IS THE CONSTITUTION'S CONVENTION FOR PROPOSING AMENDMENTS A "MYSTERY"? OVERLOOKED EVIDENCE IN THE NARRATIVE OF UNCERTAINTY

ROBERT G. NATELSON*

Since the 1960s, leading academics and other commentators have claimed that the composition and protocols of the Constitution's "Convention for proposing Amendments" are unknowable, subject to congressional control, or both. Today those claims are on a collision course with growing public sentiment for an amendments convention to address federal dysfunction.

After reviewing the academic literature, this Article examines the relevant evidence on convention composition and protocols, including Founding-era records, later historical records, and a widely-overlooked Supreme Court decision. This evidence clearly contradicts assertions that convention protocols and composition are unknowable or subject to congressional control. Rather, the evidence informs us that an amendments convention is what the founders called a "convention of the states"—a gathering whose composition and protocols were universally understood by the time the Constitution was ratified.

This Article also describes the composition and protocols and explains how the "convention of states" model fits within the Constitution's structure.

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* Professor of Law (ret.), The University of Montana; Director, Article V Information Center, Denver; Senior Fellow in Constitutional Jurisprudence, The Independence Institute; author of THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS (2d ed., Apis Books 2020); co-author of GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (Cambridge Univ. Press, 2010). The author acknowledges editing assistance from Rita Dunaway, J.D. 2001, Washington and Lee University, a member of the Virginia bar.

I. INTRODUCTION[1]

One would not expect academic writings to create a constitutional crisis. Yet it could happen.

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1. This bibliographic footnote collects sources cited in disparate locations:

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MINUTES OF THE NORTH CAROLINA HOUSE OF COMMONS (Nov. 18–24, 1788) [hereinafter N.C. MINUTES], https://docsouth.unc.edu/csr/index.php/document/csr21-0001 [https://perma.cc/6SHL-5E4X].

Other Primary Sources

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976–2019) [hereinafter DOCUMENTARY HISTORY].

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT'S DEBATES].

ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST (George W. Carey & James McClelland eds., 2001) [hereinafter THE FEDERALIST].

ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1784–85 (Wright & Potter Printing Co. 1891) [hereinafter MASS. RECORDS].

As detailed below, dissatisfaction with Congress has created powerful popular sentiment for calling a convention for proposing amendments under Article V of the Constitution. Yet the prevailing narrative among influential academics has been that the composition and protocols of such a convention are unknowable and that those items must be dictated by the very Congress whose misdeeds advocates of a convention seek to remedy. Thus arises a clash between popular dissatisfaction and high-level assurances of irremediability.

PROCEEDINGS OF A CONVENTION OF DELEGATES FROM SEVERAL OF THE NEW-ENGLAND STATES HELD AT BOSTON, AUGUST 3–9, 1780 (Franklin B. Hough ed., 1867) [hereinafter BOSTON CONVENTION].

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

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Modern Commentary

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

Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968) [hereinafter Bonfield].

RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988) [hereinafter CAPLAN].

Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979) [hereinafter Dellinger].

Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 PUBLIUS 113 (1981) [hereinafter Diamond].

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

Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1968) [hereinafter Kauper].

Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011) [hereinafter Natelson, *Rules*].

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*].

ROBERT G. NATELSON, THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS (2d ed. 2020) [hereinafter LAW OF ARTICLE V].

Emily M. Padgett, *Constitutional Conventions: Power to the People or Pandora's Box?*, 65 LOY. L. REV. 195 (2019) [hereinafter Padgett].

Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53 (2012) [hereinafter Rappaport].

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

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) [hereinafter Tribe].

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

Fortunately, a constitutional crisis is unnecessary. This is because, despite the high credentials of those who have promoted the narrative of uncertainty, copious historical evidence contradicts it. In fact, the record makes convention composition and protocols reasonably clear. It also informs us that Congress has no power to alter convention composition and protocols.

The Constitution's amendment procedure is outlined in Article V.[2] It requires that any amendment be ratified by the legislatures or conventions in three fourths of the states (now thirty-eight of fifty).[3] Before ratification, however, an amendment must be proposed.[4] Article V outlines two methods of proposal: by a two thirds vote of each chamber of Congress or by a "Convention for proposing Amendments."[5] The Constitution's framers and ratifiers adopted the convention device as a way for the American people to obtain amendments Congress refused to propose—particularly if Congress was contributing to the ills requiring amendment.[6]

The proposal portion of Article V states that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[7] Thus, the text tells us that (1) if two thirds of the state legislatures transmit to Congress resolutions ("applications") favoring a convention, (2) Congress must "call" a convention, which then (3) decides whether to propose amendments, and, if it decides to do so, then drafts them. After that point, the procedure is the same as when Congress proposes an amendment.

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2. U.S. CONST. art. 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.

3. *Id.*

4. *Id.*

5. *Id.*

6. Natelson*, Conventions*, *supra* note 1, at 621–22; LAW OF ARTICLE V, *supra* note 1, at 26–28 (quoting several founders on how the convention method permits the people to amend the Constitution without the consent of federal legislators and officials).

7. U.S. CONST. art. V.

To date, the convention method of proposal has not been used. However, there have been several major campaigns to trigger an amendments convention.[8] Three of them—to adopt a bill of rights, for direct election of Senators, and to impose a two-term limit on the president—ended when Congress proposed the sought-for amendments.[9]

The years since the first three campaigns have witnessed movements for conventions to propose amendments requiring a balanced federal budget,[10] overruling certain Supreme Court decisions,[11] implementing campaign finance reform[12] and term limits,[13] and remedying alleged federal overreach.[14] To date, none of these later campaigns has triggered a convention or persuaded Congress to respond with amendments of its own.

One reason is that since the 1960s,[15] convention opponents have discouraged resort to the convention procedure by widely disseminating the claim that convention composition and protocols are unknown or potentially under congressional control.[16] According to this narrative of uncertainty, we have no idea how participants in an amendments convention would be chosen, how they might be allocated, how voting rules would be formed or what they would look like, how officers would be selected, how the scope of the convention could be limited—or whether it can be limited at all.[17]

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8. *E.g.*, BALANCED BUDGET AMENDMENT TASK FORCE, http://bba4usa.org/ [https://perma.cc/F78Q-L4PM]; *The Solution*, WOLFPAC, https://wolf-pac.com/the_solution/ [https://perma.cc/8XA2-AETQ]; *U.S. Term Limits Launches Article V Convention Effort*, U.S. TERM LIMITS, https://www.termlimits.com/article-v/ [https://perma.cc/AFU5-6KCX]; CONVENTION OF STATES, https://conventionofstates.com/ [https://perma.cc/B9E4-4XBL].

9. U.S. CONST. amends. I–X (Bill of Rights), XVII (direct election of Senators), XXII (limiting the president to two terms); Padgett, *supra* note 1, at 202 (Bill of Rights).

10. BALANCED BUDGET AMENDMENT TASK FORCE, *supra* note 8.

11. For example, 33 states have adopted applications to reverse, in whole or in part, the Supreme Court's state legislative apportionment decisions. *See* THE ARTICLE V LIBRARY, http://article5library.org/ (click on "Applications by Subject," select "Apportionment" and answer "no" to "Allow rescissions," "Include Plenary Applications" and "Limit time span").

12. *See, e.g.*, *The Solution*, *supra* note 8.

13. *E.g.*, *U.S. Term Limits Launches Article V Convention Effort*, *supra* note 8.

14. *See, e.g.*, CONVENTION OF STATES, *supra* note 8.

15. The nature and protocols of amendments conventions were well understood by lawyers, legislators, journalists, and other opinion leaders until well into the twentieth century. *See infra* Part III.

16. *See infra* Part II.

17. *See infra* Part II. Some writers have added that not even the courts can resolve these uncertainties because Article V issues are not justiciable. *E.g.*, Bonfield, *supra* note 1, at 980 ("Persuasive arguments favor the view that questions arising in the amending process are nonjusticiable."). However, this position is without merit. The courts have never refused to adjudicate

In this Article, I first examine the academic literature. Thereafter, I review pertinent historical records almost entirely overlooked in that literature. These include nineteenth-century decisions by the United States Supreme Court and by the Supreme Court of Tennessee and other nineteenth-century and early twentieth-century documents. All of these characterize an amendments convention in much the same way. I then turn to the Founding-era record to ascertain what an amendments convention was in the views of those who framed and ratified the Constitution and what its composition and protocols were. That record fully aligns with nineteenth-century and early twentieth-century views.

This material is of obvious historical interest, but it also is highly relevant legally because courts construing Article V rely heavily on historical practices and meanings.[18] I conclude by showing how the framers' model—the "convention of the states"—fits into the wider constitutional structure.

A note on terms: This Article makes frequent references to the framers and founders. Constitutional writers often employ these words imprecisely, but in this Article the *framers* are the Constitution's fifty-five drafters. The *founders* consist of the framers plus the *ratifiers*—the 1648 delegates to the ratifying conventions in the original thirteen states. (Of course, some individuals, such as James Madison, were both framers and ratifiers.) Founding generation refers to the entire involved citizenry.

II. SURVEY OF THE LITERATURE: THE UNCERTAINTY NARRATIVE

A survey of modern academic treatment of amendments conventions should begin with a 1963 Yale Law Journal article penned by Yale Law School Professor Charles L. Black, Jr.[19] In addressing a contemporaneous campaign for a convention, Black contended that convention composition and protocols were unknown and unknowable.[20] "[N]either text nor history give any real help," he wrote.[21] "When and if the article V condition is met, Congress 'shall

Article V cases on justiciability grounds. LAW OF ARTICLE V, *supra* note 1, at 13–15 (listing numerous adjudicated Article V cases); Dyer v. Blair, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975) (Judge, later Justice, Stevens) (finding Article V questions to be freely justiciable); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387–89 (1983) (outlining the claim preparatory to rebutting it).

18. LAW OF ARTICLE V, *supra* note 1, at 33.

19. Black, *supra* note 1.

20. *See generally id.*

21. *Id.* at 964.

call a Convention . . .'; that is all we know."[22] Black added that when calling a convention, Congress should define its composition and protocols.[23]

As explained below, Black's narrative of uncertainty was not based on a thorough review of the historical record. Further, his prescription for congressional oversight undercut the primary reason for the convention procedure: to enable the people to amend the Constitution without significant congressional influence.[24] Nevertheless, Black enjoyed enormous prestige and his narrative of uncertainty and congressional oversight set the stage for similar claims by scholars, lawyers, politicians, and political activists.

Thus, writing later the same year, William Swindler, a Georgetown law professor, argued that the courts should declare the convention device as no longer operative—but that if the courts did not do so, Congress should determine the rules of convention composition and voting.[25] Senator Sam Ervin (D.-N.C.), who enjoyed a "reputation as a skilled interpreter of constitutional law,"[26] was more favorably disposed to the convention procedure than Black or Swindler, but he agreed that congressional oversight was necessary.[27] Ervin introduced a congressional bill that, if adopted, would have regulated state legislative applications, the election and apportionment of delegates, and many other aspects of the convention process.[28] University of Michigan law professor Paul G. Kauper agreed with this approach.[29] Because of Article V's supposed silence[30] and ambiguity[31] about convention composition and rules, he wrote, "It is highly important that Congress define procedures and rules to govern" the subject.[32]

A 1972 study by the American Bar Association similarly claimed that convention composition and protocols were unknown, in part because of the

22. *Id.*

23. *Id.* at 959, 964.

