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.”<sup>59</sup> According to usages of the time, the term “constitution” usually did not denote a particular document (such as the Articles), but rather a governmental structure as a whole.<sup>60</sup> Particular documents traditionally had not been called “constitutions,” but “instruments of government,” “frames of government,” or “forms of government.” (This explains why several of the early state constitutions described themselves in multiple terms.<sup>61</sup>) 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.<sup>62</sup> Two Massachusetts delegates, Rufus King and Nathaniel Gorham, and one New Yorker, Alexander

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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.”<sup>63</sup> 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

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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.<sup>64</sup> In fact, unlike a Convention for proposing amendments, the Philadelphia assembly was not even entitled to have

its decisions transmitted to the states or considered by them. James Wilson summed up the delegates’ position: “authorized to conclude nothing, but . . . at liberty to propose any thing.”<sup>65</sup>

#### **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,”<sup>66</sup> 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.”<sup>67</sup>

It seems to have escaped notice from almost everyone writing on this topic<sup>68</sup> 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<sup>69</sup> and the first draft of the eventual Constitution by that committee<sup>70</sup> 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.<sup>71</sup>

***It seems to have escaped notice from almost everyone writing on this topic<sup>68</sup> that the federal convention delegates actively considered including in the Constitution a provision for future plenipotentiary conventions—and specifically rejected that approach.***

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.<sup>72</sup> The other delegates agreed, considering first a requirement that any amendments the convention adopted be approved by two-thirds of the states, but later strengthening that requirement to three-quarters.<sup>73</sup> The final wording came primarily from the pen of James Madison.<sup>74</sup>

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.”<sup>75</sup> 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.”<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup>

## 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. . . .<sup>79</sup>

Other dictionary definitions of “application” and “apply” were not greatly different.<sup>80</sup> Nathaniel Bailey’s dictionary<sup>81</sup> 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.

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.<sup>82</sup> 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.”<sup>83</sup> 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.<sup>84</sup> Reflecting this understanding, the 1789 amendment applications from New York and Virginia both lacked the governor’s signature.<sup>85</sup>

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,<sup>86</sup> yet the council’s approval of the application seems not to have been necessary.<sup>87</sup> Furthermore, in Massachusetts, the governor acting alone enjoyed a qualified veto,<sup>88</sup> and in soon-to-be-admitted Vermont, the governor’s council had a suspensive veto.<sup>89</sup> If the Founders had wished to require assent by all legislative actors rather than merely the

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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.

As we have seen,<sup>90</sup> during the Founding Era most interstate or “federal” conventions were limited in subject matter, and states sending delegates to a convention 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<sup>91</sup> 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.”<sup>92</sup> 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.

**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

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not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.”<sup>93</sup> In other words, Madison referred to the states “appl[ying] for” amendments,” with either the convention or congress being “bound to propose” them.<sup>94</sup>

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.<sup>95</sup>

**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.”<sup>96</sup> When explaining that Congress could not block the state-application-and-convention procedure, the influential Federalist writer Tench Coxe did so in these words:

If two thirds of those legislatures require it, Congress **must** call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such proposed amendments, they become **an actual and binding part of the constitution**, without any possible interference of Congress.<sup>97</sup>

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. . . .”<sup>98</sup>

(“The amendments” here presumably means the amendments proposed in advance of the convention.) Another Anti-Federalist, Abraham Yates, Jr., wrote, “We now Cant get the Amendments unless 2/3 of the States first Agree to a Convention And as Many to Agree to the Amendments— And then 3/4 of the Several Legislatures to Confirm them:”<sup>99</sup>

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.”<sup>100</sup> 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:

**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.**

On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments, which shall be a part of the Constitution when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments.<sup>101</sup>

Of course, such a conclusion would be “natural” only if the convention was expected to stick to the agenda of the states that “apply for calling the convention.” 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.<sup>102</sup>

