

# Why the Constitution’s “Convention for Proposing Amendments” Is a Convention of the States

by Robert G. Natelson\*

## Introduction<sup>1</sup>

The past four years have witnessed a surge in state legislative applications<sup>2</sup> for the first “convention for proposing amendments” pursuant to Article V of the Constitution. Article V requires that any amendment be ratified by the legislatures or conventions in three-fourths of the states (now 38 of 50). Before ratification, however, an amendment must be proposed.

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The text of Article V pertaining to proposal of amendments reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified . ...<sup>3</sup>

Advocates believe a convention is necessary to address dysfunctions in the national government. Some promote agendas identifiable with the political left,<sup>4</sup> while others favor agendas identified with the political right.<sup>5</sup> Still others promote reforms traditionally enjoying broad multi-partisan support.<sup>6</sup>

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Activists opposing an amendments convention have reacted by lobbying<sup>7</sup> and placing opinion articles in national media outlets.<sup>8</sup> Their substantive case is largely a restatement of anti-convention arguments refined by academics and publicists during the 1960s and 1970s.<sup>9</sup> Those arguments emphasize real and alleged uncertainties about the convention process, including the claim that the protocols and composition of an amendments convention are unknown.<sup>10</sup> A problem for opponents—and a corresponding encouragement for advocates—is that since the 1970s a substantial body of academic research has resolved many of the former uncertainties. In particular, that research has enabled us to recapture the constitutional meaning of the phrase “Convention for proposing Amendments.”<sup>11</sup> This *Policy Brief* explains the nature of the convention and collects the evidence for its conclusions.<sup>12</sup>

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This *Policy Brief* is divided into six parts and a conclusion. Part 1 discusses the U.S. Supreme Court’s only pronouncement on the nature of amendments conventions. Part 2 explains why the Constitution does not detail the protocol for such gatherings. Part 3 explains the background history of

interstate conventions from the viewpoint of the Constitution’s ratifiers. Part 4 collects ratification-era documents expressly describing an amendments convention as a convention of the states. Part 5 collects ratification era descriptions of the process that necessarily imply a “convention of the states” model. Part 6 shows how that model fits within the wider constitutional design. After briefly summarizing the evidence, the conclusion responds to concerns that the convention of states model may not be acceptable to the modern American public.

## 1. *Smith v. Union Bank*

In 1831, the Supreme Court decided a choice of law case<sup>13</sup> titled *Smith v. Union Bank*.<sup>14</sup> The principal issue was whether Maryland’s priority rules or Virginia’s priority rules governed distribution of a debt payable in the District of Columbia (which followed Maryland law) and owed to a District of Columbia creditor by a deceased debtor whose home had been in Virginia.

It was a difficult case, with compelling and learned arguments, as well as considerations of interstate comity, pressed by both sides. In deciding that Maryland law governed, Justice William Johnson, who delivered the opinion of the Court, acknowledged some might favor the alternative result. However, he wrote, “[w]hether it would or would not be politic to establish a different rule by a convention of the states, under constitutional sanction, is not a question for our consideration.”<sup>15</sup>

Legal writers speculating on the composition of a convention for proposing amendments almost universally have ignored *Union Bank*.<sup>16</sup> Yet the case is one of the Supreme Court’s few allusions to the subject, and the only one relevant to the nature of such a convention.<sup>17</sup> Moreover, the decision cannot be dismissed as the product of a Southern justice infected by the then-current epidemic of nullification fever.<sup>18</sup> Although Johnson was a Southerner, he also was a competent jurist who firmly opposed John C. Calhoun’s nullification/convention theories. In fact, Johnson

generally took an expansive view of federal power, particularly the Commerce Power.<sup>19</sup>

Johnson's *Union Bank* pronouncement represented the views of all of his colleagues except Justice Henry Baldwin, who dissented without opinion. One of those in agreement with Johnson was Chief Justice John Marshall, who as a young Richmond, Virginia lawyer had played a central role in expounding and defending the Constitution at his state's ratifying convention.<sup>20</sup> Another concurring justice was Joseph Story, Harvard law professor and constitutional commentator *par excellence*. Neither Marshall nor Story had any reason for inventing, or even advertising, amendment prerogatives for the states. On the contrary, like Johnson, they had reputations for favoring federal prerogatives over those of the states.

So it is fair to infer that when Johnson described a convention for proposing amendments as a "convention of the states," his description reflected the common understanding at the time among those knowledgeable about the Constitution.<sup>21</sup> We certainly can infer this was the understanding of Marshall, since he joined the opinion.

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John Marshall had been intimately involved in debates over the Constitution's meaning during the ratification era (1787–90): He was one of the document's chief defenders at the Virginia ratifying convention. Of course, his 1831 views on the amendment process could have been different than they were in 1788—but there is absolutely no evidence that they were.

Fortunately, we need not speculate about what Marshall or any other ratifier thought about the subject at the time of ratification. As this *Policy Brief* shows, a substantial body of uncontradicted evidence arising before and during the ratification debates confirms the Supreme Court's description of an amendments convention.

## **2. Why the Constitution Does Not Explain the Convention for Proposing Amendments in Greater Detail**

Some modern commentators have drawn unwarranted conclusions from the failure of the Constitution and the records of the framing to specify the composition and protocols of amendments conventions. They observe that James Madison asked his colleagues what the composition and protocols would be, but the records do not report a response.<sup>22</sup> Largely on this basis, they contend an amendments convention's composition is a "mystery,"<sup>23</sup> presumably to be resolved by Congress.<sup>24</sup>

There are at least two problems in assuming the meaning of a term is a "mystery" merely because the Constitution and the drafters' records do not specifically define it. First, our records of the Constitutional Convention are incomplete, and the term may have been explained without the explanation being preserved. In this instance, Madison's colleagues seem to have thought his questions were answered adequately, because they voted overwhelmingly for the final

language.<sup>25</sup> Nor did Madison himself press the issue. His ratification-era writings suggest his questions had been resolved to his satisfaction.<sup>26</sup>

Second, no competent investigator limits his investigation to the constitutional text and the convention records. The Constitution contains many terms undefined by either the instrument or the records. Usually the reason a term is undefined is that it was so well understood there was no need to explain it.<sup>27</sup> Illustrative are phrases such as “the writ of habeas corpus,”<sup>28</sup> “original jurisdiction,”<sup>29</sup> and “trial by jury.”<sup>30</sup>

Just as the composition and protocols of a trial jury were widely understood, so also were the composition and protocols of conventions.

For example, the Constitution does not define the composition and rules governing a common law trial jury. Yet jury composition and basic protocols are not therefore a “mystery.” Founding era records tell us everyone understood a common law trial jury to consist of 12

citizens with equal votes and unanimity required for a verdict.<sup>31</sup> The Constitution and the records of the framing do not inform us of that, but other contemporaneous sources do.

Just as the composition and protocols of a trial jury were widely understood, so also were the composition and protocols of conventions. *In-state* conventions—or in the Constitution’s language, “Conventions ... in [the states]”<sup>32</sup>—were elected bodies in which majority per-capita voting was the rule of decision. *Interstate* conventions, such as the Constitution’s “Convention for proposing Amendments,” was a “convention of the states.” This term was applied exclusively to an assembly of delegations authorized by legislative authority, meeting in sovereign equality, under a rule of decision by the greater number of states present and voting.

### 3. Intergovernmental Conventions Before the Constitution’s Ratification

Before Independence, British North Americans lived in a string of colonies along the Atlantic coast. Those colonies often addressed common problems by sending official representatives to consult with each other.<sup>33</sup> Sometimes these consultations were bilateral; sometimes they were conferences that included three or more colonies. Occasionally, other sovereignties, such as Indian tribes<sup>34</sup> or the British Crown,<sup>35</sup> participated. The representatives to such conferences usually were called *commissioners*,<sup>36</sup> but at times they also were labeled delegates and deputies. The proceedings imitated international practice, and the commissioners were essentially diplomats.