24. *See infra* Part V.

25. Swindler, *supra* note 1, at 23.

26. Francesco L. Nepa, *Ervin, Sam J., Jr.*, AM. NAT'L BIOGRAPHY, https://doi-org.weblib.lib.umt.edu:2443/10.1093/anb/9780198606697.article.0700380 [https://perma.cc/SA67-BDNK] (link requires credentials to login).

27. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 893–94 (1968).

28. *Id.* at 879, 887–88, 892 (discussing his proposal).

29. Kauper, *supra* note 1, at 920.

30. *Id.* at 908 ("Article V is silent on how representation in the convention is to be determined.").

31. *Id.* at 911 ("The constitutional language is ambiguous on these questions.").

32. *Id.* at 919.

(false) belief that "there was little discussion of Article V in the state ratifying conventions."[33] The study's authors likewise urged Congress to act:

> In addition to the power to adopt standards for determining when a convention call should issue, we also believe it a fair inference from the text of Article V that Congress has the power to provide for such matters as the time and place of the convention, the composition and financing of the convention, and the manner of selecting delegates. Some of these items can only be fixed by Congress. Uniform federal legislation covering all is desirable in order to produce an effective convention.[34]

In 1979, Stanford Law School's famed constitutional scholar Gerald Gunther, while parting with Black on some issues, agreed that the convention mechanism was a mystery.[35] He tagged a contemporaneous campaign for a convention as "an exercise in constitutional irresponsibility"[36] because the "convention route bristles with unanswered questions"[37] and "promises uncertainty, controversy, and divisiveness at every turn."[38] Gunther predicted that "Congress . . . would presumably enact—at last—some legislation that would set up machinery for a convention,"[39] although he doubted the constitutional validity of some proposals.[40]

A particularly influential contribution to the uncertainty narrative was a 1979 article by Harvard Law School's Laurence Tribe.[41] "[T]he Article V Convention provision [in the Constitution] is strikingly vague," he wrote.[42] A convention "would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mystery of the

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33. AMERICAN BAR ASS'N, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 14 (1972).

34. *Id.* at 19.

35. Gunther, *supra* note 1, at 2.

36. *Id.* at 3.

37. *Id.* at 2.

38. *Id.* at 5.

39. *Id.* at 8.

40. *Id.* at 23.

41. Tribe, *supra* note 1. Tribe's "catalogue of basic matters on which genuine answers simply do not exist," *id.* at 638—otherwise characterized as "unanswerable questions," *id.* at 634—is the basis for lists still frequently distributed by opponents of the convention process to state legislators and the public. *See, e.g.*, COMMON CAUSE, THE DANGEROUS PATH: BIG MONEY'S PLAN TO SHRED THE CONSTITUTION 15 (May 1, 2016), https://www.commoncause.org/resource/the-dangerous-path-big-moneys-plan-to-shred-the-constitution/ [https://perma.cc/JXF7-8KFP] (reproducing Professor Tribe's list).

42. Tribe, *supra* note 1, at 632.

most fundamental sort."[43] Tribe added a long list of allegedly unanswered questions, among them—

> a. Who would be eligible to serve as a delegate?
> b. Must delegates be specially elected? Could Congress simply appoint its own members?
> c. Are the states to be equally represented, as they were in the 1787 Convention, or must the one-person, one-vote rule apply, as it does in elections for all legislative bodies except the United States Senate?
> d. Would delegates be committed to cast a vote one way or the other on a proposed amendment? Could they be forbidden to propose certain amendments?
> e. Would delegates at a Convention enjoy immunity parallel to that of members of Congress?
> f. Are delegates to be paid? If so, by whom?
> g. Could delegates be recalled? Could the Convention expel delegates? On what grounds?[44]

Academics more sympathetic toward the amendments convention process also assumed convention composition and protocols were necessarily uncertain and that Congress should define them. American Enterprise Institute Fellow Ann Stuart Diamond wrote:

> Because a convention has never been called none of the procedural questions has been answered. What is a valid state petition? What kind of convention does Article V authorize? Can a convention be limited? How will the delegates be chosen? What is the proper role of Congress, or the federal courts?[45]
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> . . . .
>
> Another serious question of procedure is the principle of representation at a convention. . . . representation based on population is preferable.[46]

Diamond urged Congress to pass regulatory legislation of the kind promoted by Senator Ervin.[47] Other commentators expressed comparable

43. *Id.* at 633–34.
44. *Id.* at 638–39.
45. Diamond, *supra* note 1, at 114.
46. *Id.* at 144.
47. *Id.* at 135.

views,[48] and even those who preferred that the states, rather than Congress, set convention standards did not question the claim that the entire procedure was a mystery.[49]

In 1988, Russell L. Caplan published the first scholarly book on the subject.[50] His collection of historical evidence—while far from comprehensive—was greater than that of any previous author, which should have suggested that the level of uncertainty was not as high as most commentators believed. Further, Caplan's research suggested that determining convention protocols was the task of the states rather than Congress.[51] But most academics ignored Caplan's work, and none modified their earlier assertions.

To the contrary, the uncertainty narrative continues to dominate academic writing today. For example, in 2011 Professor Tribe presented an edited version of his 1979 list of "unanswerable questions" at a Harvard Law School forum on the convention process.[52] In 2016, Professor John Vile offered four possible "models" for structuring a convention as if each had equal claim to validity.[53] The same year, Georgetown law professor David Super claimed that a convention "would be free to rewrite or scrap any parts" of the Constitution.[54] In 2018, Professor Vikram Amar published a

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48. *E.g.*, Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 ARIZ. L. REV. 1011, 1035 (1980); C. Herman Pritchett, *Congress and Article V Conventions*, 35 W. POL. Q. 222, 222 (1982); Bonfield, *supra* note 1, at 999–1000.

49. *E.g.*, Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 382 (1979) (arguing from constitutional structure and minimal historical data that states should choose their own delegates and that representation should be on a one-state/one-vote basis); James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1014–15 (2007) (claiming, largely on structural and minimal historical arguments, that states should choose their own delegates and representation should be on a one-state/one-vote basis).

50. CAPLAN, *supra* note 1, at x–xi.

51. *Id.* at 118 (stating that "Congress is therefore limited to decisions on the 'housekeeping' provisions of the call—the time and place of the convention, the apportionment and qualifications of the delegates); *see also id.* at 119 ("[S]ince the Constitution does not specify the method of selecting convention delegates, currently the states may decide the matter for themselves. Congress . . . has no power over choosing the delegates."). As explained below, Caplan erred in believing that Congress had any power over the apportionment or qualifications of the delegates.

52. Harvard Law School, *Conference on the Constitutional Convention: Legal Panel*, YOUTUBE (Oct. 6, 2011), https://www.youtube.com/watch?v=ZbJ7NOF3HRU.

53. VILE, *supra* note 1, at 125–41 (speculating on different convention models).

54. David Super, Opinion, *A constitutional convention would be a Brexit-scale crisis for the U.S.*, L.A. TIMES (July 7, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-super-constitutional-convention-balanced-budget-amendment-20160706-snap-story.html. Professor Super's assumption—widely shared among establishment figures at the time—that British departure from the European Union ("Brexit") would provoke a massive economic crisis did not, of course, prove accurate.

> partial list of (two dozen) important and relatively open questions concerning a new federal constitutional convention to propose amendments. Almost all of these are drawn from an excellent essay by my friend and esteemed constitutional law colleague Laurence Tribe of the Harvard Law School that was penned over three decades ago and remains instructional today.[55]

Thus, the prevailing view—especially at the highest levels of academia—remains that the composition and protocols of an Article V convention are unknown, presently unknowable, and must be determined by Congress.

Activists opposing a convention have distributed these conclusions widely during their lobbying[56] and media campaigns.[57] These activists have been assisted by two widespread popular assumptions: The first is that any convention related to the Constitution must be a "constitutional convention"—i.e., an assembly charged with writing an entirely new basic law. The second assumption is that a convention for proposing amendments is akin to the mob-scenes sponsored quadrennially by the national Republican and Democratic Parties—presumably because they all share the name "convention."[58]

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55. Vikram David Amar, *What Would a New Constitutional Convention Look Like? Two Dozen Unanswered Yet Crucial Questions*, JUSTIA: VERDICT (Dec. 14, 2018), https://verdict.justia.com/2018/12/14/what-would-a-new-constitutional-convention-look-like-two-dozen-unanswered-yet-crucial-questions [https://perma.cc/6JXS-HCZD]. *See also* Padgett, *supra* note 1, at 197–98, 203–05, 214–17 (opposing conventions in part for legal uncertainty).

56. *E.g.*, Jay Riestenberg, *Idaho Rejects the "Dangerous Path:" State Says No to New Constitutional Convention*, COMMON CAUSE (Mar. 1, 2017), http://www.commoncause.org/democracy-wire/idaho-rejects-the-dangerous-path.html [https://perma.cc/8HCY-2QAK] (mentioning lobbying efforts in Idaho).

57. *E.g.*, Robert Greenstein, Opinion, *A Constitutional Convention Could Be the Single Most Dangerous Way to "Fix" American Government*, WASH. POST (Oct. 21, 2014), https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/?utm_term=.18ab2a3ba128 [https://perma.cc/C7RU-YKSF]; David A. Super, Opinion, *Don't even think about "updating" the Constitution*, CHI. TRIB. (Mar. 19, 2017), http://www.chicagotribune.com/news/opinion/commentary/ct-constitutional-convention-amendments-20170319-story.html [https://perma.cc/94Y3-4W9B]; Editorial Board, Opinion, *We're surprisingly close to our first constitutional convention since 1787. Bad idea.*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/opinions/were-surprisingly-close-to-a-new-constitutional-convention-bad-idea/2017/04/06/f6d5b76a-197d-11e7-855e-4824bbb5d748_story.html [https://perma.cc/R4NT-J8R5] ("In fact, nearly everything about this power process would be uncertain.").

58. The late Phyllis Schlafly, a conservative Republican activist with wide experience in party politics but apparently little knowledge of the amendment convention procedure, relied on both of these memes in opposing amendment conventions. *E.g.*, Phyllis Schlafly, *Failed Republicans Want*

A result of all this academic writing and opposition lobbying has been, as Professor Michael Rappaport points out, to impose an "uncertainty tax" on the procedure that disheartens convention advocates.[59] The supposed experts have been telling them that promoting a convention is like buying a pig in a poke where Congress—the very agency advocates wish to curb or reform—gets to stuff the poke. "Even if you trigger a convention," the line goes, "Congress can rig the process so the convention proposes amendments other than, and even in direct contradiction to, those you've applied for." These discouraging pronouncements are abetted further by academic claims that the state legislatures cannot limit convention subject matter in any way.[60]

No wonder widespread disillusionment with Congress has translated neither into a convention nor (as in earlier times) into congressionally proposed amendments to preempt one.