There seems to have been little dissent to the understanding that the applying states would fix the agenda.<sup>103</sup> The belief was so widespread it sometimes led to the assumption that the states, rather than the convention, would do the proposing. We have seen Tench Coxe suggest as much in the 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.”<sup>104</sup> A Federalist writing under the name of Cassius asserted that “the states may propose any alterations which they see fit, and that Congress shall take measures [i.e., call an amendments convention] for having them carried into effect.”<sup>105</sup>

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.<sup>106</sup> 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.”<sup>107</sup> Second, an Article V convention—or Congress, if it acted quickly enough (as it did)—would choose among the state suggestions,<sup>108</sup> 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.”<sup>109</sup> 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.

This historical evidence pretty well disproves the view of a few writers<sup>110</sup> 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.

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## 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

***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.***

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.

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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup>

Thus, the convention for proposing amendments is a creature—or, in the words of a former assistant U.S. Attorney-General, the "servant"<sup>114</sup>—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**.<sup>115</sup>

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**.<sup>116</sup> 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. The delegates altered this to allow only Congress to call an amendments convention.<sup>117</sup> George Mason then pointed out that if amendments were made necessary by Congress's own abuses, Congress might block them unless the Constitution contained a way to circumvent Congress.<sup>118</sup> Accordingly, "Mr. Govr. Morris & Mr. Gerry

***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.***

moved to amend the article so as to require a Convention on application of 2/3 of the Sts."<sup>119</sup> If the proper number of states applied, Congress had no choice in the matter; it was constrained to do their bidding.<sup>120</sup>

As an agent, Congress was expected to follow rules of fiduciary law, except as otherwise provided by the Constitution.<sup>121</sup> 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.”<sup>122</sup> 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.<sup>123</sup>

As the writer of a *Harvard Law Review* note observed, “any requirement imposed by Congress which is not necessary for Congress to bring a convention into existence or to choose the mode of ratification is outside Congress’ constitutional authority.”<sup>124</sup>

Copious evidence supports the conclusion that Congress may not refuse to call a convention for proposing amendments upon receiving the required number of

applications.<sup>125</sup> When some Anti-Federalists suggested that Congress would not be required to call a convention,<sup>126</sup> Hamilton, writing in *Federalist* No. 85 affirmed that the call would be mandatory.<sup>127</sup> Numerous other Federalists agreed, among them James Iredell,<sup>128</sup> John Dickinson,<sup>129</sup> James Madison,<sup>130</sup> 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.<sup>131</sup>

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.<sup>132</sup> During the constitutional debates, participants frequently noted with approval the Constitution’s lack of time requirements for the amendment process.<sup>133</sup>

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:

***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.***

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<sup>134</sup> 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.<sup>135</sup>

Congress may not expand the scope of the convention beyond that subject-matter.<sup>136</sup> 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.<sup>137</sup>

Of course, this is one area where "ministerial" duties necessarily require a certain amount of discretion, since Congress may have to decide whether differently worded applications actually address the same subject.<sup>138</sup>

## **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.<sup>139</sup> It also is consistent with representations made by Federalist Tench Coxe during the ratification battle,<sup>140</sup> 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.<sup>141</sup>

## **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<sup>142</sup>—the first of several congressional bills on the matter.<sup>143</sup> Under Ervin's revised proposal, delegates would have been selected among the states in proportion to their strength in Congress.<sup>144</sup>

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.<sup>145</sup> 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.

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.<sup>146</sup> Nor may Congress establish rules under which

***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.<sup>146</sup> Nor may Congress establish rules under which the convention is to operate.***

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*

*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.*<sup>149</sup>

conventions, representation generally was apportioned in some way related to population,<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup> 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.<sup>150</sup>

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.<sup>151</sup> 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.<sup>152</sup>

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.<sup>153</sup> Political realities are such that no amendment can be ratified without wide popular support. The "national" interest in the amendment process is thereby protected.