To trigger a multilateral conference, a colonial official or legislature would issue to two or more other colonies an invitation known as an *application* or *call*.<sup>37</sup> The call invited colonies convene at a particular place and time to address issues identified in the call.

Each invited colony decided whether to accept the invitation and, if so, whom to select as its commissioners to form its delegation or “committee.”<sup>38</sup> Each colony also decided the scope of the commissioners’ authority in documents called commissions, credentials, and instructions.

Once convened, the conference elected its officers and, if circumstances rendered it advisable, adopted formal rules. Each colony received one vote.<sup>39</sup> These conferences were always time limited: They met, addressed the issues assigned by the call, issued a formal report containing any proposals winning majority support among the represented states, and adjourned *sine die*.

During the century before Independence, such conferences were common. We have records of at least 22 of them.<sup>40</sup>

The Declaration of Independence converted the colonies into states, but even the presence of a permanent Continental Congress did not alter the practice of holding inter-governmental conclaves. In fact, the frequency increased: In the 11 years between 1776 and 1787, interstate conferences met, on average, annually.<sup>41</sup> Others were called but did not materialize.<sup>42</sup> Individual states issued most of the invitations, Congress issued a few, and on some occasions prior conferences called later ones.<sup>43</sup>

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These meetings were known by any of four synonyms, and people favoring periphrasis might use more than one synonym to describe the same gathering.<sup>44</sup> Before 1775, they were commonly labeled “congresses,” in imitation of congresses of diplomats from sovereign governments. Occasionally, they were referred to as “councils”<sup>45</sup> or “committees.” The latter usage must not be confused with the “committees” (delegations) representing individual governments at a particular gathering.

Still another synonym was *convention*. The word appears to have been a popular alternative to “congress” from the beginning, but after 1775 it became the prevailing designation, presumably to avoid confusion with the Second Continental Congress.<sup>46</sup> This helps explain the framers’ choice of that term for Article V.

Both before and after Independence, most convention calls invited only colonies or states within a particular geographic region: A call might summon the (then) four New England states, or the New England states and New York, or states in the mid-Atlantic region. These gatherings were *partial conventions*. On other occasions, both before and after 1776, the call invited all states, or at least states from all regions. These were *general conventions*.<sup>47</sup> General conventions were held in 1754, 1765, 1774, 1780, 1786, and, of course, in 1787.<sup>48</sup> During the debates over the Constitution, there was agreement among both Federalists<sup>49</sup> and Antifederalists<sup>50</sup> that a convention for proposing amendments would be a general convention.

Just as there were well-recognized synonyms for interstate meetings, there were accepted synonyms for the partial and general subcategories. A regional gathering might be described as a “Convention of Commissioners from the States of [naming states]”<sup>51</sup> or “the Convention of Delegates from the four eastern states,”<sup>52</sup> or a “convention of committees from the states of [named states].”<sup>53</sup> A general conclave might be referred to as a “convention of delegates from all

the states,”<sup>54</sup> a “federal convention,”<sup>55</sup> a “convention of the United States,”<sup>56</sup> or a convention of “such commissioners as may be appointed by the ... States.”<sup>57</sup> However, the most common designation for a general convention probably was the phrase *convention of the states*.<sup>58</sup> For example, the 1787 Constitutional Convention was labeled a convention of the states both in official<sup>59</sup> and unofficial<sup>60</sup> documents.

The use of words such as “federal” and “states” distinguished interstate meetings from the directly elected, popular conventions operating solely within a state’s boundaries, such as “the convention of South Carolina”<sup>61</sup> or a ratifying “Convention of the People.”<sup>62</sup>

The protocols for partial and general conventions were precisely the same. They were called, empowered, commissioned, instructed, convened, and conducted in much the same manner, although the size of the assembly might determine such details as to whether written rules were necessary.

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The scope of the problems assigned to these gatherings varied greatly. The convention of the New England states meeting in Providence, Rhode Island in 1781 assembled only to plan war supply for New England for a single year.<sup>63</sup> The general convention held in Philadelphia in 1780 received the much broader

assignment of addressing wartime inflation.<sup>64</sup> The general convention held in Philadelphia in 1787 received the even more daunting task of recommending measures to “render the Foederal Constitution [i.e., the political system] adequate for the Exigencies of the Union.”<sup>65</sup>

The frequency with which conventions of colonies and states met—on average, every three or four years—rendered them a very familiar part of American political life. Leading founders became acquainted with them by serving in Congress or in the state legislatures, or in the conventions themselves. When Roger Sherman of Connecticut represented his state in Philadelphia in 1787, he was attending his *fifth* convention of states. Sherman was but one of at least 18 framers who were veterans of such service.<sup>66</sup>

Thus, the historical record tells us (1) an amendments convention was to be a general convention, (2) general conventions were always understood to be “conventions of the states,” and (3) a convention of the states was a meeting of state delegations in conditions of sovereign equality. From these facts, we can deduce the phrase “Convention for proposing Amendments” signified a meeting of state delegations under conditions of sovereign equality.

As Part 4 demonstrates, however, there is no need to resort to deduction. Records from the ratification era relieve us of the effort.

#### 4. The Ratification Era: Direct Descriptions of the Convention for Proposing Amendments as a “Convention of the States”

The ratification era was the period from September 17, 1787, when the Constitution was signed, to May 29, 1790, when the 13<sup>th</sup> state, Rhode Island, ratified the document.<sup>67</sup> This Part 4 collects ratification-era records that inform us *explicitly* that a convention for proposing amendments was to be a convention of the states. Significantly, most of these records represent more than the opinions of individuals. Rather, they are official documents, or statements in official settings, that reflect public consensus on the “convention of the states” designation, even if they arose out of disagreement on other issues.

In January 1788, the South Carolina legislature debated whether to send the Constitution to a ratifying convention. Charles Cotesworth Pinckney, who had served as a delegate in Philadelphia, was among the Constitution’s defenders.

When responding to questions as to why the Constitution did not protect jury trial in civil cases, he answered that juries should be dispensed with in some kinds of civil cases. If the Constitution had contained such a civil jury requirement, he said, “[I]t could only be altered by a convention of the different states.”<sup>68</sup>

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When the North Carolina ratifying convention met in July 1788, Governor Samuel Johnson warned that if his state remained out of the union, it would not be able to participate in an amendments convention. Antifederalist Willie Jones responded, “I assert the contrary; and that, whenever a convention of states is called, North Carolina will be called upon like the rest.”<sup>69</sup> Jones was almost certainly in error about whether a state outside the union could attend an amendments convention. However, language in a committee report adopted by the full ratifying convention reveals agreement as to its composition. The report favored laying amendments before “the convention of the states that shall or may be called for the purpose of amending the said Constitution.”<sup>70</sup>

On July 28, 1788, in response to a request from the New York ratifying convention, Governor George Clinton (who had chaired the gathering) sent a circular letter to the executives of other states.<sup>71</sup> The letter expressed a desire for amendments and requested that other states make application for a new general convention because “it is essential that an application for the purpose should be made to [Congress] by two thirds of the states.”<sup>72</sup> One of the drafts on which the final version of the letter was based stated it was preferable for amendments to be offered by a general convention rather than by Congress, in part because “on such an occasion *the states* would depute men in whose ability & dispositions ... they could repose the fullest confidence.”<sup>73</sup>

Partly in response to Clinton’s circular letter, on November 14, 1788, the Virginia legislature adopted the first Article V application ever submitted. The Virginia application employed both the phrase “convention of the States” and one of its recognized variants:

Happily for their wishes, the Constitution had presented the alternative, by admitting the submission to a *convention of the States* . ...