III. THE CONSTITUTION'S SILENCE DOES NOT NECESSARILY RENDER A SUBJECT "VAGUE"

A fundamental assumption behind the narrative of uncertainty is that because the Constitution does not specify convention composition and protocols, they are unknowable: hence Professor Tribe's remark that Article V's convention language is "strikingly vague."[61] Seeming to buttress this view is James Madison's record of an episode at the Constitutional Convention in

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To Rewrite Constitution, INV. BUS. DAILY (May 24, 2016, 8:00 AM), https://www.investors.com/politics/columnists/phyllis-schlafly-failed-republicans-want-to-rewrite-constitution/ [https://perma.cc/A9WV-PHXC] (labeling an Article V convention a "constitutional convention" and resorting by analogy to the Republican and Democratic national conventions).

59. Rappaport, *supra* note 1, at 89.

60. *E.g.*, Dellinger, *supra* note 1, at 1636 ("[T]he authority to determine the agenda and to draft the amendments to be proposed should rest with the convention rather than with Congress or the state legislatures."); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972) (claiming that Article V conventions are "illimitable"). Black's conclusion was based, in part, on the inaccurate belief that during the Constitution's first century no legislative applications clearly limited the scope of convention authority. However, rather than personally examining the applications, Black based his conclusion on another's tabulation that led him to his conclusion "[a]s far as I can make out." *Id.* at 202. [!] Personally examining the applications would have corrected this impression and also informed him that an amendments convention is a convention of the states. *See infra* Parts IV, V.

61. Tribe, *supra* note 1, at 632; *cf.* VILE, *supra* note 1, at 228–29 n.22 (arguing that 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 or the subsequent democratization of Congress").

which he asked his colleagues about the convention's composition and protocols but received no answer.[62]

Of course, Madison's failure to record an answer does not mean there was none. His notes are incomplete, and the question may have been answered later. Certainly his colleagues were satisfied because they voted overwhelmingly for the final language.[63] Supporting the hypothesis that the question eventually was answered is that Madison did not press the issue and his later writings suggest his questions had been resolved.[64]

More to the point, competent constitutional scholars do not assume a phrase has no meaning merely because the Constitution and the framers' records do not define it. The Constitution contains many terms undefined by either the instrument or by the framers' records. The usual reason for the lack of definition is that the term was so well understood that there was no need to explain it.[65] Illustrative are phrases such as "the Writ of Habeas Corpus,"[66] "original Jurisdiction,"[67] and "Trial . . . by Jury."[68] Although neither the Constitution nor the framers' records define those phrases, we know their precise meaning because other Founding-era sources tell us.

For example, the Constitution and the records of the framing do not outline the composition and rules inherent in the constitutional term "jury." Other Founding-era sources fill that gap.[69] Similarly, other sources inform us of the

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62. 2 FARRAND'S RECORDS, *supra* note 1, at 558 (Sept. 10, 1787) (James Madison) ("How was a Convention to be formed? by what rule decide? what the force of its acts?").

63. *Id.* (showing the language approved by a vote of the states against reconsideration of nine states in favor, one against, one delegation divided).

64. *See infra* note 141 and accompanying text (discussing Madison's formulation in THE FEDERALIST); *see also* Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 398 (Galliard Hunt ed., 1910) (endorsing the convention procedure).

65. Many of my publications are reconstructions of Founding-era meanings of constitutional terms modern commentators once thought obscure. *E.g.*, Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629, 629 (2015); GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 6–7 (2010); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1122 (2009).

66. 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.").

67. U.S. CONST. 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.").

68. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

69. *E.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394–95 (2020) (consulting pre-Founding-era and Founding-era sources in concluding that the Sixth Amendment guarantee of trial by jury in criminal

composition and protocols of the constitutional term "convention." Officially-sponsored political conventions were ad hoc assemblies that substituted for legislatures on designated occasions.[70] In-state conventions (in the Constitution's language, "Conventions . . . in [the states]")[71] were elected assemblies in which majority per capita voting was the rule of decision.[72] As explained below, interstate conventions such as the "Convention for proposing Amendments" were conventions of the states, a term communicating universally-understood rules of composition and protocol.[73]

IV. *SMITH V. UNION BANK* AND THE POST-RATIFICATION UNDERSTANDING

The initial authors, or at least publicizers, of the uncertainty narrative were law professors. One might expect, therefore, that their research included a careful examination of relevant case law.[74] This apparently did not happen, however, because none of them found a Supreme Court pronouncement on this very subject: *Smith v. Union Bank*.[75]

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cases requires unanimity). 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 435 (June 8, 1789). Congress later dropped this list, presumably because essential protections were included in the common understanding of trial by jury.

70. Natelson, *Rules*, *supra* note 1, at 706.

71. U.S. CONST. art. V ("[W]hen ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .").

72. *Cf. In re* Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (applying Founding-era in-state convention practice to rule that delegates to an Article V ratifying convention must be popularly elected by district).

73. *See infra* Parts V, VII.

74. Or perhaps not. *See generally* ALAN WATSON, THE SHAME OF AMERICAN LEGAL EDUCATION (2006) (documenting, among other weaknesses, pervasive research incompetence and negligence among law professors, including at highly-ranked law schools). Until his decease in 2018, Professor Watson was among the world's premier legal history and comparative law scholars. Professor Watson's observations on the shoddy nature of much of the legal academy's "research" are fully corroborated by my own observations. *See, e.g.*, Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1268–73 (2007) (addressing the historical and citation errors in widely-cited articles on constitutional interpretation); *see generally* Robert G. Natelson, *Comments on the Historiography of Condominium: The Myth of Roman Origin*, 12 OKLA. CITY U. L. REV. 17 (1987) (demonstrating that a long-repeated historical claim about condominiums had no factual basis).

75. 30 U.S. 518 (1831). None of the law review articles promoting the uncertainty narrative mention *Union Bank*, although it is discussed in two books: VILE, *supra* note 1, at 83; CAPLAN, *supra* note 1, at 45–46, 99. Every legal writer seems to have missed a similar pronouncement in *State v. Foreman*. 16 Tenn. 256, 304 (1835) (referring to an amendments convention as a convention of the states); *see also infra* note 91 and accompanying text. Most also fail to address the full scope of Article V judicial and non-judicial precedent. *Cf.* LAW OF ARTICLE V, *supra* note 1 (treating cases and other precedent in detail).

Union Bank was an 1831 choice of law case.[76] The principal issue was whether Maryland 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.[77] It was a difficult question 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 that some might favor the alternative result.[78] However, he wrote, "Whether 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."[79] *Union Bank* is the only Supreme Court to address the nature of the convention.[80]

The date of the case, and the fact that Justice Johnson was a Southerner, might provoke the question of whether his comment was the product of nullification fever.[81] The answer is "no." Justice Johnson was a South Carolinian, but he was also a competent jurist who firmly opposed John C. Calhoun's nullification theories.[82] Johnson generally took an expansive view of federal power, particularly the Commerce Power.[83]

Moreover, Justice Johnson's opinion was joined by all his colleagues except Justice Henry Baldwin, who dissented without opinion.[84] Among those in the majority was Chief Justice John Marshall, who as a young Richmond, Virginia lawyer had played a central role in expounding and defending the

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76. 30 U.S. at 519. "Choice of law" is a process by which courts decide which jurisdiction's law applies where the event or its participants have connections to more than one jurisdiction. The text offers one example; another example is an automobile accident in Ohio between a car driven by a resident of Indiana and another driven by a resident of Ontario, Canada.

77. *Id.* at 518–19.

78. *Id.* at 526.

79. *Id.* at 528.

80. The other Supreme Court references are quotations from Article V. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2682–83 (2015) (Roberts, C.J., dissenting); Hawke v. Smith, 253 U.S. 221, 225–26 (1920).

81. *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).

82. Judith K. Schafer, *Johnson, William*, AM. NAT'L BIOGRAPHY, https://doi-org.weblib.lib.umt.edu:2443/10.1093/anb/9780198606697.article.1100471 [https://perma.cc/7K96-F62S] (link requires credentials to login).

83. *Id.*; *see also* Gibbons v. Odgen, 22 U.S. 1, 228–29 (1824) (Johnson, J., concurring) (claiming that regulation of commerce is exclusively the prerogative of Congress and that the state may not participate).

84. *Union Bank*, 30 U.S. at 528.

Constitution at his state's ratifying convention.[85] Also in the majority was Justice Joseph Story, Harvard law professor and constitutional commentator par excellence. As Justices who—like Johnson—were "nationalists" by the standards of the time, neither Marshall nor Story had any reason for inventing, or even advertising, amendment prerogatives for the states. So it is safe to conclude that when Justice Johnson described a convention for proposing amendments as a "convention of the states," he was reflecting the common understanding of the entire bench except, perhaps, Baldwin.[86] (Because Baldwin issued no opinion, we have no evidence of his views on the issue.) Hence, while the Court's description of an amendments convention is obiter dictum, it is obiter dictum of an informative sort.

Other evidence informs us that the characterization in *Union Bank* reflected the dominant understanding, not only in 1831 but throughout much of American history. In a case decided four years after *Union Bank*, the Tennessee Supreme Court identified an amendments convention as a convention of the states.[87] During the nineteenth century, the same terminology was employed routinely in the popular press[88] and in formal legislative applications.[89]

After the turn of the twentieth century, it became more common to use the constitutional name "convention for proposing amendments."[90] However, the

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85. Marshall was a prominent speaker at the Virginia ratifying convention. 3 ELLIOT'S DEBATES, *supra* note 1, at 222–36, 419–21, 551–62, 578 (reporting Marshall's speeches).

86. Story did not address directly the composition of the convention in his *Commentaries on the Constitution*, but he did write that "[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 § 1824 (1833), https://web.archive.org/web/20120804231020/http://www.constitution.org/js/js_341.htm. The phrase "requiring amendments to be proposed" implies that the state legislatures not only mandate that a convention be called but also that they control the convention's subject matter and decisions.

87. State v. Foreman, 16 Tenn. 256, 304 (1835).

88. *E.g.*, *The Maryland Resolutions*, NAT'L INTELLIGENCER, Mar. 4, 1850 (opining that a convention of "*all* the States" was "the only sort of Convention which the Constitution of the United States authorizes or permits"); *Washington*, NAT'L INTELLIGENCER, May 28, 1866 ("convention of all the States"); *Washington: A Convention of States to Propose Constitutional Amendments*, MILWAUKEE SENTINEL, Apr. 1, 1884, at 5 ("convention of . . . the states").

89. *See* Application, New Jersey, CONG. GLOBE, 36th Cong., 2d Sess. 680 (1861) ("[A] convention (of the States) to propose amendments."); Application, Indiana, Mar. 11, 1861, CONG. GLOBE, 37th Cong., Special Sess. 1465–66 (1861) ("convention of the several States"); Application, Ohio, Mar. 20, 1861, 1861 Ohio Laws 181 ("convention of the several states"); Application, Nebraska, Apr. 14, 1893, 1893 Neb. Laws 466–67 ("convention of the several States") (all available at *Convention Applications*, THE ARTICLE V LIBRARY, http://article5library.org/applications.htm (last visited Feb. 2, 2020).