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## 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."<sup>154</sup>

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.<sup>155</sup> 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

***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.***

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.<sup>156</sup> 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. . . .”<sup>157</sup>

As noted earlier,<sup>158</sup> 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.<sup>159</sup> 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<sup>160</sup> 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.<sup>161</sup> 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 balanced 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.<sup>162</sup> 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

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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.<sup>163</sup>

## 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 within 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*

***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.***

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.

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.<sup>164</sup> This Issue Paper has resolved some of those doubts.

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.<sup>165</sup> The claim was rejected then, not only by supporters of the Constitution,<sup>166</sup> but by the Anti-Federalist leadership itself.<sup>167</sup>

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,

***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.***

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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.<sup>168</sup>

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

<sup>1</sup> 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](http://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).

<sup>2</sup> 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.

<sup>3</sup> 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.").

<sup>4</sup> Russell L. Caplan, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 52-56 (Oxford Univ. Press, 1988).

<sup>5</sup> In the 65 years since World War II, Congress has balanced the budget only 12 times.

<sup>6</sup> 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).

<sup>7</sup> See Robert G. Natelson, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 9-11 (2010) [hereinafter *NATELSON, ORIGINAL CONSTITUTION*].

<sup>8</sup> Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 *Ohio St. L.J.* 1239 (2007).

<sup>9</sup> 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.

<sup>10</sup> U.S. Const. art. V.

<sup>11</sup> 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.

<sup>12</sup> 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).

<sup>13</sup> 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"].

<sup>14</sup> 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).

<sup>15</sup> 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. L.J. 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).

<sup>16</sup> Caplan, *supra* note 4.

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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*.

<sup>20</sup> 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).

<sup>21</sup> 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. . .").

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> An Old Whig II, 13 DOCUMENTARY HISTORY 316, 377. See also I 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.*

<sup>25</sup> 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.

<sup>26</sup> "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.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> 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*).

<sup>30</sup> For an example of this approach, see Carson, *supra* note 13, at 922-24.

<sup>31</sup> Caplan, *supra* note 4, at vii-viii (quoting various public figures), 146-47 (quoting Theodore Sorensen).

<sup>32</sup> *Id.* at xi-xv, 44, 47, 56, 60.

<sup>33</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE

(8th ed., 1786) (unpaginated).

<sup>34</sup> 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).

<sup>35</sup> Caplan, *supra* note 4, at 5.

<sup>36</sup> Anonymous, *The Student's Law-Dictionary* (1740) (unpaginated).

<sup>37</sup> Timothy Cunningham, *A New and Complete Law-Dictionary* (1783) (unpaginated).

<sup>38</sup> 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.

<sup>39</sup> GILES JACOB, *A NEW LAW DICTIONARY* (1782) (unpaginated).

<sup>40</sup> I EPHRAIM CHAMBERS, *CYCLOPAEDIA, OR AN UNIVERSAL HISTORY OF ARTS AND SCIENCES* (unpaginated). See also 2 *ENCYCLOPAEDIA BRITANNICA* at 2238 (2d ed. 1778) (containing only Chambers' second and third definitions).

<sup>41</sup> Caplan, *supra* note 4, at 5-9 describes the process by which the plenipotentiary Anglo-American political convention developed.

<sup>42</sup> 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. *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." *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).

<sup>43</sup> Caplan, *supra* note 4, at 95-96 (citing Emer Vattel's then-popular work on international law).

<sup>44</sup> 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).

<sup>45</sup> *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]").

<sup>46</sup> 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).

<sup>47</sup> 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).

<sup>48</sup> *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](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).

<sup>49</sup> CAPLAN, *supra* note 4, at 23. On this usage, see also *id.* at xx-xxi (explaining usage), 20 (quoting Hamilton).

<sup>50</sup> 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. . . .

<sup>51</sup> 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.

<sup>52</sup> 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.

<sup>53</sup> E.g., Voegler, *supra* note 13, at 393.

<sup>54</sup> See discussion *supra* "The Founders' Theory of 'Fiduciary Government.'"

<sup>55</sup> 23 JCC 73 (Feb. 21, 1787).