We do, therefore, in behalf of our constituents, in the most earnest and solemn manner, 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 this Constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests. ...<sup>74</sup>

The Rhode Island legislature could not formally apply for an amendments convention, because that state had not yet joined the Union. Nevertheless, the state's lawmakers resolved to consult the state's voters on the question of amendments by sending the New York circular letter to all Rhode Island towns.<sup>75</sup> The legislature's resolution described the proposed gathering as a "general convention of the states" and asked whether Rhode Island should "meet in convention with the state of New York, and such other states as shall appoint the same."<sup>76</sup>

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Less than a month after Rhode Island submitted the convention issue to the state's electorate, a related issue arose in the North Carolina legislature. On November, 21, 1788, the state house of commons received back with senate approval "the resolution of this House for

appointing five persons by ballot to represent this State in a *Convention of the States*, should one be called."<sup>77</sup>

Back in Virginia, the state legislature soon dispatched notice of its application to Clinton of New York, and its letter was read in the New York legislature on November 20. When designating an amendments convention, Virginia's letter also employed the term "Convention of the States."<sup>78</sup>

On February 4, 1789, the New York Assembly debated a proposed application. Two lawmakers referred to an amendments convention explicitly as a "convention of the states." One was Samuel Jones, formerly a moderate Antifederalist in the New York ratifying convention,<sup>79</sup> and the other was John Lansing, Jr.,<sup>80</sup> who had served as one of his state's delegates to the Constitutional Convention.

The following day, the New York legislature adopted its application. It employed a synonym for a convention of the states employed by Virginia:

The People of the State of New York having ratified the Constitution ... in the fullest confidence of obtaining a revision of the said Constitution by a General Convention ... In compliance, therefore, with the *unanimous* sense of the Convention of this State, who all united in opinion that such a revision was necessary to recommend the said Constitution ... we, *the Legislature of the State of New York* DO, ... make this application to Congress, that a *Convention of Deputies from the several States* be called as early as possible ...<sup>81</sup>



The Pennsylvania legislature was firmly set against an amendments convention but used the same terms to describe it. On March 5, 1789, the Pennsylvania legislature defeated a motion to apply for “a convention of deputies from the several states.”<sup>82</sup> Later that day, lawmakers passed a resolution declining to apply:

*Resolved*, That his Excellency the President [i.e., of Pennsylvania, then Thomas Mifflin] be requested to assure his Excellency Governor *Randolph*, that, accustomed to sentiments of the highest respect and deference for the legislature of *Virginia*, it must ever be [pain?] ful to the House, when obliged to dissent from the opinion of that Assembly upon any point of common concern to the two states, as members of the union; and particularly, on a measure of such importance as the one proposed, the calling of a *convention of the states for amending the constitution*, the necessity of which they are not able to discern, though it is so apparent to and so earnestly insisted on by that legislature.

That though it is possible this constitution may not be a system exempt, in all its parts, from error, yet the House do not perceive it wanting in any of those fundamental principles, which are calculated to insure the liberties of their country ... That under such forcible impressions, the House cannot, consistently with the special duty they owe to the good people of this state, or with the affection, which, in the enlarged spirit of patriotism, they bear to the citizens of the United States at large, concur with the Legislature of Virginia in their proposed application to Congress, for calling a *Convention of the states* for the above mentioned purpose.<sup>83</sup>

To summarize: Within a few months amid the ratification debates, five states in different regions of the country—three in favor, one against, and one neutral—issued seven official documents identifying an amendments convention as a convention of the states. This is in addition to several usages of lesser standing. I have been unable to find any document suggesting any other formulation.

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## V. The Ratification Era: Indirect Evidence that the Convention for Proposing Amendments Is a Convention of the States

During the ratification debates, Federalists frequently sought to reassure the public by pointing out that if the Constitution proved abusive or dysfunctional in practice, state legislatures and conventions could secure amendments. A fair number of those statements make sense only if one assumes an amendments convention is an agency of the state legislatures and defined by the scope of legislative applications. If the gathering can be composed in any other way, then all these statements—including some issued by Founders of the highest reputation for integrity—were untrue and perhaps fraudulent.

Let us begin with James Madison. In *Federalist No. 43*, Madison assured his readers that the Constitution “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”<sup>84</sup> Congress, of course, may “originate” amendments by proposing them; the only way for the states to be “equally enable[d]” with Congress was for states to have power to propose. Since Article V provides it is *the convention* that proposes, Madison’s observation make sense only if the convention is an assembly of the states. This is not much of a leap, because all prior interstate conventions had been assemblies of the participating states.

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A comment by another Federalist essayist, writing as “Cassius,” buttresses this interpretation. He wrote, “*the states may propose any alterations which they see fit*, and that Congress shall take measures for having them carried into effect.”<sup>85</sup> For the states to propose, the convention must be their agent.

Also corroborative is a remark by a Rhode Island Federalist employing the pseudonym “Solon, Jr.” In urging his state to ratify, “Solon” explained Article V’s two procedures for proposing amendments, and added:

[I]t is clear that the non-complying States can have no agency whatever in the [amendment] business. They will not be represented on the floor of the New Congress, and so cannot act in amendments originating with that body; nor can *they have a seat in any future Convention* directed by that body, in which amendments may originate ...<sup>86</sup>

Note the distinction: States may be *represented* in Congress, but they have *seats* at the convention.

Samuel Jones, the New York state legislator and ratifier, explained Article V this way:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed *for the states a mode of restraining* the powers of the government, if upon trial it should be found they had given too much.<sup>87</sup>

Alexander Contee Hanson, a Maryland judge who later served as that state’s chancellor, expressed similar views.<sup>88</sup>

Of course, the states enjoy a “mode of restraining” the national government only if they control the proposing convention.

Before proceeding further, we need to address two competing numbers. The framers anticipated an initial union of 13 states,<sup>89</sup> and two-thirds of those were necessary to trigger a convention—that is, *nine*. Three-fourths of the states were necessary to ratify—that is, *ten*. In alluding to state power over the amendment process, participants on both sides of the ratification issue sometimes used one number and sometimes the other. In April 1788 George Washington wrote that if the Constitution were adopted, “a constitutional door is open for such amendments as shall be thought necessary by nine States.”<sup>90</sup> At the Massachusetts ratifying convention, Federalist Charles Jarvis contended if the Constitution were ratified, “Nine states may insert amendments into the Constitution; but if we reject it, the vote must be unanimous.”<sup>91</sup> At the Maryland ratifying convention Antifederalist Samuel Chase (subsequently a Supreme Court justice) observed nine states were necessary to obtain amendments.<sup>92</sup>

Why “nine” instead of “ten?” This repetition of “nine” suggests it was not an error. Rather, it was meant to underscore the power of the applying state legislatures to determine the kind of amendments considered by the convention and, because their state delegations would constitute a majority on the convention floor, their power to determine the convention’s output.

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Alexander Hamilton recited both numbers while declaring firmly that the states could obtain any amendments they wanted:

If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States ... whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.<sup>93</sup>

The writings of Madison and Hamilton were influential in the state ratifying conventions, but their complicated and scholarly style limited their impact on the general public. More accessible, and perhaps more popular, were the essays of Tench Coxe,<sup>94</sup> a Philadelphia businessman and prolific Federalist. Coxe served in the Confederation Congress and represented his state at the Annapolis Convention. After ratification he became Alexander Hamilton’s assistant in the Treasury Department. In urging approval of the Constitution, he wrote:

*The sovereign power of altering and amending the constitution ... does not lie with this foederal legislature, whom some have erroneously apprehended to be supreme—That power, which is truly and evidently the real point of sovereignty, is vested in the several legislatures and [ratifying] conventions of the states, chosen by the people respectively within them. The foederal government cannot alter the constitution, but the representative bodies of the states, that is, their legislatures and conventions, only can execute these acts of sovereign power.*

From the foregoing circumstances results another reflection equally satisfactory and important, which is, that ... the foederal legislature ... *cannot prevent such*

*wholesome alterations and amendments as are now desired, or which experience may hereafter suggest.* Let us suppose any one or more alterations to be in contemplation by the people at large, or by the state legislatures. 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 amendments, they become *an actual and binding part of the constitution*, without any possible interference of Congress. If then ... the foederal government should prove dangerous, it seems the members of the confederacy will have a full and uncontrollable power to alter its nature, and render it completely safe and useful.<sup>95</sup>

Coxe made a similar argument in another essay as well.<sup>96</sup>

Again, all of the statements surveyed in this Part 5—by Madison, Washington, Hamilton, Coxe, and the rest—are consistent only with the convention of states model, staffed by the state legislatures with delegations of equal power, where the commissioners, however free to negotiate and compromise, ultimately are subject to state legislative instruction.