90. The application formula adopted by the popular campaign for direct election of Senators used the phrase "convention for proposing amendments" rather than "convention of the states." Most states

label "convention of the states" continued to appear as well. In 1905, Professor Black's home law review published an article quoting the "convention of the States" language from Union Bank,[91] and in 1913 the same periodical published an article describing an amendments convention the same way.[92] In 1906, the governor of Iowa announced that he would campaign for an amendments convention, which The New York Times described as a "Convention of the States."[93] In 1909, newspapers throughout the country carried a syndicated story about how state legislative applications for an amendment mandating direct election of Senators were approaching the number required to trigger a convention of the states.[94]

A backlash against one of the Progressive Era's reforms, Prohibition, provoked discussion about a convention of the states to propose repeal of the Eighteenth Amendment. For example, in 1926 The New York Times and the Hartford Courant reported on a Nevada referendum asking Congress "to call a convention of the States for amending or repealing the Eighteenth Amendment."[95] The following year, the Racine Journal News used the term "convention of the states" repeatedly in an article explaining the amendment process.[96] Even as late as 1931, The New York Times reported that the Massachusetts state senate had adopted resolutions calling for repeal of the Eighteenth Amendment and suggesting that an amendment for this purpose be proposed either by Congress or by "a convention of the States."[97]

Were these nineteenth and early twentieth century characterizations faithful to the views of those who ratified the Constitutions? As explained below, they clearly were.

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adopted applications with this wording, so when legislators drafted later applications on other subjects, they understandably followed their most recent precedent. It was in this period also that the imprecise term "constitutional convention" began to creep into applications. *See* THE ARTICLE V LIBRARY, http://article5library.org/applications.htm (last visited Feb. 4, 2020) (collecting all applications).

91. Simeon E. Baldwin, *The Modern "Droit D'Aubaine"*, 14 YALE L.J. 129, 145 (1905).

92. Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 YALE L.J. 129, 148 (1913).

93. *Fight for Income Tax*, N.Y. TIMES, May 12, 1906, at 1.

94. *E.g.*, *Revision of Federal Constitution*, MONROE J., Oct. 21, 1909, at 1; *Big Task in Sight*, HADDAM LEADER, Oct. 22, 1909, at 2; *Demos Look Ahead*, EVENING TIMES-REPUBLICAN, Oct. 15, 1909, at 7 (all reprinting the same story about the effort to call a convention of the states to propose direct election of Senators).

95. *Nevada for Change in Law*, N.Y. TIMES, Nov. 4, 1926, at 9; *Hartford Sees a National Demand*, N.Y. TIMES, Nov. 5, 1926, at 4 (reprinting item from the *Courant*).

96. *That Proposed Constitutional Convention*, RACINE J.-NEWS, Mar. 30, 1927, at 6.

97. *Massachusetts Asks for Dry Law Repeal*, N.Y. TIMES, Mar. 13, 1931, at 12.

V. THE ORIGINAL UNDERSTANDING: EXPLICIT RATIFICATION-ERA DESCRIPTIONS OF AN AMENDMENT CONVENTION AS A "CONVENTION OF THE STATES"

The ratification era extended from September 17, 1787, the day the Constitution was signed and transmitted to Congress, until May 29, 1790, when the thirteenth state, Rhode Island, ratified.[98] During this period, writers and speakers frequently alluded to a possible second general convention.[99] The allusion might be to (1) a second plenipotentiary (broadly-empowered) constitutional convention, commissioned, like the first, by the states pursuant to their reserved sovereign powers, or (2) an Article V amendments convention. Obviously, statements made about the protocols and procedures of a general convention are most probative on the nature of an amendments convention if the writer or speaker was, in fact, referring to an amendments convention rather than to a plenipotentiary gathering.

Often, the writer or speaker stated explicitly which kind of convention he was referring to. Otherwise, we must deduce the kind from context. A crucial element of context is timing: A statement about a second federal convention made before the ninth state (New Hampshire) ratified the Constitution on June 21, 1788 almost invariably meant a plenipotentiary gathering. A statement made after nine states had ratified—when it was nearly certain the Constitution would go into effect—invariably meant an Article V amendments convention. A letter written by Edmund Pendleton a few days before the New Hampshire convention also reflects its timing: At that point ratification by a ninth state seemed probable but not definite, so the letter mentions both kinds of conclaves.[100]

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98. *See* 19 DOCUMENTARY HISTORY, *supra* note 1, at xviii–xx (presenting a chronology of the ratification period). One might argue for extending the period until January 10, 1791, the day of Vermont's ratification. However, proceedings during the ratification debates in Vermont could have no effect on decisions of the original thirteen states. Accordingly, statements of constitutional meaning issued during Vermont proceedings offer only weak evidence for the constitutional bargain. *But see* Robert G. Natelson, *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FEDERALIST SOC'Y REV. 60, 65 (2018) (discussing statements in Vermont that confirm pre-1790 representations). Although lawyers sometimes speak loosely of the "intent of the framers," the decisive inquiry for determining the Constitution's original legal effect is how the ratifiers—those who converted it into law—understood the document or, if that cannot be determined, the text's public meaning at the time. I have explored these refinements in depth in Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, *supra* note 74.

99. A general convention was one that included all states or at least states from all regions as opposed to a regional or "partial" convention. *See infra* Part VII.

100. Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 1, at 1623–24.

This Part V collects instances in which writers and speakers referred to Article V conventions explicitly as "conventions of the states" or "conventions of states." Part VI collects instances in which writers and speakers did so implicitly. Part VII shows that the "convention of states" nomenclature carried with it universally understood rules of composition and protocol.

A. *Official Statements*

In January 1788, the South Carolina legislature debated whether to send the Constitution to a state ratifying convention.[101] Charles Cotesworth Pinckney, who had served as a delegate in Philadelphia, was among the Constitution's defenders.[102] 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.[103] 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."[104]

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.[105] 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."[106] 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.[107] 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."[108]

> You have been truly informed of my Sentiments being in favr. of Amendments, but against the insisting on their Incorporation previous to, and as a Sine qua Non of Adoption, or of a *Convention being previously called* to consider them, before the Government was brought into Action to give it a fair Experiment, & secure the great good it contains. . . . Prevs. Amendments either as a Sine qua Non, or to be the Subject of Consideration in a *Future Convention of the States*, impress on my mind a *Fatal* tendency to *rejection*, & it's consequent *evils* . . . .

Id. (first and second emphasis added).

101. 4 ELLIOT'S DEBATES, *supra* note 1, at 253.

102. *Id.* at 263–64.

103. *Id.* at 306–07.

104. *Id.* at 308.

105. *Id.* at 223.

106. *Id.* at 225.

107. *Id.* at 242.

108. *Id.*; *see also id.* at 251 (recording adoption of the report).

The New York ratifying convention recommended an amendments convention, which Melancton Smith, one of the ratifying convention's leading members, referred to as a "Convention of the States."[109] On July 28, 1788, in response to a request from the New York convention delegates, Governor George Clinton (who had chaired the assembly) sent his convention's circular letter to the executives of other states.[110] This expressed a desire for amendments and requested that other states apply 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."[111] One of the drafts on which the final version of the letter was based stated that 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."[112]

Partly in response to Governor Clinton's circular letter, on November 14, 1788, the Virginia legislature adopted the first Article V application ever submitted.[113] The Virginia application employed both the phrase "convention of the States" and one of its recognized variants:

> Happily for their wishes, the Constitution hath presented an 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

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109. Melancton Smith, Draft of New York Circular Letter, *in* 23 DOCUMENTARY HISTORY, *supra* note 1, at 2338.

> Our opinion is that the most eligible mode of revising the Constitution will be by calling another general Convention, to consider of and propose such amendments, as will secure the Liberties of the people and accord with the sentiments of the several States.
>
> This cannot be effected unless 2/3 of the States apply to the Congress for the purpose—We therefore earnestly invite your State to join with ours in making application to the Congress to call a *Convention of the States* for this purpose, as soon after they meet as is convenient.

Id. (emphasis added).

110. 2 ELLIOT'S DEBATES, *supra* note 1, at 413–14 (reproducing the letter).

111. *Id.*

112. 23 DOCUMENTARY HISTORY, *supra* note 1, at 2339.

113. ANNALS OF CONG., *supra* note 1, at 248 (May 5, 1789).

> State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests . . . .[114]

The Rhode Island legislature could not apply formally for an amendments convention because that state had not yet joined the Union. Nevertheless, Rhode Island 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.[115] 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."[116]

Less than a month after the Rhode Island legislature submitted the convention issue to the electorate, the North Carolina legislature authorized calling a second ratifying convention.[117] The final resolution of the legislature provided that it was summoned "for the purpose of deliberating and determining on the proposed Foederal Constitution . . . and on such amendments, if any, as Shall or may be made to the said Constitution, by a Convention of the States, previous to the meeting of the said Convention of this state . . . ."[118] The legislature staffed its delegation for a prospective Article V convention: On November, 21, 1788, the state house of commons received

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114. *Id.* at 249.

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

116. Resolution of the Rhode Island General Assembly (Oct. 27, 1788), *in* 10 RECORDS OF THE STATE OF RHODE ISLAND 309–10 (John Russell Bartlett 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 . . . .
>
> 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* . . . .

Id. (emphasis added).

117. North Carolina Resolutions Calling a New Convention (Nov. 17–21, 1788), *in* 31 DOCUMENTARY HISTORY, *supra* note 1, at 711–12.

118. *Id.* at 712.

senate approval of a "resolution . . . for appointing five persons by ballot to represent this State in a Convention of the States, should one be called."[119]

Back in Virginia, the state legislature dispatched a letter to Governor Clinton of New York notifying Clinton of the Virginia application.[120] On November 20, 1788, the letter was read in the New York legislature.[121] That letter described the desired amendments convention as a "Convention of the States."[122]

On February 4, 1789, the lower house of the New York state legislature, the Assembly, debated a proposed application.[123] Two lawmakers referred to an amendments convention explicitly as a "convention of the states."[124] One was Samuel Jones, formerly a moderate Antifederalist in the New York ratifying convention.[125] The other was John Lansing, Jr.,[126] who had served as a delegate to the Constitutional Convention.

The following day, the New York legislature adopted its application.[127] It employed a synonym for a convention of the states employed by Virginia:

> The People of the State of New York, having ratified the

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119. N.C. MINUTES, *supra* note 1 (Nov. 21, 1788); 31 DOCUMENTARY HISTORY, *supra* note 1, at 711.

120. N.Y. ASSEMB. JOURNAL, 12th Sess., Dec. 1788, at 25 (Feb. 5, 1789).

121. *Id.*

122. Letter from John Jones, Secretary of the Senate, and Thomas Mathews, Secretary of the House of Delegates, to New York Governor George Clinton (Nov. 20, 1788), *in* N.Y. ASSEMB. JOURNAL, 12th Sess., Dec. 1788, at 25 (Feb. 5, 1789) (urging "[t]he 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.

Id.

123. 23 DOCUMENTARY HISTORY, *supra* note 1, at 2516.

124. *Id.* at 2522–23.

125. *Id.* at 2520, 2522.

126. *Id.* at 2522–23.

127. *Id.* at 2528–29.

