Br. J. Am. Leg. Studies 11(2) (2022), DOI: 10.2478/bjals-2022-0007 sciendo

Article V and the Law of Constitutional Conventions

Roman J. Hoyos[1]

ABSTRACT

Can an Article V convention be limited? While there is an emerging consensus that it can, in this paper I focus on John A. Jameson's legal treatise on constitutional conventions and the jurisprudence it spawned to help round out our understanding of both Article V in particular, and of constitutional revision more generally. Jameson's treatise was directed to the larger question of whether constitutional conventions in general could be limited. Since its initial publication in 1867, courts have relied upon Jameson's insights to build a law of constitutional conventions at the state level. Several components of this jurisprudence are particularly relevant to Article V, including the distinction between constitutional and revolutionary conventions, the distinction between amendment and revision, and the requirements of convention acts and ratification votes, in addition to the preclusion of a robust role for the electorate in the Article V convention process. This jurisprudence is readily available for courts to help guide them in determining the nature and limits of an Article V convention.

KEYWORDS

Constitutional change, state constitutional law, John Alexander Jameson

CONTENTS

[1] Professor of Law, Southwestern Law School (Los Angeles). I would like to thank Ashland Denison (Southwestern Law School Class of 2021) for his help with this paper.

> "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.…"
>
> U.S. Constitution, Article V

Can an Article V constitutional convention be limited? This "recurring question" taps into both our fears and aspirations about the federal constitution.[2] It is either a cure or a vehicle for corruption. But the debate has largely grounded to a stalemate. And our national "constitutional conventionphobia"[3] has failed to press the issue to resolution — better the devil you know. This phobia is not an entirely new phenomenon. William Gaston, a well-respected North Carolina judge and delegate to North Carolina's 1835 constitutional convention, admitted that he went to that convention with "fear and trembling" of the changes the convention might attempt to make.[4] But Gaston was in the distinct minority in the nineteenth century, when constitutional conventions dotted the constitutional landscape. From 1830 to 1880 no less than ten conventions per decade were held. In the 1860s alone over thirty conventions were held.[5] By contrast, it has been decades since a constitutional convention was held in the United States, despite numerous referendums on the issue. Fear and trembling, it appears, has forced us to defer meaningful amendment, even in the states, until there is an overwhelming consensus supporting it.[6]

More recently, though, scholars have begun to push through what Robert Natelson calls "this narrative of uncertainty," a narrative in which "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 looked like, how officers would be selected, how the scope of the convention could be limited

---

2 Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L. J. 957, 964 (1963); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972); Walter E. Dellinger, *The Recurring Question of the 'Limited' Constitutional Convention*, 88 Yale L. J. 1623, vol. 1979 (1979); Dellinger, *Who Controls a Constitutional Convention?: A Response,* Duke L. J. 999 (1979); Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983); Paulsen, *A General Theory of Article V*, 103 Yale L. J. 677 (1993). *But see* William van Alstyne, *The Limited Constitutional Convention: The Recurring Answer*, Duke L. J. 985, vol. 1979, 985-986 (1979); Damian O'Sullivan, *Structural Analysis of Article V: The Constitutionality of a Limited Convention to Propose Amendments*, 22 U. Penn. J. Con. L. 291 (2019).

3 Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 Hofstra L. & Pol'y Symp. 53 (1996).

4 North Carolina Convention Debates (1835).

5 This number is complicated by Reconstruction, a period during which ex-Confederate states held multiple conventions within a handful of years of one another.

6 Which may have been Article V's intended function. Huq Aziz, *The Function of Article V*, 162 U. Penn. L. Rev. 1165 (2014).

– or whether it could be limited at all."[7] Professor Natelson and others have done an important job of growing our understanding of Article V, both in terms of introducing new sources, and in diving more deeply into the Founding sources and precedents for an Article V convention.[8] Their work has produced an emerging consensus that an Article V convention can be limited. While this scholarship quite sensibly focuses on Article V precedents, commentary, and jurisprudence, I want to move in a different direction.