In other words, a convention for proposing amendments was to be the same sort of general convention that had universally prevailed in America for over a century.

## **6. How the Convention of States Model Fits Within the Constitutional Scheme**

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Some commentators have denied this. During the 1960s and 1970s, when law professors were perfecting the arguments still deployed against the convention process, they maintained that for state legislatures to fashion proposed amendments would be to revert to the old system of the Confederation—a reversion

necessarily inconsistent with the Constitution’s “national” scheme. Professor Walter Dellinger, for example, maintained it violates the framers’ design to permit state legislatures to control the content of a proposed amendment.<sup>97</sup> Professor William Swindler likewise asserted state legislatures were not proper parties to any amendments that might reduce federal power.<sup>98</sup>

Swindler went even farther. He claimed the convention method of proposal was merely a “transitional safeguard” to be disregarded “once the constitutional system was demonstrably operative.”<sup>99</sup> In other words, he claimed the convention procedure should be read out of the Constitution entirely.<sup>100</sup>

Of course, there is no textual basis for Swindler’s assertion that the convention mechanism was temporary. Moreover, as we have seen, the Ratification-Era record is flatly inconsistent with the Dellinger-Swindler conclusions. On the contrary, assuring the state legislatures power to check the national government was a principal reason for the convention procedure.<sup>101</sup>

Nor was the convention method just a discordant confederal concession to necessity. It was a harmonious part of the overall design—not *despite* its confederation heritage<sup>102</sup> but precisely *because of it*.

The Constitution is, in Madison’s words, only “partly national.” It also is “partly federal.”<sup>103</sup> When translated from eighteenth century to twenty-first century English, this means the Constitution is partially unitary and popular, and partially confederal.<sup>104</sup> Elements of the confederal approach not only survive in the

Article V’s application-and-convention process is merely a component of one of many constitutional couplets. As such, it is fully consistent with the constitutional design.

Constitution, they comprise a significant portion of the fabric. During the ratification debates, Federalists emphasized aspects of continuity with the Articles as well as differences.<sup>105</sup>

As Madison pointed out, the national/federal amalgam is particularly evident in Article V.<sup>106</sup> However, it pervades the entire document. One aspect of the amalgam is the Constitution’s “pairing” feature. Couplets appear throughout the instrument in which one element of the couplet is entirely or mostly “national,” while the other is entirely or mostly “federal.”

Different couplets serve different, but often overlapping, functions. Some divide power and responsibility. For example, Congress may regulate congressional elections,<sup>107</sup> but presidential elections are (supposed to be) regulated by the states.<sup>108</sup> The couplets may contain mutual checks, such as the complementary roles of the president and Senate in exercising the treaty power,<sup>109</sup> and of the House of Representatives and Senate in enacting legislation.<sup>110</sup> Most significantly for our purposes, couplets may provide alternative routes to the same result: When the primarily national Electoral College fails to elect a president, the selection defaults to the primarily federal procedure of election by the House of Representatives on the basis of one state/one vote.<sup>111</sup> When the “federal” approach of local law enforcement fails, the alternative is transfer of the state militia to central control<sup>112</sup> and national intervention via the Guarantee Clause.<sup>113</sup>

Article V contains at least two couplets offering alternative paths to the same results: (1) ratification by state legislatures (seen as leaning “federal”) or ratification by state conventions (more “national” in the sense of popular) and (2) proposal by the mostly national Congress or proposal by a convention of the states through a mostly federal procedure.<sup>114</sup>

In other words, Article V’s application-and-convention process is merely a component of one of many constitutional couplets. As such, it is fully consistent with the constitutional design.

## Conclusion (With Some Political Observations)

A convention for proposing amendments is a convention of the states. That conclusion is supported by history previous to the Constitution's ratification, by numerous explicit and implicit statements from the Ratification Era, and by the constitutional design.

This *Policy Brief* is an exposition of constitutional meaning rather than a political essay. Nevertheless, I would like to react to a political concern. Political scientist John R. Vile fears the convention of states model reduces the chances of a convention being called because modern Americans would find that model too undemocratic and thus likely to produce unpopular amendments. He particularly fears the one state/one vote suffrage rule may deter larger states from applying for a convention.<sup>115</sup>

The popular will is more likely to be frustrated by continued *inaction* than by anything an amendments convention might do.

Of course, the public accepts other (con)federal constitutional provisions, such as the allocation scheme of the Senate. Would the public reject the same allocation for an amendments convention? It might, if the procedure permitted a bare majority of the states representing a

minority of the population to impose amendments without further check. However, that is not what Article V prescribes, and it is not even remotely likely the actual procedure will lead to imposition of amendments conflicting with the popular will. The popular will is more likely to be frustrated by continued *inaction* than by anything the convention might do. There are at least seven reasons for these conclusions.

First, to obtain a convention on a given topic requires approval by a constitutional minimum of 67 or 68 dispersed legislative chambers out of a total of 99.<sup>116</sup> That seems a formidable requirement, but the reality is more formidable still. Approval by 68 chambers in bicameral legislatures is insufficient if *even one* of the 68 is a house in a state in which the other house has demurred. Moreover, if 34 states apply on the same subject matter, but some applications include terms entirely inconsistent with the rest, then presumably additional states will have to submit consistent applications before Congress is obligated to call. In the real world, therefore, the number of legislative chambers demanding a convention call on a discrete topic is likely to number well into the 70s.

Although it is mathematically possible for all these legislative chambers to represent a minority of the population, it is almost politically impossible for them do so. There are too many large and small states on both sides of the red/blue divide and too many bicameral states in which the legislative chambers have different interests and different majorities.

Second: In some states, a single powerful lawmaker can block an application favored by majorities in both houses.<sup>117</sup>

Third: At the convention the rule of decision is a majority of all states attending, not merely a majority of states applying. That majority must agree on more than a general concept. It must

agree on an actual draft. A majority may favor a concept, but different majorities may oppose any single instantiation of the concept. “The devil,” it is said, “is in the details.”

Fourth: One allegedly “undemocratic” aspect of the convention-of-states model is that most, if not all, state legislatures will reserve selection of commissioners to themselves rather than delegating it to the people by popular election. However, the public may see this as a good way to appoint an assembly that is not a branch of general government but merely an ad hoc task force. Commissioners selected by state lawmakers will be seasoned individuals who need no schooling in parliamentary conduct and who understand not to waste time on unpopular proposals with no chance of ratification.

Fifth: Even if a proposal should emerge from this complicated process, at that stage it will be only a *proposal*. Ratification requires approval by 38 states. That means approval by 75 or 76 legislative chambers out of 99. At this stage, too, the approving houses must be allocated properly, and if Congress selects the state legislative mode of ratification (as it almost always has) in some states a single powerful lawmaker will be able to block ratification.

The ratification process is likely to consume several years. There is almost no risk of an unpopular measure being stampeded into ratification without popular support.