<sup>56</sup> *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.").

<sup>57</sup> I FARRAND'S RECORDS at 43.

<sup>58</sup> 3 *id.* at 579-80.

<sup>59</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> 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").

<sup>62</sup> Gerry usually supported state over federal prerogatives at the convention.

<sup>63</sup> 3 FARRAND 574-75.

<sup>64</sup> U.S. CONST. art. VII.

<sup>65</sup> 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."

<sup>66</sup> 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).

<sup>67</sup> 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\(mjm023394\)\)\)](http://memory.loc.gov/cgi-bin/ampage?collid=mjm&fileName=03/mjm03.db&recNum=773&itemLink=r?ammem/mjm:@FIELD(DOCID+@BAND(@lit(mjm023394)))).

<sup>68</sup> But see Harmon, *supra* note 12, at 399.

<sup>69</sup> 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>).

<sup>70</sup> *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.”).

<sup>71</sup> *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.]

<sup>72</sup> *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—

<sup>73</sup> *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:

<sup>74</sup> *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.

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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.]

<sup>75</sup> 3 ELLIOT’S DEBATES 234.

<sup>76</sup> *Id.* at 102. Nicholas was referring specifically to state ratifying conventions, but the same principle governs conventions for proposing amendments.

<sup>77</sup> 4 *id.* at 177 (quoting Iredell at the North Carolina ratifying convention).

<sup>78</sup> Diamond, *supra* note 15, at 137.

<sup>79</sup> ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763).

<sup>80</sup> 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).

<sup>81</sup> NATHANIEL BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1783) (unpaginated).

<sup>82</sup> CAPLAN, *supra* note 4, at 104.

<sup>83</sup> *Id.* The Constitution also assigned another task to state legislatures, independent of any requirement for signature or veto: election of U.S. Senators.

<sup>84</sup> 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.

<sup>85</sup> CAPLAN, *supra* note 4, at 104-05; 1 ANNALS CONG. 29-30 (reproducing New York's application).

<sup>86</sup> N.Y. CONST. (1777), art. III.

<sup>87</sup> 1 ANNALS CONG. 29-30 (reproducing New York's application).

<sup>88</sup> MASS. CONST. (1780), ch. I, §1, art. II.

<sup>89</sup> VT. CONST. (1786), ch. II, §XVI.

<sup>90</sup> See discussion *supra* "The Ubiquity of Limited-Purpose Conventions in the Founding Era."

<sup>91</sup> 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").

<sup>92</sup> 9 DOCUMENTARY HISTORY 655, 689.

<sup>93</sup> 2 FARRAND'S RECORDS 629-30. *Accord*: Harmon, *supra* note 12, at 398-401 (discussing this remark in wider context).

<sup>94</sup> 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.

<sup>95</sup> 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.

<sup>96</sup> 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>.

<sup>97</sup> *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June

11, 1788, reprinted in 20 DOCUMENTARY HISTORY 1139, 1142 (italics in original).

<sup>98</sup> An Old Whig I, Phila. INDEPENDENT GAZETTEER, 12 October, 1787, reprinted in 13 DOCUMENTARY HISTORY 376, 377.

<sup>99</sup> Abraham Yates, Jr., to William Smith, Sept. 22, 1788, reprinted in 23 DOCUMENTARY HISTORY 2474.

<sup>100</sup> 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).

<sup>101</sup> 3 ELLIOT'S DEBATES 101-02.

<sup>102</sup> *Id.* at 102.

<sup>103</sup> 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.

<sup>104</sup> 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").

<sup>105</sup> Cassius VI, MASS. GAZETTE, Dec. 25, 1787, reprinted in 5 DOCUMENTARY HISTORY 511, 512.

<sup>106</sup> 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.

<sup>107</sup> 2 ELLIOT'S DEBATES 124.

<sup>108</sup> 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).

<sup>109</sup> 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).

<sup>110</sup> E.g., Charles L. Black, *Amending the Constitution*, *supra* note 15, at 198.