> 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 the Congress, that a *Convention of Deputies from the several States* be called as early as possible . . .[128]

The Pennsylvania legislature was firmly set against an amendments convention. On March 5, 1789, it defeated a motion to apply for "a convention of deputies from the several states."[129] Later that day, lawmakers passed a resolution declining to apply:

> *Resolve*d, 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 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.[130]

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 eight official documents identifying an amendments convention as a convention of the states. In addition, five individuals, both Antifederalists and Federalists, employed the same designation when speaking

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128. N.Y. ASSEMB. JOURNAL, 12th Sess., Dec. 1788, at 105 (Feb. 5, 1789) (first and third emphasis added).

129. MINUTES OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 121, 123 (Mar. 5, 1789).

130. *Id.* at 124–25 (fourth and sixth emphasis added).

in official contexts. Two of those individuals had been delegates to the Constitutional Convention. I have been unable to find any document suggesting that an amendments convention was anything other than a convention of the states.

B. *Unofficial Statements*

Unofficial utterances by both Federalists and Antifederalists—some in newspapers, others in private letters—described an amendments convention as a "convention of the states" or a "convention of states." Following are ten examples.

In the November 30, 1787 edition of the New York Journal, an author writing under the pseudonym "A Baptist" criticized the Philadelphia Baptist Association for endorsing the Constitution under the assumption that the document could be amended easily:

> [B]efore any amendment can be proposed, two thirds of both houses of the federal legislature, or two thirds of those of the several states, must agree to it; and after any amendment is agreed to by a convention of the states, three fourths of the legislatures of the respective states must ratify them before they become valid . . . .[131]

Despite the difficulty of the procedure, many hoped for a future amendments convention. In a private letter written during the New York ratifying convention, Seth Johnson predicted that the conclave

> will adopt the new constitution. this manner is proposed. that the state will ratify it for 4 years & if during which time a general convention of the states should be called to make amendments then to continue as one of the confederated States, if no convention is called then to have the liberty of withdrawing if the state pleases.[132]

In a letter written near the end of the convention, Antifederalist delegate Cornelius C. Schoonmaker, related additional information about this effort to make ratification temporary:

> We then, as a farther security to obtain a[n] [amendments] convention, brought forward Mr. Smith's plan for an adoption of the Constitution for—years, and if the amendments proposed should not in that time be submitted to a convention of States this State should reserve a right to withdraw itself

131. A Baptist, N.Y. J., Nov. 30, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 1, at 331–32, 336.

132. Letter from Seth Johnson to Andrew Craigie (July 19, 1788), *in* 21 DOCUMENTARY HISTORY, *supra* note 1, at 1325–26.

from the Union.[133]

New York did not limit its ratification, but its delegates did propose an amendments convention, which a Virginia essayist ("the Republican") identified as "a convention of the states."[134]

Writing from Virginia, Federalist Edmund Pendleton—his state's leading lawyer and later president of its ratifying convention—distinguished between a revising convention called before ratification and an amendments convention called after, which he designated a "Future Convention of the States."[135] In Massachusetts, an author writing under the pseudonym "An American" suggested "a convention of the States, in some future time, to review the system, and to make such emendations as time and experience, and the wisdom of the world may point out."[136] In North Carolina, Federalist James Iredell contended that Antifederalists were wrong when they claimed North Carolina could participate in an Article V convention without joining the Union: "And if a general Convention should be called, we can have no pretence [sic] to form a part of it, unless we are in the union, because the general Convention spoken of in the constitution must mean a convention of those states which are members of the union."[137]

Another North Carolinian distinguished between the roles of an in-state convention of the people and an interstate convention of the states: "Our legislature ordered a Convention of the people to deliberate upon [ratification] and they have resolved not to accept it but upon previous amendments, to be submitted to the Congress and Convention of the states which shall be called for the purpose of amending the constitution."[138] The same author noted how

133. Letter from Cornelius C. Schoonmaker to Peter Van Gaasbeek (July 25, 1788), *in* 23 DOCUMENTARY HISTORY, *supra* note 1, at 2298–99.

134. 10 DOCUMENTARY HISTORY, *supra* note 1, at 1754 (editor's note to entry for the *Virginia Independent Chronicle*, July 16, 1788) ("On 27 August the 'Republican' published this statement in the *Chronicle*: 'Since the publication of my last number, a proposition has been received from the convention of New-York, for a new convention of the states.'"); *see also* Letter from Antoine de la Forest to Comte de la Luzerne (Aug. 16, 1788), *reprinted in* 23 DOCUMENTARY HISTORY, *supra* note 1, at 2455 (referring to New York's requested Article V convention as a "convention of the states").

135. Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 1, at 1623–24.

136. An American, Opinion, INDEP. CHRON., Nov. 30, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 337–38.

137. Letter from A Citizen of North Carolina (James Iredell) to the People of North Carolina (Aug. 18, 1788), *in* 31 DOCUMENTARY HISTORY, *supra* note 1, at 507, 515 (emphasis omitted).

138. A Citizen and Soldier, Opinion Letter VI, Aug. 27, 1788, *reprinted in* 31 DOCUMENTARY HISTORY, *supra* note 1, at 527, 545.

a convention of states was triggered: "[N]ine states must first petition for amendments, and a Convention of the separate states will be directed."[139]

Some called an amendments convention "a convention of the states" only to oppose calling one. "Tullius," a Federalist, responded in this way to charges that the initial House of Representatives was too small:

> It is to be presumed that there were particular reasons for limiting the number to 65; I do not object to it, as it is but a temporary expedient, from which no real inconvenience can be apprehended. My aim is to shew the propriety of providing a moveable ratio of representation in the federal constitution now to be adopted—thereby avoiding the necessity of calling a future convention of the States upon that account.[140]

VI. INDIRECT RATIFICATION-ERA DESCRIPTIONS OF AN AMENDMENTS CONVENTION AS A "CONVENTION OF THE STATES"

During the ratification debates, Federalists sought to reassure the public by pointing out that if the new government proved abusive or dysfunctional, state legislatures and conventions could secure amendments. Many of these reassurances are coherent only if one assumes the states would control any convention for proposing amendments. Otherwise, all these statements—including some issued by founders with the highest reputation for integrity—were untrue and perhaps fraudulent.

Perhaps the best-known statement in this category was penned by 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."[141] Congress, of course, may "originate" amendments by proposing them, so the only way for the states to be "equally enable[d]" is for states to have power to propose.[142] Because Article V provides that the convention proposes, a necessary predicate to the accuracy of Madison's observation is that the convention is a creature of the states—just as all other interstate conventions had been.

The same predicate is necessary to understand a comment by another Federalist essayist, "Cassius": "[T]he states may propose any alterations which

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139. *Id.* at 545–46.

140. Tullius, Opinion, PHILA. FREEMAN'S J., Oct. 10, 1787, *reprinted in* 32 DOCUMENTARY HISTORY, *supra* note 1, at 288, 292 (emphasis omitted).

141. THE FEDERALIST NO. 43, *supra* note 1, at 228 (James Madison).

142. *Id.*

they see fit, and . . . Congress shall take measures for having them carried into effect."[143]

"Solon, Jr.," a Rhode Island Federalist, after explaining Article V's two methods of proposing amendments, 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 . . . .[144]

Note the wording: Each state has a seat at the convention.

Alexander Contee Hanson of Maryland opposed a convention to re-write the entire Constitution but was open to 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 . . . .[145]

In this passage, Hanson strongly implies the will of the states was sufficient for obtaining amendments—which means they must control both the proposal and ratification stages. Hanson was a lawyer, judge, later chancellor of Maryland, and the author of Maryland's digest of laws (Hanson's Laws).[146] Presumably he was speaking accurately.

Another outstanding lawyer, Samuel Jones of New York, served both in his state's legislature and ratifying convention.[147] He 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

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143. Cassius, Letter VI, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 511–12 (1998).

144. Solon, Jr., Opinion, PROVIDENCE GAZETTE, Aug. 23, 1788, *reprinted in* 25 DOCUMENTARY HISTORY, *supra* note 1, at 399–400.

145. Aristides (Alexander Contee Hanson), *Remarks on the Proposed Plan*, Jan. 31, 1788, *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 1, at 229, 247–48.

146. Kevin R. Chaney, *Hanson, Alexander Contee*, AM. NAT'L BIOGRAPHY (Feb. 2000), https://doi-org.weblib.lib.umt.edu:2443/10.1093/anb/9780198606697.article.1100381 [https://perma.cc/U4QW-VKRH] (link requires credentials to login).

147. Ronald W. Howard, *Jones, Samuel*, AM. NAT'L BIOGRAPHY (Feb. 2000), https://doi-org.weblib.lib.umt.edu:2443/10.1093/anb/9780198606697.article.0100471 [https://perma.cc/MU2C-9Q24] (link requires credentials to login).

> 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.[148]

Of course, the states enjoy the ability to "restrain[]" the federal government through amendments only if they control the proposing convention as well as the legislatures or conventions that ratify amendments.

Tench Coxe had represented Pennsylvania at the Annapolis Convention and later served in the final (1788–89) Confederation Congress.[149] Still, later he became Alexander Hamilton's assistant in the Treasury Department.[150] Coxe's pro-Constitution writings were more accessible than the difficult essays of The Federalist, and probably more widely read by the general public.[151] In urging approval of the Constitution, Coxe 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.

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148. N.Y. Assemb. Debates (Feb. 4, 1789), *reprinted in* 23 DOCUMENTARY HISTORY, *supra* note 1, at 2522.

149. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 95–96, 126 (1978).

150. *Id.* at 152–53.

151. *See generally id.* (presenting Coxe's biography); *see id.* at 111 (discussing the influence of Coxe's essays).

> If then . . . the foederal government should prove dangerous, it seems the members of the confederacy will have a full and uncontroulable power to alter its nature, and render it completely safe and useful.[152]

There is more, but we must first address some numbers. Of the initial thirteen states,[153] the two thirds necessary to trigger a convention amounted to nine. However, the three fourths necessary to ratify amendments amounted to ten. One might think, therefore, that participants in the ratification debates would use the larger number to specify how many states must cooperate to amend the Constitution. Yet most participants on both sides of the debate used the number "nine."

For example, in November 1787, James Iredell of North Carolina wrote in the Grand Jury Presentment on the New Constitution:

> It is also a part of the Constitution that we observe with particular pleasure, that nine States may at any time make alterations, so that any changes which experience may point out can be made without the danger of such calamities as are incident upon changes of Government in all other Countries, where they can be only brought about by a civil war.[154]

Similarly, 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."[155] At the Massachusetts ratifying convention,

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152. Tench Coxe, *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142–43 (emphasis omitted). Coxe made a similar argument a few weeks later:

> 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 Foederal 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*.

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

153. U.S. CONST. art. I, § 2, cl. 3 (listing temporary representation in the House of Representatives for thirteen states).

154. James Iredell, *Edenton District: Grand Jury Presentment on the New Constitution*, Nov. 12, 1787, *in* 30 DOCUMENTARY HISTORY, *supra* note 1, at 23.

155. Letter from George Washington to John Armstrong (Apr. 25, 1788), https://founders.archives.gov/documents/Washington/04-06-02-0201 [https://perma.cc/G7WA-QR5C].