Sixth: Well in advance of the convention, the public will learn that the ratification process is likely to consume several years. There is almost no risk of an unpopular measure being stampeded into ratification without popular support. Indeed, to be successful in navigating such a long process, it will need sustained super-majority support.

Seventh: However undemocratic some might believe the “one state/one vote” procedure to be, there is no alternative both practical and publicly acceptable. The congressional paradigm suggests allocation among states by House districts or by House districts-plus-Senators (as in the Electoral College), but it is difficult to justify a drafting committee that large. Large size also increases the odds of mob-like behavior. This is particularly true if delegates are directly elected, without state legislative supervision, and in many cases without relevant experience. The probable alternative to mob-like behavior is control concentrated in relatively few. In any event, one can make a good argument that an assembly designed to bypass Congress should be selected by a method different from that used to select Congress.

An alternative to congressional-style allocation is to apportion delegates by population but reduce the number substantially—perhaps to eighty or one hundred. That procedure would require drawing new districts. Less-populous states would have to be combined with other states into single districts and more populous states would have to be divided. My use of the passive voice begs these questions: Who decides the size of the convention? Who combines and divides states? For that matter, who writes the election code? Congress? For a procedure designed to *bypass* Congress?

Professor Vile worries large states will be deterred from applying for a convention in which they will enjoy only sovereign equality. On the other hand, lawmakers in small states may be deterred

from applying for a convention in which they will be lost in the mass. Moreover, state lawmakers are now well aware that the amendments convention is supposed to be their agency,<sup>118</sup> and they will resist efforts to cut them out of the process. The results could be extensive litigation and refusal to ratify anything the convention might propose.

State lawmakers are now well aware that the amendments convention is supposed to be their agency, and they will resist efforts to cut them out of the process.

The lack of acceptable alternatives was the same hurdle the framers faced when trying to create an allocation formula for the Senate. All efforts to distribute Senators among states by population or by compromise formulae proved abortive,<sup>119</sup> and the framers were left with interstate

equality. More recently, congressional bills to allocate delegates for prospective amendment conventions<sup>120</sup> may have represented “two decades of serious congressional consideration”<sup>121</sup> — but none has ever come close to passing.

So even if the founding era evidence were not clear that a convention for proposing amendments is a convention of the states, that model probably would be our only realistic option.

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## About the Author

Robert G. Natelson is widely acknowledged to be the country's leading scholar on the Constitution's amendment procedure and among the leaders on several other topics. He is the author of *The Original Constitution: What It Actually Said and Meant* (Apis Books, 3d ed., 2014) and co-author of *The Origins of the Necessary and Proper Clause* (Cambridge University Press, 2010), a book based primarily on his groundbreaking research. He is also a senior fellow in Constitutional Jurisprudence at the Independence Institute, Montana Policy Institute, and The Heartland Institute. He was law professor for a quarter of a century, serving at three different universities. 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.

Natelson has been cited 17 times in U.S. Supreme Court decisions since 2013. Parts of Chief Justice Roberts' 2012 opinion on the "Obamacare" health care law closely tracked his original research on the Necessary and Proper Clause. In addition to his articles on the U.S. Constitution, he created the first online guide to "originalist" research; created the database the Documentary History of the Ratification of the Montana Constitution; and in conjunction with his eldest daughter Rebecca, edited the first complete Internet versions of the Emperor Justinian's great Roman law collection (in Latin).

Prior to entering academia he practiced law in two states, ran his own businesses, and worked as a journalist and at other jobs. While serving as a professor he created and hosted Montana's first statewide commercial radio talk show.

## About The Heartland Institute

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## Endnotes

<sup>1</sup> *Bibliographical footnote.* This note collects principal sources cited more than once:

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*Massachusetts:* THE ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1777-87 (1890-1918) [hereinafter MASS. RESOLVES]

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THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS]

### Modern Commentary

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

JOHN R. VILE, CONVENTIONAL WISDOM: THE ALTERNATE ARTICLE V MECHANISM FOR PROPOSING AMENDMENTS TO THE U.S. CONSTITUTION (2016) [hereinafter VILE]

<sup>2</sup> All available applications are collected in [The Article V Library](#). See also *Article V Convention Legislative Progress Report*, available from [dfg@guldenschuhlaw.com](mailto:dfg@guldenschuhlaw.com) (a regular report on the progress of currently-active Article V movements).

<sup>3</sup> The entire Article V is as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the

several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; 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>4</sup> E.g., Alison Hartson, [The Logical Path to End Corruption: Wolf-PAC's Plan to Use the Constitution](#).

<sup>5</sup> E.g., Convention of States, [The Solution](#).

<sup>6</sup> E.g., [U.S. Term Limits Launches Article V Convention Effort](#); [Balanced Budget Amendment Taskforce](#).

<sup>7</sup> E.g., Common Cause, [Idaho Rejects the "Dangerous Path:" State Says No to New Constitutional Convention](#) (mentioning lobbying efforts in Idaho).

<sup>8</sup> E.g., Robert Greenstein, [A Constitutional Convention Could Be the Single Most Dangerous Way to "Fix" American Government](#), WASHINGTON POST, October 21, 2014; David A. Super, [Don't Even Think About "Updating" the Constitution](#), CHICAGO TRIBUNE, March 19, 2017.

<sup>9</sup> Possibly the three most influential articles developing the anti-convention case were Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); and 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).

<sup>10</sup> E.g., Common Cause, [The Dangerous Path: Big Money's Plan to Shred the Constitution](#); see also sources cited *supra* note 8.

<sup>11</sup> The clarification process began in 1979 with publication of a U.S. Office of Legal Services Opinion, and accelerated after 2010. See ROBERT G. NATELSON, [STATE INITIATION OF CONSTITUTIONAL AMENDMENTS: A GUIDE FOR LAWYERS AND LEGISLATIVE DRAFTERS](#) 5-11 (4<sup>th</sup> ed. 2016) (summarizing the Article V legal bibliography).

<sup>12</sup> See also Natelson, *Conventions*, *supra* note 1 (referencing some of the material collected in this *Policy Brief*).

<sup>13</sup> "Choice of law" is a process by which courts decide which state's or nation's law applies where the event or its participants have connections to more than one state or nation. The text offers one example; another is an automobile accident in Illinois between a car driven by a resident of Indiana and another driven by a resident of Ontario, Canada.

<sup>14</sup> 30 U.S. 518 (1831).

<sup>15</sup> 30 U.S. at 528.

<sup>16</sup> But see VILE, *supra* note 1, at 83 and RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 45–46 & 99 (1988) (both discussing *Union Bank*).

<sup>17</sup> Other references are quotations from Article V. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S.Ct. 2652, 2692 (2015) (Scalia, J., dissenting); *Hawke v. Smith*, 253 U.S. 221, 226 (1920).

<sup>18</sup> Cf. VILE, *supra* note 1, at 83 (minimizing the comments in the case as dicta and possibly the product of the nullification controversy—although in milder terms than I use in the text).

<sup>19</sup> *Gibbons v. Odgen*, 22 U.S. 1, 89 (1824) (Johnson, J. concurring) (stating of the congressional commerce power that the power “over commerce ... amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive”); Judith K. Shafter, *Johnson, William*, [AMERICAN NATIONAL BIOGRAPHY ONLINE](#) (last visited Apr. 17, 2017).

<sup>20</sup> Marshall was a prominent speaker at the Virginia ratifying convention. 3 ELLIOT’S DEBATES, *supra* note 1, at 222–36, at 419–20, 420–21, 551–62, and 578 (reporting Marshall’s speeches).

<sup>21</sup> Story did not address directly the composition of the convention in his *Commentaries on the Constitution*, but he did write, “[t]wo thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring amendments to be proposed...” JOSEPH L. STORY, [COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES](#) (1833), § 1824

<sup>22</sup> 2 FARRAND’S RECORDS, *supra* note 1, at 558 (September 10, 1787) (James Madison) (“How was a Convention to be formed? By what rule decided? What was the force of its acts?”).