<sup>111</sup> North Carolina and Rhode Island still had the Constitution under advisement, waiting to see if Congress would approve a bill of rights.

<sup>112</sup> Italics added.

<sup>113</sup> Italics added.

<sup>114</sup> Harmon, *supra* note 12, at 409.

<sup>115</sup> NATELSON, ORIGINAL CONSTITUTION, *supra* note 7, at 41-44.

<sup>116</sup> Accord: CAPLAN, *supra* note 4, at 94.

<sup>117</sup> 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:

<sup>118</sup> 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.

<sup>119</sup> *Id.*

<sup>120</sup> See discussion *infra* "Congress's Role in Calling the Convention"

<sup>121</sup> It is "otherwise provided" in one respect: Congress has a free choice between two ratifying procedures.

<sup>122</sup> 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).

<sup>123</sup> Van Alstyne, *supra* note 15, at 1303.

<sup>124</sup> Note, *Proposed Legislation*, *supra* note 14, at 1633.

<sup>125</sup> 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).

<sup>126</sup> E.g., "Massachusetts," 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.").

<sup>127</sup> 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.

<sup>128</sup> 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").

<sup>129</sup> "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").

<sup>130</sup> 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/>

<sup>131</sup> "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 Documentory 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.

<sup>132</sup> Cf. CAPLAN, *supra* note 4, at 108-10 (explaining that the Founding-Era record suggests states have power to rescind their applications).

<sup>133</sup> *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. . .").

<sup>134</sup> See discussion *supra* "May the Application Limit the Convention Agenda?"

<sup>135</sup> CAPLAN, *supra* note 4, at 105-08.

<sup>136</sup> *Id.* at 113.

<sup>137</sup> 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.").

<sup>138</sup> 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.

<sup>139</sup> See discussion *supra* "Congress as a (Limited) Agent of the States."

<sup>140</sup> "A Friend of Society and Liberty," PA. GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY 277, 283.

<sup>141</sup> Accord: CAPLAN, *supra* note 4, at 134-37; ABA Study, *supra* note 13, at 9.

<sup>142</sup> The legislation is discussed in Ervin, *supra* note 11 and Rogers, Note, *Proposed Legislation*, *supra* note 14.

<sup>143</sup> 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.

<sup>144</sup> 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).

<sup>145</sup> 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).

<sup>146</sup> 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.

<sup>147</sup> CAPLAN, *supra* note 4, at 119.

<sup>148</sup> *Id.* at 123.

<sup>149</sup> 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.

<sup>150</sup> THE FEDERALIST NO. 39.

<sup>151</sup> 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.”).

<sup>152</sup> U.S. CONST., art. I, §2, cl. 3.

<sup>153</sup> 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.

<sup>154</sup> Harmon, *supra* note 12, at 410.

<sup>155</sup> Accord: CAPLAN, *supra* note 4, at 107.

<sup>156</sup> James Madison to Philip Mazzei, Dec. 10, 1788, 11 THE PAPERS OF JAMES MADISON 388, 389 (Robert A. Rutland & Charles F. Hobson, eds. 1977).

<sup>157</sup> “An Old Whig,” Letter II, Oct. 12, 1787, *reprinted in* 13 DOCUMENTARY HISTORY 376, 377.

<sup>158</sup> See discussion *supra* “May the Application Limit the Convention Agenda?”

<sup>159</sup> 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”).

<sup>160</sup> 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.]

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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. divid. Md. no. Va. no. N. C. no. S. C. no. Geo. no [Ayes -- 2; noes -- 8; divided -- 1.]

<sup>161</sup> 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).

<sup>162</sup> See discussion *supra* “The Founders’ Theory of ‘Fiduciary Government.’”

<sup>163</sup> 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.

<sup>164</sup> 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”).

<sup>165</sup> 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.”).

<sup>166</sup> 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.”).

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<sup>167</sup> 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.

<sup>168</sup> Ervin, *supra* note 11, at 884.