Federalist Charles Jarvis said that if the Constitution were ratified, "[n]ine states may insert amendments into the Constitution; but if we reject it, the vote must be unanimous."[156] At the Maryland ratifying convention, Antifederalist Samuel Chase (subsequently a Supreme Court justice) also observed that nine states were necessary to obtain amendments.[157]

Possibly the use of the number "nine" reflects an expectation that Rhode Island would not join the union and that among the remaining twelve states, nine would be sufficient to ratify amendments. This is unlikely, however. The Constitution itself envisions thirteen original states[158] and Founding-era writers consistently described ratification as a thirteen-state process.[159] So it is more probable that the focus on "nine" signified the power of nine applying state legislatures to force an amendments convention and then control its output. Alexander Hamilton was more precise:

> 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. . . . [W]henever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly prevail.[160]

All of the statements surveyed in this Part—by Madison, Washington, Hamilton, Coxe, and the rest—imply that the states can control the amendment process and, thus necessarily, the proposal mechanism. Moreover, none of these statements disclose any doubts or disagreements about the convention's composition or protocols. There was a common understanding that the composition and protocols would be much the same as those for interstate conclaves.

VII. THE COMPOSITION AND PROTOCOLS OF A CONVENTION OF THE STATES

Before Independence, the colonies of British North America often addressed common problems by sending official representatives to consult with

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156. 2 ELLIOT'S DEBATES, *supra* note 1, at 157.

157. Samuel Chase, Objections to the Constitution (Apr. 24–25, 1788), *reprinted in* 12 DOCUMENTARY HISTORY, *supra* note 1, at 631, 640.

158. U.S. CONST., art. I, § 2, cl. 3 (providing for congressional representation of thirteen states, even though Rhode Island was not represented at the framing convention).

159. The raising of thirteen pillars was "perhaps the most widely used metaphor of the ratification process." 5 DOCUMENTARY HISTORY, *supra* note 1, at 525 (editor's note) (emphasis omitted). Thus, "An item published in the *Massachusetts Gazette*, 7 December, compared 'the disunited states of America' to 'thirteen distinct, separate, independent, unsupported columns.'" *Id.*

160. 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." *Id.*

each other.[161] Sometimes these consultations were bilateral; sometimes they included three or more colonies.[162] Occasionally, other sovereignties, such as Indian tribes or the British Crown, participated.[163] During the century before Independence, such conferences were exceedingly common: There were at least twenty, and possibly more.[164]

The Declaration of Independence converted the colonies into states, but even the institution of a permanent Continental Congress did not alter the practice of holding inter-governmental conclaves operating under the same protocols. In fact, the frequency increased: In the eleven years between 1776 and 1787, interstate conferences met, on average, annually.[165] Other conferences were called but did not materialize.[166] Individual states issued most of the invitations, Congress issued a few, and on some occasions prior conferences called later ones.[167]

These conferences were known by any of four synonyms, and people favoring periphrasis might use more than one synonym to describe the same gathering.[168] Before 1775, they were commonly labeled "congresses," in imitation of congresses of diplomats from sovereign governments.[169] Occasionally, they were referred to as "council[s]"[170] or "committees."[171] (This usage of "committee" must be distinguished from its use to designate a delegation representing a government at a particular conference.)

Another synonym was convention. This term 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 Continental

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161. *See generally* Natelson, *Conventions*, *supra* note 1 (surveying conventions and convention practice before and during the Founding).

162. *Id.* at 624.

163. *Id.* at 626–28.

164. *List of Conventions of States and Colonies in American History*, ARTICLE V INFO. CTR. (Aug. 10, 2017), http://articlevinfocenter.com/list-conventions-states-colonies-american-history/ [https://perma.cc/RG67-S58Q].

165. *Id.*

166. Natelson, *Conventions*, *supra* note 1, at 645 (referring to a congressionally-called Charleston, South Carolina convention that never met).

167. *See generally id.*

168. *E.g.*, *id.* at 666–67 (citing Massachusetts governor James Bowdoin as proposing a "'Convention or Congress' of 'special delegates from the States'").

169. *Id.* at 626.

170. Only the 1684 Albany Council seems to have been so designated. Rob Natelson, *The 37th "Convention of States" Discovered!*, INDEP. INST. (Aug. 21, 2016), https://i2i.org/the-37th-convention-of-states-discovered/ [https://perma.cc/7SR2-SPF8].

171. Natelson, *Conventions*, *supra* note 1, at 630.

Congress[172]—which helps explain the framers' choice of that word in 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. A partial convention might be described as a "Convention of Commissioners from the States of [naming states],"[173] "the Convention of Delegates from the four eastern [i.e., New England] states,"[174] or a "convention of committees from the states of [named states]."[175]

On the other hand, a call might invite all colonies or states to convene, or at least colonies or states from all regions. These were "general" conventions.[176] General conventions met in 1754,[177] 1765, 1774, 1780, 1786, and, of course, 1787.[178] During the debates over the Constitution, Federalists[179]

172. 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 619–20 (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, Connecticutt [*sic*], New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia").

173. 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").

174. *E.g.*, Letter from George Washington to Mass. Governor James Bowdoin (Aug. 28, 1780), *in* BOSTON CONVENTION, *supra* note 1, at xxxi–xxxii (so naming the Boston Convention of 1780); *id.* at 52 (calling for a "[m]eeting of Commissioners from the several States" at Hartford, Connecticut).

175. *E.g.*, Letter from N.Y. Governor George Clinton to George Washington (Sept. 1, 1780), *in* BOSTON CONVENTION, *supra* note 1, at xxxi–xxxii (so naming the Boston Convention of 1780).

176. Natelson, *Conventions*, *supra* note 1, at 629.

177. *See id.* at 632. Thus, in describing the proposed 1754 Albany Congress to his colonial legislature, New Hampshire Governor Wentworth stated that 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 232. He subsequently described it as "the General Congress held at Albany." *Id.* at 292.

178. Natelson, *Conventions*, *supra* note 1, at 635, 637, 655–56, 671, 674.

179. *E.g.*, A Friend to Good Government, Opinion, NEWPORT HERALD, July 24, 1788, *reprinted in* 25 DOCUMENTARY HISTORY, *supra* note 1, at 363–64 (describing a future amendments convention as "another general Convention"); Solon, Jr., Opinion, PROVIDENCE GAZETTE, Aug. 23, 1788, *reprinted in* 25 DOCUMENTARY HISTORY, *supra* note 1, at 399 (describing an amendments convention called under Article V as "a General Convention"); Tench Coxe, *A Friend of Society and Liberty*, PA.

and Antifederalists[180] agreed that a convention for proposing amendments would be a general convention.

General conventions were known by several synonyms: (1) convention of delegates from all the states,[181] (2) federal convention,[182] (3) convention of the United States,[183] and (4) convention of "such commissioners as may be appointed by the . . . States."[184] Probably more common was (5) convention of

GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283–84 (referring to a "general convention for . . . amending the constitution").

180. *E.g.*, N.Y. ASSEMB. JOURNAL, 12th Sess., Dec. 1788, at 106 (Feb. 5, 1789) (reproducing a New York legislative application referring to an amendments convention as a "General Convention"); Resolution of the Rhode Island General Assembly (Oct. 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").

181. Resolve Recommending a Convention of Delegates from all the States, *in* 1784–85 MASS. RECORDS, *supra* note 1, at 666; *cf.* 2 J. CONT. CONG., *supra* note 1, at 51 (setting forth instructions recommending an "annual Convention of Delegates or Representatives from all the Colonies"); 31 J. CONT. CONG., *supra* note 1, 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 J. CONT. CONG., *supra* note 1, at 74 (Feb. 21, 1787) (reproducing congressional opinion in favor of "a Convention of delegates who shall have been appointed by the several States").

182. 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").

183. *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.").

184. This was the form of the resolution by which the Virginia legislature authorized a circular letter that served as the call to Annapolis. JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 153–54 (Jan. 21, 1786) (session beginning Oct. 17, 1785); *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").

the states,[185] sometimes shortened to (6) convention of states.[186] Both official[187] and unofficial[188] documents[189] employed the last two terms to designate the

185. *E.g.*, 5 DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, No. 11, Pt. 2, 28–29 (1904) (reproducing a July 21, 1782 resolution of the New York legislature stating 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 . . . ."). 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 Government, may find a remedy as soon as possible." 1784–85 MASS. RECORDS, *supra* note 1, at 667 (July 1, 1785) (emphasis added); *cf.* An Elector, MD. J., Mar. 25, 1788, *reprinted in* 12 DOCUMENTARY HISTORY, *supra* note 1, at 435, 442 (referring to "a Convention of all the states") (emphasis omitted).

186. *To the Political Freethinkers of America*, N.Y. DAILY ADVERTISER, May 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 113 ("A Convention of States, created from fear and suffering, are now to sit at Philadelphia") (emphasis omitted); Giles Hickory, Opinion, N.Y. AM. MAG., Feb. 1, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 738, 741 ("The distinction between the *Legislature* and a *convention* is, for the first time, introduced into Connecticut by the recommendation of the late convention of States."); Letter from Cornelius C. Schoonmaker to Peter Van Gaasbeek (July 25, 1788), *in* 23 DOCUMENTARY HISTORY, *supra* note 1, at 2298–99 ("We then, as a farther security to obtain a convention, brought forward Mr Smith's plan for an adoption of the Constitution for—years, and if the amendments proposed should not in that time be submitted to a convention of States this State should reserve a right to withdraw itself from the Union.").

187. Examples are legion. *See, e.g.*, 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"); 33 J. CONT. CONG., *supra* note 1, at 544 (reproducing an unsuccessful motion of Nathan Dane of Massachusetts of September 27, 1787 "that there be transmitted to the supreme executive of each State a copy of the report of the Convention of the States lately Assembled in the City of Philadelphia"); 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."); 2 DOCUMENTARY HISTORY, *supra* note 1, at 68–69 (reproducing a Pennsylvania legislative resolution on "the proposition submitted to this House by the deputies of Pennsylvania in the General Convention of the states . . . ."); 3 DOCUMENTARY HISTORY, *supra* note 1, at 57 (reproducing Delaware legislative records: "With the above mentioned letter of the 28th of September, the Federal Constitution as reported by the late Convention of the states is now transmitted to you . . . .").

188. Again, examples are legion. *See, e.g.*, Letter from George Washington to the Marquis de LaFayette (June 6, 1787), *in* 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."); 4 DOCUMENTARY HISTORY, *supra* note 1, at 67 (reproducing the following from John Quincy Adams' Diary: "The day pass'd as usual, except, that I had some political chat with Mr. Parsons. he favours very much the federal constitution, which has lately been proposed by the Convention of the States."); *Federal Constitution*, MASS. GAZETTE, Oct. 30, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 171–72 ("At length a Convention of the states has been assembled, they have formed a constitution."); A Freeman, Opinion, NEWPORT HERALD, Apr. 3, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 220–21 (referring to the Constitutional Convention as "the

1787 Constitutional Convention. All of these synonyms distinguished interstate meetings from the directly elected, popular assemblies operating solely within a state's boundaries, such as "the convention of South Carolina"[190] or a ratifying "Convention of the People."[191]

By the time the Constitution was ratified, the basic procedures for calling and holding conventions of states were fairly well standardized. They were the same for both regional and general gatherings. The first step was issuance of an application or call. This was an invitation to designated states to convene at a particular place and time to address issues identified in the call. Usually, the call came from a state legislature or from a governor operating under legislative authority. Occasionally, it came from the Confederation Congress or a prior convention.[192]

Next, each invited state decided whether to accept the invitation. If it did so, it then selected representatives to form its delegation or "committee."[193]

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*").