<sup>23</sup> 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):

An Article V Convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mystery of the most fundamental sort ...

*Id.* at 633–34.

Tribe’s article, like those of Black, *supra*, has proved highly influential. His “catalogue of basic matters on which genuine answers simply do not exist”, *id.* at 637—otherwise characterized as “unanswerable questions,” *id.* at 634—is the basis for lists still frequently distributed to state legislators and the public from opponents of the convention process. See, e.g., Common Cause, [The Dangerous Path: Big Money’s Plan to Shred the Constitution](#) (reproducing Professor Tribe’s list).

Professor Michael Rappaport has argued claims that the convention process is a “mystery” impose an “uncertainty tax” on that process, thereby discouraging its use. Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMM. 53, 89 (2012). He adds, I think correctly, that claims the founders would not have wanted the state legislatures to propose amendments are based on presupposing

a hostility towards the states that was not held generally when the Constitution was enacted. Instead, the Constitution was based on the view that both the national government and the state governments had virtues and vices and the constitutional structure should be designed accordingly. In the Article V area, this view suggests that both Congress and the state legislatures should be able to propose (and ultimately enact) amendments without the other entity being able to veto the amendment. Thus, the desire to prevent the state legislatures from having an effective mechanism to amend the Constitution is inconsistent with the overall design of the Constitution and the purposes underlying it.

*Id.* at 90–91.

<sup>24</sup> Cf. VILE, *supra* note 1, at 228–29 n. 22 (arguing the failure of the framers to “incorporate a particular common-law understanding of a mechanism” justifies changes in the nature of the convention congruent with “the transition from a confederal to a federal system and] the subsequent democratization of Congress.”).

<sup>25</sup> *Id.* (showing the language approved by a vote against reconsideration of nine states in favor, one against, one delegation divided).

<sup>26</sup> *Infra* Part 5 (discussing Madison’s formulation in *The Federalist*).

<sup>27</sup> I have made something of a career reconstructing the founding-era meaning of constitutional terms modern commentators thought obscure. *E.g.*, Robert G. Natelson, *The Founders’ Origination Clause (and Implications for the Affordable Care Act)*, 38 *Harvard J. L. & Pub. Pol.* 629 (2015); GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, AND GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (Cambridge University Press 2010); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 *GA. L. REV.* 1117 (2009).

<sup>28</sup> U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

<sup>29</sup> *Id.* art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

<sup>30</sup> *Id.*, art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”).

<sup>31</sup> In his first draft of the Bill of Rights, Madison listed a series of “accustomed requisites” for what became the Sixth Amendment right of jury trial. *ANNALS OF CONG.*, *supra* note 1, at 452 (Jun. 8, 1789). Congress later dropped this list, presumably because essential protections were included in the common understanding of trial by jury.

<sup>32</sup> U.S. CONST. amend. 5 (“when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof”).

<sup>33</sup> *See Natelson, Conventions, supra* note 1 (surveying conventions and convention practice before and during the Founding).

<sup>34</sup> *Id.* at 627 and 633.

<sup>35</sup> *Id.*, at 633.

<sup>36</sup> *Id.*, at 633.

<sup>37</sup> *Id.*, at 689.

<sup>38</sup> *E.g.*, Governor George Clinton, *Message to the N.Y. Legislature*, August 4, 1780, in *BOSTON CONVENTION, supra* note 1, at 62 (referring to “a Convention of Committees from three States, lately held at Boston”).

<sup>39</sup> *Natelson, Conventions, supra* note 1, at 681.

<sup>40</sup> *Id. passim* (identifying 21 conventions); however, since publication of that article I have found one more. This was the Albany Council of 1684, a convention that included Massachusetts, New York, Virginia and five Iroquois nations. Robert G. Natelson, [The 37<sup>th</sup> “Convention of States” Discovered!](#)

<sup>41</sup> *Id.*, at 640–80 (describing eleven held between 1776 and 1787).

<sup>42</sup> *Id.*, at 645 (referring to a congressionally called Charleston, South Carolina convention that never met).

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

<sup>44</sup> *E.g., id.*, at 667 (citing Massachusetts Governor James Bowdoin as proposing a “Convention or Congress” of “special delegates from the States”).

<sup>45</sup> Only the 1684 Albany Council seems to have been so designated. *Id.*

<sup>46</sup> All the interstate gatherings between 1776 and 1787 were known primarily, although not exclusively, by the term “convention.” See, e.g., 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 585-620 (Charles J. Hoadley ed., 1894) (setting forth the records of the first Providence, Springfield, and New Haven “conventions”); *id.* at 619, 619, 620 (containing self-identification of the New Haven gathering as a convention); *Natelson, Conventions, supra* note 1, at 654 (reproducing the call for the 1780 Philadelphia Price Convention, referring to it as “a convention of Commissioners from the States of New Hampshire, Massachusetts, Rhode Island, Connecticut [sic], New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia.”).

<sup>47</sup> *Natelson, Conventions, supra* note 1, at 62.

<sup>48</sup> Thus, in describing the proposed 1754 Albany Congress to his colonial legislature, New Hampshire Governor Wentworth stated it “will be more general, and not confined to one particular Colony, but that all his Majesty’s Provinces that are present by their Commissioners will be included”). 6 N.H. STATE PAPERS, *supra* note 1, at 132. He subsequently described it as “the “General Congress held at Albany.” *Id.* at 292.

<sup>49</sup> *A Friend to Good Government*, NEWPORT HERALD, July 24, 1788, in 25 DOCUMENTARY HISTORY, *supra* note 2, at 363, 364 (describing a future amendments convention as “another general Convention”); *Solon, Jr.*, PROVIDENCE GAZETTE, August 23 1788, in 25 *id.* at 399 (describing an amendments convention called under Article V as “a General Convention”); Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, in 18 *id.*, at 277, 283–84 (referring to a “general convention for amending the constitution”).

<sup>50</sup> E.g., N.Y. ASSEMB. J. 12<sup>TH</sup> SESSION, DEC. 1788 at 105-06 (February 5, 1789) (reproducing a New York legislative application referring to an amendments convention as a “General Convention”); *Resolution of the Rhode Island General Assembly*, October 27, 1788, in 10 RECORDS OF THE STATE OF RHODE ISLAND 309-10 (John Russell Bartlett ed. 1865) (describing an amendments convention as a “general convention of the states”). Both the New York and Rhode Island legislatures leaned Antifederalist.

<sup>51</sup> *Natelson, Conventions, supra* note 1, at 654 (quoting the call for the Philadelphia Price Convention of 1780); cf. 5 N.H. STATE PAPERS, *supra* note 1, at 115 (reproducing a letter of June 29, 1747 from Massachusetts Governor William Shirley, referring to a convention with “such Commissioners as may be appointed by all his Majestys Governments from New Hampshire to Virginia inclusively”).

<sup>52</sup> E.g., Letter from George Washington to Massachusetts Governor James Bowdoin, August 28, 1780, in BOSTON CONVENTION, *supra* note 1, at xxxi-xxxii (so naming the Boston Convention of 1780); cf. *id.* at 52 (calling for a “meeting of Commissioners from the several States” at Hartford, Connecticut).

<sup>53</sup> E.g., Letter from New York Governor George Clinton to George Washington, September 1, 1780, in Boston Convention, *supra* note 1, at xxxi - xxxii (so naming the Boston Convention of 1780).

<sup>54</sup> *Resolve Recommending a Convention of Delegates from all the States*, 1784–1785 MASS. RECORDS, *supra* note 1, at 666 (July 1, 1785); cf. 2 J. CONT. CONG., *supra* note 1, at 51 (May 15, 1775) (setting forth instructions recommending “an annual Convention of Delegates or Representatives from all the Colonies”); 31 *id.*, at 679 (Sept. 20, 1786) (reproducing a letter from John Dickinson as chairman of the Annapolis convention to Congress recommending “a Convention of deputies from the different States”); 32 *id.*, at 74 (Feb. 21, 1787) (reproducing congressional opinion in favor of “a Convention of delegates who shall have been appointed by the several States”).

<sup>55</sup> N.C. MINUTES, *supra* note 1 (Nov. 24, 1788) (“resolving, with respect to a future amendments convention, “We consent and propose that five persons to represent this State in a Federal Convention be also balloted for at the same time.”).

<sup>56</sup> *Id.* (Nov. 18, 1788) (“Resolved, That the present General Assembly proceed to ballot for five persons to represent this State in a Convention of the United States, in case such Convention is appointed for the purpose of amending the Constitution, proposed at Philadelphia the 17th September, 1787.”).

<sup>57</sup> This was the form of the resolution by which the Virginia legislature authorized a circular letter that served as the call to Annapolis. VA. H.D. J., *supra* note 1, at 153 (session beginning October 17, 1785) (January 21, 1786); *cf.* 5 N.H. STATE PAPERS, *supra* note 1, at 425 (reproducing a house of representatives journal reference to “a convention of commissioners from each Government on this Continent”).

<sup>58</sup> On July 21, 1782, the New York legislature resolved as follows:

It appears to this Legislature, that the foregoing important Ends, can never be attained by partial Deliberations of the States, separately, but that it is essential to the Common Welfare, that there should be ... a *General Convention of the States*, specially authorised to revise and amend the Confederation, reserving a Right to the respective Legislatures, to ratify their Determinations.

5 DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, No. 11, Pt. 2, 28–29 (1904) (emphasis added).

Similarly, in a 1783 “application” and circular letter, the Massachusetts legislature asked Congress “to recommend a *Convention of the States* at some convenient place, on an early day, [so] that the evils so severely experienced from the want of adequate powers in the foederal [*sic*] Government, may find a remedy as soon as possible.”

1784–1785 MASS. RECORDS, *supra* note 1, at 667 (July 1, 1785) (emphasis added).

*Cf. An Elector*, MD J., March 25, 1788, in 12 DOCUMENTARY HISTORY, *supra* note 1, at 435, 440 (referring to “a Convention of all the states”).

<sup>59</sup> 33 J. CONT. CONG., *supra* note 1, at 543 and 544 (unsuccessful motion of Nathan Dane of Massachusetts referring to the Constitutional Convention as “the Convention of the States lately assembled”); 3 FARRAND’S RECORDS, *supra* note 1, at 585 (reproducing the Connecticut act for appointing delegates to the Constitutional Convention, describing it as “a convention of the States” and as “a Convention of Delegates, who shall have been appointed by the several States”); 2 ELLIOT’S DEBATES, *supra* note 1, at 3 (“The resolve of the General Court of this commonwealth [Massachusetts], of March, 1787, appointing delegates for the Convention of the states, held at Philadelphia, was ordered to be read.”).

<sup>60</sup> *E.g.*, Letter from George Washington to the Marquis de LaFayette, June 6, 1787, 3 FARRAND’S RECORDS, *supra* note 1, at 34 (“The pressure of the public voice was so loud, I could not resist the call to a convention of the States, which is to determine whether we are to have a Government of respectability ... ”); *A Freeman*, NEWPORT HERALD, April 3, 1788, in 24 DOCUMENTARY HISTORY, *supra* note 1, at 220, 21 (referring to the Constitutional Convention as “the General Convention of the States”); “A Native of Boston,” THOUGHTS UPON THE POLITICAL SITUATION OF THE UNITED STATES OF AMERICA 178 (1788) (referring to the Constitutional Convention as “the late Convention of the States at *Philadelphia*”).

<sup>61</sup> 4 J. CONT. CONG., *supra* note 1, at 274 (April 12, 1776) (producing a letter from the president of the convention of South Carolina); *cf.* [MINUTES OF THE NORTH CAROLINA COUNCIL OF SAFETY](#), July 27, 1776 (referring to “the convention of that Colony [Virginia]”).

<sup>62</sup> N.H. HOUSE OF REP. J. (Dec. 13, 1787), in 21 N.H. STATE PAPERS, *supra* note 1, at 165 (so designating a state ratifying convention).

<sup>63</sup> *Natelson, Conventions*, *supra* note 1, at 665.

<sup>64</sup> *Id.*, at 654 (quoting the call) and 655.

<sup>65</sup> *Id.*, at 675 (quoting the call) and 675–80 (discussing the scope of that gathering, including the false narrative that the 1787 convention exceeded the scope of its call. The most recent and comprehensive treatment of the “runaway” myth is Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARVARD J. L. & PUB. POL. 61 (2017).

<sup>66</sup> *Natelson, Conventions*, *supra* note 1, at 691–700 (setting forth the lists of commissioners at three major conventions of colonies and all conventions of states between 1776 and 1787).

<sup>67</sup> See 19 DOCUMENTARY HISTORY, *supra* note 1, at xviii–xx (setting forth a chronology of the period).

<sup>68</sup> 4 ELLIOT’S DEBATES, *supra* note 1, at 308.

<sup>69</sup> 2 *id.*, at 225.

<sup>70</sup> 4 *id.*, at 242; *see also id.* at 251 (recording adoption of the report).

<sup>71</sup> 2 *id.*, at 413–14 (reproducing the letter).

<sup>72</sup> 2 *id.*, *supra* note 1, at 414.

<sup>73</sup> 23 DOCUMENTARY HISTORY, *supra* note 1, at 2339 (emphasis added).

<sup>74</sup> 1 ANNALS OF CONG., *supra* note 2, at 258–59 (May 5, 1789).

<sup>75</sup> Partial records of town deliberations on the New York circular letter are reproduced in 25 DOCUMENTARY HISTORY, *supra* note 1, at 435–49.

<sup>76</sup> *Resolution of the Rhode Island General Assembly*, October 27, 1788, in 10 RECORDS OF THE STATE OF RHODE ISLAND 309–10 (John Russell Barlett ed. 1865).

Whereas, His Excellency George Clinton, president of the convention of New York, hath transmitted to the legislature of this state a proposal, that a *general convention of the states* should take place, in order that such necessary amendments may be made in the constitution proposed for a federal government, as will secure to the people at large their rights and liberties, and to remove the exceptionable parts of the said proposed constitution:

It is therefore voted and resolved, that the secretary forthwith cause to be printed a sufficient number of copies of Governor Clinton’s letter, with the amendments proposed by the convention of the state of New York, and transmit one as soon as possible to each town clerk in the state; who is hereby directed, upon receipt thereof, to issue his warrant to call the freemen of such town to convene in town meeting, to take the same into consideration, and thereupon to give their deputies instructions whether they will have delegates appointed *to meet in convention with the state of New York, and such other states as shall appoint the same*; or such other instructions as they may deem conducive to the public good; that this General Assembly may know their determination at the session to be holden by adjournment on the last Monday in December next.

(Italics added.)

<sup>77</sup> N.C. MINUTES, *supra* note 1 (November 21, 1788).

<sup>78</sup> Letter from John Jones, Secretary of the Senate, and Thomas Mathews, Secretary of the House of Delegates, to New York Governor George Clinton, November 20, 1788, N.Y. ASSEMB. J. 12<sup>th</sup> session, December 1788), at 25. (urging “The propriety of immediately calling a Convention of the States, to take into consideration the defects of the Constitution.”).