189. There were precedents. The phrases "convention of the states" and "convention of states" formerly designated a meeting of representatives from the three "estates" (or states): nobility, clergy, and commons. *E.g.*, HELKIAH BEDFORD, AN ABRIDGMENT OF THE HISTORY OF HEREDITARY RIGHT 243 (London, 1714) (calling the convention Parliament that offered the English crown to William and Mary a "Convention of the States"); 1 JOHN ANDREWS, THE HISTORY OF THE REVOLUTIONS OF DENMARK 240 (London, 1774) (referring to the "convention of the states of the [Danish] kingdom, which placed Frederick I. on the throne"); 4 WILLIAM BLENNERHASSETT, A NEW HISTORY OF ENGLAND 1463 (Newcastle Upon Tyne, 1751) (mentioning the Scottish convention of states); 1 JOHN GIFFORD, THE HISTORY OF ENGLAND 50, 101 (London, 1790) (mentioning the Scottish convention of states).

190. 4 J. CONT. CONG., *supra* note 1, at 274 (Apr. 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), http://docsouth.unc.edu/csr/index.php/document/csr10-0302 [https://perma.cc/KGZ5-FULX] (referring to "the Convention of that Colony [Virginia]").

191. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF NEW HAMPSHIRE (Dec. 13, 1787), *reprinted in* 21 N.H. STATE PAPERS, *supra* note 1, at 165 (so designating a state ratifying convention); Letter from Mass. Governor John Hancock to Governor Richard Caswell (Feb. 16, 1788), *in* 30 DOCUMENTARY HISTORY, *supra* note 1, at 69 (referring to the Massachusetts ratifying convention as "the Convention of the people of this Commonwealth" and the federal convention as "the Convention of Delegates from the said United States").

192. *See generally* Natelson, *Conventions*, *supra* note 1.

193. *E.g.*, Governor George Clinton, *Message to the N.Y. Legislature*, Aug. 4, 1780, *in* BOSTON CONVENTION, *supra* note 1, at 64 (referring to "a Convention of Committees from three States, lately held at Boston").

Each state defined the scope of its representatives' authority in commissions (or credentials) and instructions.[194]

These representatives might be referred to as "deputies" or "delegates," but probably the most common term was commissioner.[195] All three terms communicated the status of the representative as an agent for his legislature or state and subject to instructions and to the restrictions of agency law. Here is how the most popular contemporaneous law dictionary defined "commissioner":

> Commissioner, (commissionarius) Is he that hath a commission, letters patent, or other lawful warrant to examine any matters, or to execute any public office . . . Commissioners by the Common law must pursue the authority of the commission, and perform the effect thereof . . . and if they do any thing for which they have not authority, it will be void . . . The office [i.e., duty] of commissioners is to do what they are commanded . . . .[196]

The same dictionary defined "deputy" in this way: "Deputy, (Deputatus) Is he that exercises an office, &c, in another man's right; whose forfeiture or misdemeanor, shall cause him, whose deputy he is, to lose his office . . . ."[197] Jacob's work did not contain a definition for "delegate," but lay dictionaries made it plain that the term designated no more than an agent. [198]

Accordingly, commissioners were required to obey state instructions, remain within their authority, and were subject to recall for non-compliance. The scope of authority sometimes was a subject of convention discussion.[199]

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194. *E.g.*, THE FEDERALIST NO. 40, *supra* note 1, at 199 (James Madison) ("The powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents.").

195. *Id.* at 200; THE FEDERALIST NO. 39, *supra* note 1, at 196 (James Madison).

196. GILES JACOB, A NEW LAW-DICTIONARY (10th ed., 1782) (unpaginated) (defining "commissioner"). Jacob's Dictionary does not contain relevant definitions of "delegate" or "deputy," the other two words commonly used for commissioners. Samuel Johnson's dictionary's non-specialized definition of "delegate" (there was another meaning inapplicable here) was, "A deputy; a commissioner; a vicar." His definitions of "deputy" were (1) "A lieutenant; a viceroy" and (2) "Any one that transacts business for another." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed., 1786) (unpaginated); *cf.* SHERIDAN, DICTIONARY, *supra* note 1 (unpaginated) (definitions almost identical to Johnson's). In other words, delegates and deputies were agents.

197. JACOB, *supra* note 196 (defining "deputy").

198. *E.g.*, JOHNSON, *supra* note 196 (stating, as the first applicable definition of *delegate:* "A deputy; a commissioner; a vicar"); *cf.* SHERIDAN, DICTIONARY, *supra* note 1 (unpaginated) (definition almost identical to Johnson's).

199. *E.g.*, 1 FARRAND'S RECORDS, *supra* note 1, at 182 (quoting William Paterson interpreting the limits of his authority at the Constitutional Convention).

At the time and place designated by the call, the commissioners from participating states came together. After their initial meeting, however, they controlled their schedule and place of meeting.[200] They also elected convention officers and committees.[201] If the assembly was of significant size, it adopted procedural rules.[202]

The commissioners next proceeded to discuss the subject-matter assigned by the call. That subject-matter might be very narrow, very broad, or somewhere in between. The 1781 convention of the New England states in Providence, Rhode Island assembled only to plan war supply for New England for a single year.[203] The 1780 general convention in Philadelphia was called to address the much wider topic of wartime inflation.[204] The 1787 general convention in Philadelphia received the daunting task of considering and recommending measures to "render the Foederal Constitution [i.e., the political system] adequate for the Exigencies of the Union."[205]

Voting on substantive matters was by state;[206] a majority of the state's delegation determined how the delegation cast its vote. Voting on non-substantive matters usually was on the same basis.[207] The default rule of decision was majority of states present and voting, although some conventions staffed committees by a plurality vote.[208] Theoretically, a convention could change the rule of decision, but there are no records of a convention having done so. If a majority of voting states opted for particular solutions, the convention drafted them in its formal report and arranged for them to be sent back to the sponsoring states for consideration.[209] If a majority did not endorse any particular solution, the convention did not propose one. Either way, the convention then adjourned sine die.

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200. *Cf.* 4 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 572 (1791) ("Time and Place is only for the fix'd [first] Meeting of the Commissioners; but after they may adjourn to another Time or another Place") (emphasis omitted).

201. Natelson, *Conventions*, *supra* note 1, at 634–36.

202. *Id.* at 636.

203. *Id.* at 665.

204. *Id.* at 654 (quoting the call), 655.

205. *Id.* at 675 (quoting the call), 675–80 (discussing the scope of that gathering, including the "runaway" narrative—the very common, but false, claim that the 1787 convention exceeded the scope of its call); *see also* Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARVARD J.L. & PUB. POL'Y 61, 99–101 (2017) (correcting the "runaway" narrative).

206. Natelson, *Conventions*, *supra* note 1, at 679.

207. *Id.* at 666.

208. VILE, *supra* note 1, at 120.

209. Natelson, *Conventions*, at 663–74.

These standardized procedures were well understood when the Constitution was ratified. Over the previous century, conventions of colonies and states had met—on average, every three or four years.[210] In the eleven-year span between Independence and 1787, there had been eleven interstate conventions.[211] Leading framers and ratifiers learned of them from newspaper reports or by serving in Congress or in the state legislatures. Indeed, many leading framers and ratifiers had themselves been commissioners. For example, when Roger Sherman of Connecticut represented his state in Philadelphia in 1787, he was attending his fifth convention of states.[212] At least seventeen other framers had seen convention service.[213]

Promoters of the uncertainty narrative frequently claim the 1787 conclave is our only federal convention precedent.[214] In view of the pre-1787 record, this claim is astoundingly inaccurate. It is rendered even more inaccurate by the fact that there also have been important interstate conventions since 1787. These include regional conventions in Hartford, Connecticut in 1814; two successive sessions in Nashville, Tennessee in 1850; in Montgomery, Alabama in 1861; in St. Louis, Missouri in 1889; in four different cities in 1922; and in several locales from 1946 to 1949.[215] In addition, general conventions gathered in Washington, D.C. in 1861 and in Phoenix, Arizona in 2017.[216] With some

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210. *Id.* at 691.

211. *Id.*

212. *Id.* at 698.

213. *Id.* at 691–700 (setting forth the lists of commissioners at three major conventions of colonies and all conventions of states between 1776 and 1787).

214. *E.g.*, Padgett, *supra* note 1, at 199 (labeling a convention for proposing amendments a "constitutional convention" and asserting that "[t]he United States held its first, and so far only, Constitutional Convention in 1787"). There is an obvious problem in labeling an amendments convention a "constitutional convention." The task of an amendments convention is not to start from scratch but only to propose amendments to "this Constitution." U.S. CONST. art. V. If one properly limits the term, then America has seen not one constitutional convention, but two: Philadelphia in 1787 and Montgomery in 1861 (the Confederate analogue). If, however, one includes in the term "constitutional convention" those assemblies authorized to propose amendments, then America has had seven: Albany (1754), Philadelphia (1787), Hartford (1780), Annapolis (1786), Hartford (1814), Washington, D.C. (1861), and Montgomery (1861). *List of Conventions of States and Colonies in American History*, *supra* note 164 (listing all confirmed and several probable conventions).

215. *List of Conventions of States and Colonies in American History*, *supra* note 164.

216. *Id.* Several books examine post-1787 conventions of states. *See, e.g.*, ROBERT GRAY GUNDERSON, OLD GENTLEMAN'S CONVENTION: THE WASHINGTON PEACE CONFERENCE (1961) (the 1861 Washington Conference Convention); THELMA JENNINGS, THE NASHVILLE CONVENTION: SOUTHERN MOVEMENT FOR UNITY, 1848–1851 (1980) (the 1850 Southern Convention); DANIEL TYLER, SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS 123–201 (2003) (discussing the Colorado River Compact Commission, a convention of seven states held in 1922). The Article V Information Center, articlevinfocenter.com, which I direct, has collected and published the proceedings of the 1922 conclave, as well as those of several others.

variation in detail, all of these meetings followed similar rules of composition and protocols.[217]

VIII. HOW THE CONVENTION OF STATES MODEL FITS WITHIN THE CONSTITUTIONAL DESIGN

Some commentators have asserted 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, has maintained that permitting state legislatures to control the content of a proposed amendment violates the framers' design.[218] Professor William Swindler asserted that state legislatures are not proper parties to amendments that might reduce federal power.[219]

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217. Convention journals disclose the relative consistency in composition, convention procedures, equal state voting, and so forth. For example, the Washington Conference Convention generally followed the rules of the 1787 Constitutional Convention. CRAFTS J. WRIGHT, OFFICIAL JOURNAL OF THE CONFERENCE CONVENTION HELD AT WASHINGTON CITY, FEBRUARY, 1861, at 19 1861), https://books.google.com/books?id=J9lsKRBeLycC&pg=PA30&lpg=PA30&dq=Official+Journal+of+the+Conference+Convention+Held+at+Washington+City,+February,+1861&source=bl&ots=8-hYSm12-v&sig=ACfU3U1kgDWRSwGnFPMNA-a1BhQWeGD4uA&hl=en&sa=X&ved=2ahUKEwjxm57bmr3mAhWFB80KHd7aBtsQ6AEwAHoECAsQAQ#v=onepage&q=Official%20Journal%20of%20the%20Conference%20Convention%20Held%20at%20Washington%20City%2C%20February%2C%201861&f=false [https://perma.cc/ME9T-WXT9]. The Balanced Budget Planning Convention, held in Phoenix, Arizona, in 2017, adopted more elaborate rules, partly to reduce to writing norms that were implicit earlier in our history, such as the subject matter limitation. Rule 1.1. However, the basic protocols were the same as they always have been. DAVID GULDENSCHUH, JOURNAL OF THE BALANCED BUDGET PLANNING CONVENTION, FOURTH DAY, SEPT. 15, 2017 (2018), http://articlevinfocenter.com/wp-content/uploads/2018/10/BBA-Journal.pdf [https://perma.cc/C6CK-6ZP7].