The complete text is as follows:

S I R,

THE letter from the Convention of the State of New-York hath been laid before us, since our present session. The subject which it contemplated was taken up, and we have the pleasure to inform you of the entire concurrence in sentiment between that Honorable Body, and the Representatives, in Senate and Assembly, of the *freemen* of this *Commonwealth*. The propriety



of immediately calling a Convention of the States, to take into consideration the defects of the Constitution, was admitted, and, in consequence thereof, an application agreed to, to be presented to the Congress, so soon as it shall be convened, for the accomplishment of that important end. We herewith transmit to your Excellency a copy of this application, which we request may be laid before your Assembly at their next meeting. We take occasion to express our most earnest wishes, that it may obtain the approbation of *New-York*, and of all our sister States.

<sup>79</sup> 23 DOCUMENTARY HISTORY, *supra* note 1, at 2522.

<sup>80</sup> 23 *id.* at 2523.

<sup>81</sup> N.Y. ASSEMB. J. 12<sup>TH</sup> SESSION, DEC. 1788 at 105–06 (February 5, 1789) (emphasis in original except for last one added).

<sup>82</sup> PA. GEN'L. ASSEMBLY MINUTES, *supra* note 1, at 123 (March 5, 1789).

<sup>83</sup> *Id.*, at 124–25 (March 5, 1789) (emphasis in original except for last item).

<sup>84</sup> THE FEDERALIST NO. 43, *supra* note 1, at 228 (James Madison).

<sup>85</sup> *Cassius VI*, MASS. GAZETTE, December 25, 1787, in 5 DOCUMENTARY HISTORY, *supra* note 1, at 511–12 (1998).

<sup>86</sup> *Solon, Jr.*, PROVIDENCE GAZETTE, August 23 1788, in 25 DOCUMENTARY HISTORY, *supra* note 1, at 399, 400.

<sup>87</sup> 23 *id.*, at 2520, 2522 (February 4, 1789).

<sup>88</sup> Hanson argued against a second convention to re-write the entire Constitution, but held out the promise of an amendments convention:

If there be any man, who approves the great outlines of the plan, and at the same time, would reject it, because he views some of the minute parts as imperfect, he should reflect, that, if the states think as he does, an alteration may be hereafter effected, at leisure.

“Aristides” (Alexander Contee Hanson), *Remarks on the Proposed Plan*, January 31, 1788 in 11 *id.* at 229, 247–48.

<sup>89</sup> U.S. CONST. art. I, § 1, cl. 3 (listing the temporary representation in the House of Representatives for thirteen states).

<sup>90</sup> Letter from George Washington to John Armstrong (April 25, 1788), available at [Founders Online](#).

<sup>91</sup> 2 ELLIOT'S DEBATES, *supra* note 1, at 157.

<sup>92</sup> Samuel Chase, *Objections to the Constitution*, 12 DOCUMENTARY HISTORY, *supra* note 1, at 631, 640.

<sup>93</sup> THE FEDERALIST NO. 85, *supra* note 1, at 455–56 (Alexander Hamilton). After the portion before the ellipsis, Hamilton included the following footnote: “It may rather be said ten, for though two-thirds may set on foot the measure, three-fourths must ratify.”

<sup>94</sup> JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978) (discussing the influence of Coxe's essays).

<sup>95</sup> Tench Coxe, *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, in 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142–43.

<sup>96</sup> Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283–84:

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>97</sup> Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1630 (1979).

<sup>98</sup> William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L. J. 1, 17–18 (1963):

If the people of the United States—the amalgam of the people of the thirteen original states and of the subsequently created states—ordained and established this Constitution, the states and their legislatures cannot be proper parties at interest in any amending proposal having the effect ... of abridging a right of the very people who created the Constitution.

<sup>99</sup> *Id.* at 15–16.

<sup>100</sup> A point of trivia: Swindler was a friend of Chief Justice Warren Burger; it is likely Swindler’s opposition to the convention process was at least partly responsible for the Chief Justice’s own celebrated hostility. I have found no evidence that Burger ever researched the issues personally or ever heard an Article V case. See Robert G. Natelson, [Where Chief Justice Burger Likely Got His Anti-Amendment Convention Views](#), THE AMERICAN THINKER.

<sup>101</sup> *Supra* Part 5. Neither Professor Swindler’s nor Professor Dellinger’s articles display much familiarity with the ratification record. Their method was to cite the proceedings of the drafting convention and then deduce conclusions from those proceedings and from their own normative preferences.

<sup>102</sup> Robert G. Natelson, *Proposing Constitutional Amendments By Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 732–73 (2011) (discussing how Congress acts as an agent for the states in counting applications and calling a convention and commenting, “In this respect, the Framers retained the Confederation way of doing things.”).

<sup>103</sup> THE FEDERALIST NO. 39, *supra* note 1, at 193–99.

<sup>104</sup> At the time Madison wrote, “federal” and “confederal” were synonyms; the two words both referred to a treaty, alliance or league (from the Latin *foedus*, treaty). See, e.g., THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed., 1789) (unpaginated) (defining “federal” as “Relating to a league or contact” and “confederation” as “League, alliance”).

<sup>105</sup> One example of many: FEDERALIST NO. 40, *supra* note 1, at 203 (“The truth is, that the great principles of the constitution proposed by the convention, may be considered less, as absolutely new, than as the expansion of principles which are found in the articles of confederation.”).

<sup>106</sup> *Id.* at 199:

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it 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>107</sup> U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

<sup>108</sup> *Id.*, art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. LAW 1, 20–21 (2010); *but see Burroughs v. United States*, 290 U.S. 534, 545–46 (1934) (recognizing an apparently extra-constitutional power in Congress to regulate presidential elections).

<sup>109</sup> *Id.* art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

<sup>110</sup> *Id.* art. I, § 1, cl. 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

<sup>111</sup> *Id.* art. II, § 1, cl. 3 (“But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote”); *cf. id.* amend 12 (“But in choosing the President, the votes shall be taken by states, the representation from each state having one vote”).

<sup>112</sup> *Id.* amend. 10 (reserving general police power in the states and people). *Compare id.* art. I, § 8, cl. 15 (“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

<sup>113</sup> *Id.* art. IV, § 4 (“The United States shall ... protect each [state] ... on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

<sup>114</sup> The process is not entirely federal because calling a convention requires two-thirds of the states, thereby assuring a critical mass of popular support.

<sup>115</sup> VILE, *supra* note 1, at 121 (“How many large states will agree to call a convention in which they are equally represented, when they are currently represented according to population in the U.S. House of Representatives and (largely) in the Electoral College?”).

<sup>116</sup> One state of the 50, Nebraska, is unicameral.

<sup>117</sup> For example, in Arizona, Senate President Andy Biggs, imbued with the notion that an amendments convention might be uncontrollable and “run away,” blocked applications favored by the majority of both houses over the course of several years. In 2017, immediately after Biggs departed the legislature for Congress, Arizona adopted two applications and called for a non-Article V “convention of states” to plan for an Article V convention.

<sup>118</sup> The “convention of states” model has been widely accepted by state legislators in recent years. Several bipartisan organizations of lawmakers, including the [Assembly of State Legislatures](#) and [State Legislators’ Article V Caucus](#), distribute information based on that model. A “planning convention” of 19 states met in Phoenix, Arizona in September 2017 and adopted the convention of states model both for itself and in recommending rules to a future convention for proposing a balanced budget amendment.

<sup>119</sup> *E.g.*, 2 FARRAND'S RECORDS, *supra* note 1, at 1 (July 14, 1787) (Journal); *id.* at 5 and 11 (July 14, 1787) (Madison) (recording failure of Charles Pinckey's proposed compromise).

<sup>120</sup> The first measure of this kind was introduced during the 1960s by Senator Sam Ervin (D-NC), of Watergate-hearings fame. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968).

<sup>121</sup> Thomas H. Neale, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (Congressional Research Service, July 10, 2012), at 21.