218. Dellinger, *supra* note 1, at 1630. Professor Rappaport, asserts, I think correctly, that such claims 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.

Rappaport, *supra* note 1, at 90–91.

219. Swindler, *supra* note 1, at 17–18 (noting, "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

As we have seen, the ratification-era record is flatly inconsistent with the Dellinger-Swindler view. On the contrary, a principal reason for the convention procedure was to ensure that state lawmakers could use the amendment process to check the federal government if they deemed it necessary.[220]

Nor was the convention method merely a discordant confederal concession to necessity. It was a harmonious part of the overall design—not despite its Confederation heritage[221] but precisely because of it.

The Constitution is, in Madison's words, only "partly national."[222] It is also "partly federal."[223] When translated from eighteenth century to twenty-first century English, that means that the Constitution is partly unitary (and democratic and relating to individuals) and partly confederal (state-based, relating to states).[224] Elements of the confederal approach comprise a significant portion of the document, which is why during the ratification debates Federalists could emphasize continuity with the Articles of Confederation as well as differences.[225]

One aspect of the national/federal amalgam is the Constitution's "pairing" feature. Couplets appear throughout the document, each characterized by one element entirely or mostly "national" and another element entirely or mostly "federal." These couplets serve different, but often overlapping, functions. Some divide power and responsibility. For example, Congress may regulate congressional elections,[226] but presidential elections are (supposed to be)

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amending proposal having the effect . . . of abridging a right of the very people who created the Constitution").

220. THE FEDERALIST NO. 43, *supra* note 1, at 228 (James Madison).

221. Natelson, *Rules*, *supra* note 1, at 732–33 (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.").

222. THE FEDERALIST NO. 39, *supra* note 1, at 199 (James Madison).

223. *Id.*

224. 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.*, SHERIDAN, DICTIONARY, *supra* note 1 (unpaginated) (defining "federal" as "Relating to a league or contact" and "confederation" as "League, alliance").

225. *E.g.*, THE FEDERALIST NO. 40, *supra* note 1, at 203 (James Madison) ("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."); Letter from A Citizen of North Carolina (James Iredell) to the People of North Carolina (Aug. 18, 1788), *in* 31 DOCUMENTARY HISTORY, *supra* note 1, at 507 (stating that the nominal powers of the Confederation Congress almost equaled those of the Federal Congress under the Constitution).

226. 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 chusing Senators.").

regulated by the states.[227] Some couplets are mutual checks, such as the division of the treaty power between the president (a national officer) and Senate (a federally-based assembly)[228] and the division of the legislative power between the House of Representatives (national) and the Senate (federal).[229] Other couplets offer alternative routes to the same result. Thus, 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, but on the basis of one state/one vote.[230] When state-based law enforcement fails, national force is mustered: the state militia is transferred to central control,[231] and the nation intervenes pursuant to the Guarantee Clause.[232]

As Madison pointed out, the national/federal amalgam is particularly evident in Article V,[233] which contains two couplets offering alternative paths to the same results:

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227. *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. L. 1, 20–21 (2010); *cf.* Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (holding that state legislatures may, pursuant to their power to fix the method of choosing electors, dictate how they vote). *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).

228. U.S. CONST. 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").

229. *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.").

230. *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. XII ("But in choosing the President, the votes shall be taken by states, the representation from each state having one vote").

231. *Id.* amend. X (reserving general police power in the states and people); *cf. 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.").

232. *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.").

233. THE FEDERALIST NO. 39, *supra* note 1, at 199 (James Madison). Madison stated:

> If we try the Constitution by . . . 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 . . . . 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

- ratification by either (1) state legislatures (seen as leaning "federal") or (2) state conventions (seen as more "national" in the sense of popular), and
- proposal by either (1) the mostly-national Congress or (2) a convention of the states constituted and staffed in mostly-federal ways.[234]

As a component of one of many constitutional couplets, Article V's convention of the states is fully consistent with the constitutional design.

IX. SOME PRACTICAL OBSERVATIONS

This Article is an exposition of constitutional meaning rather than a political essay. Nevertheless, I would like to address some practical issues.

Political scientist John R. Vile fears the convention of states model reduces the chances of a convention call because modern Americans would find that model undemocratic and likely to produce unpopular amendments. He particularly fears that the one state/one vote suffrage rule may deter larger states from applying for a convention.[235]

How weighty is this concern? 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. Nor is it even remotely likely that the procedure will lead to imposition of amendments conflicting with the popular will. On the contrary, the popular will is more likely to be frustrated by continued inaction than by anything the convention might do. There are at least six reasons for this conclusion.

First, to obtain a convention on a given topic requires approval by a constitutional minimum of sixty-seven or sixty-eight dispersed legislative chambers out of a total of ninety-nine.[236] That seems a formidable requirement,

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> 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.

Id.

234. U.S. CONST. art. V. The process is not entirely federal because calling a convention requires two thirds of the states, thereby assuring a critical mass of popular support.

235. 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?").

236. One state of the fifty, Nebraska, is unicameral. *History Of The Nebraska Unicameral*, NEBRASKA LEGISLATURE, https://nebraskalegislature.gov/about/history_unicameral.php [https://perma.cc/3GC4-QTDZ].

but the reality is more formidable still. Approval by sixty-eight chambers in bicameral legislatures is insufficient if even one of the sixty-eight is a chamber in a state in which the other chamber has demurred. Moreover, if thirty-four states apply on the same subject matter, but some applications include terms 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 seventies.

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.[237]

Third, at the convention the rule of decision is a majority of all states attending, not merely a majority of states applying.[238] Moreover, that majority must agree on more than a general concept; it must agree on a specific draft. A majority may favor a concept, but different majorities may oppose any single instantiation of that concept. "The devil," it is said, "is in the details."

Fourth, one purportedly 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 reasonable way to appoint an assembly that is not a branch of general government but only an ad hoc task force. Commissioners selected by state lawmakers are likely to be seasoned individuals familiar with parliamentary procedure and unwilling to waste time on unpopular proposals offering no chance of ratification.

Fifth, even if an undemocratic proposal should emerge from this complicated process, at that stage it will be only a proposal. Ratification requires approval by thirty-eight states.[239] That means approval by seventy-five or seventy-six legislative chambers out of ninety-nine. At this stage, too, the approving houses must be allocated properly, and if Congress selects the state

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237. 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 a 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. Telephone Conversation with Rita Dunaway, Senior Vice President for Legislative Affairs, Convention of States Action (Feb. 4, 2020).

238. Natelson, *Rules*, *supra* note 1, at 740–42.

239. *Id.*

legislative mode of ratification (as it almost always has) a single powerful lawmaker will be able to block ratification in some states.

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.

As a practical matter, there is no feasible and publicly acceptable alternative to the convention of states model. For example, allocating commissioners by House districts or by House districts-plus-Senators (as in the Electoral College) is problematic for several reasons. It makes little sense to constitute an assembly designed to bypass Congress in much the same way as we constitute Congress. It is also impractical for a drafting committee that numerous to work effectively. Large size raises the odds of mob-like behavior, particularly if delegates are directly elected without state legislative supervision and perhaps without relevant experience. A common antidote to mob-like behavior is control concentrated in a relative few, which may be even worse.

One could ensure "democratic" apportionment by allocating delegates by population but reducing the overall number, perhaps to eighty or one hundred. But that 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. 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?

Moreover, state lawmakers are now well aware that the amendments convention is their instrumentality[240] and they surely would resist efforts to cut them out of the process. The result would be public outcry, litigation, and state refusal to ratify amendments proposed by a convention not based on the traditional model.

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240. The "convention of states" model has been accepted widely by state legislators in recent years. Several bipartisan organizations of lawmakers distribute information based on that model, including the State Legislators' Article V Caucus, articlevcaucus.com/, and the Assembly of State Legislatures. *See* Robert G. Natelson, *Convention Rules from the "Assembly of State Legislatures:" Two Cheers Only*, INDEP. INST. (August 17, 2016), https://i2i.org/convention-rules-from-the-assembly-of-state-legislatures-two-cheers-only/ [https://perma.cc/T2X3-R3WB].

A "planning convention" of nineteen states met in Phoenix, Arizona in September 2017 and both adopted a one-state/one-vote rule for itself and recommended it to any Article V convention for proposing a balanced budget amendment. GULDENSCHUH, *supra* note 217.

Professor Vile worries that lawmakers in large states will be deterred from applying for a convention in which they will enjoy only sovereign equality.[241] But the historical record reveals no evidence that this has ever happened. In any event it is just as likely that small states would be deterred from applying for a convention where they would be lost in the mass.

The lack of acceptable alternatives to state-based representation 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,[242] and the framers were left with interstate equality. More recently, congressional bills to allocate delegates for prospective amendment conventions may have represented "two decades of serious congressional consideration"[243]—but none has ever come close to passing.

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

X. CONCLUSION

Despite the prestige of the commentators subscribing to the narrative of uncertainty, that narrative is contradicted by virtually all the legal and historical evidence. The sources inform us clearly that a convention for proposing amendments is a convention of the states—a sibling to the many other conventions of states and colonies held over the past three hundred years.[244]

The composition and protocols of such gatherings are well established: Each state selects a delegation of commissioners in the manner the state legislature (or its designee) determines. The states meet on terms of sovereign equality, with each delegation enjoying equal voting power. The state legislatures prescribe the subject matter in advance, and the commissioners may only propose solutions within the scope of that subject matter. State legislatures may instruct and recall their commissioners. The convention establishes its own rules, elects its own officers, and decides whether to propose amendments. Unless those rules specify otherwise, proposals and other substantive decisions are adopted by a majority of states present and voting.[245]

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241. VILE, *supra* note 1, at 121.

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

243. THOMAS H. NEALE, CONG. RSCH. SERV., R42592, THE ARTICLE V CONVENTION FOR PROPOSING CONSTITUTIONAL AMENDMENTS: HISTORICAL PERSPECTIVES FOR CONGRESS 21 (2012).

244. *See supra* Part VI.

245. Natelson, *Rules*, *supra* note 1, at 740–42.

In other words, on all salient points there is no "mystery."