Rather than focus on Article V itself, I want to explore how Americans have dealt with the parallel question of whether their state constitutional conventions could be limited, and how that experience might provide insight into whether a federal convention could be limited. The question about whether a state constitutional convention could be limited generated intense debate throughout the nineteenth century, forming, in fact, one of the most important constitutional questions of the era. The question about the scope of a convention's authority was closely connected to the meaning and nature of popular sovereignty, which was foundational to the creation of republican governments at both the state and national levels for over a half century following the American Revolution. The convention embodied the people's constituent power, which provided the motive force for the development of new republican governments. Here, I want to explore the questions raised, and the methods and answers posed to the larger question of a whether a convention can be limited. Approaching the question that way should help to round out our understanding of the history and jurisprudence of constitutional revision in America, and demonstrate that Article V is part of a longer, centuries-long conversation about self-governance in America.

At the center of that jurisprudential history is the treatise literature on the law of constitutional conventions, and John Alexander Jameson's treatise in particular. Following the Civil War, Jameson published the first-ever legal treatise on constitutional conventions, drawing upon the rich American constitution-making experience of the nineteenth century to invent a law of constitutional conventions. Jameson's work makes a systematic and powerful case for the idea that constitutional conventions are by definition limited institutions.[9] At the very least, this treatise, and the jurisprudence it spawned, should be part of the discussion about the scope of an Article V convention's authority.

---

7 Robert G. Natelson, *Is the Constitution's Convention for Proposing Amendments a 'Mystery'?: Overlooked Evidence in the Narrative of Uncertainty*, 104 Marq. L. Rev. 1, 5 (2020).

8 *See, e.g., id*.; Natelson, *Proposing Constitutional Amendments by Conventions: Rules Governing the Process*, 78 Tenn. L. Rev. 693 (2011); Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla. L. Rev. 615 (2013); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012); Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J. L. & Pub. Pol'y 1005 (2007); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev.765 (2011); John R. Vile, Conventional Wisdom: The Alternate Article V Mechanism for Proposing Amendments to the U.S. Constitution (2016).

9 That would require a reconceptualization of American constitutionalism that is beyond the scope of this paper.

I. This Great Work of Liberty

There was nothing that could be said to constitute a law of constitutional conventions before the Civil War, at least not in the sense of courts playing a role in limiting the scope of convention authority. Indeed, there were very few cases that directly presented the question of the powers of the convention, and those that did were largely ignored or became embroiled in judicial reform politics, limiting their reach. As an "offspring of revolution," as a judge would put it in the 1870s, the convention was understood to embody and exercise the people's constituent power. As James Kent explained, "The constitution is the act of the people speaking in their original character, and defining the permanent conditions of the social alliance."[10] Another treatise writer elaborated the idea in more detail.

> It should be observed that a constitution of a state is a form of government instituted by the people in their sovereign capacity, in which just principles and fundamental law is established. It is the supreme will of the people, permanent, and fixed, in their original, unlimited, and sovereign capacity; and in it are determined the conditions, rights, and duties of every individual of the community. From the decrees of the constitution there is no appeal, for it emanated from the highest source of power, the sovereign people.[11]

This relationship between popular sovereignty and the constitutional convention was forged during 1770s and 1780s, before finding its way into American jurisprudence in the early nineteenth century.

The constitutional convention helped to make popular sovereignty the operating principle of the newly-founded republican governments by visibly embodying the people in a distinct institutional form. As Frederick Grimke explained, the invention of the constitutional convention meant that "the popular mind, and not merely the popular will, should have so direct an agency in the formation of a constitution of government." Through the convention, "the people" had gained the capacity to both act and reason, marking "an entirely new era in the history of society."[12] The convention rendered the people capable of action as a single collective whole, and enabled them to exercise their constituent power to create the institutions by which they would govern themselves.[13] In the century following the American

---

10 James Kent, 1 Commentaries on American Law 421 (1826).

11 E. Fitch Smith, 1 Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction 313 (1848).

12 Frederick Grimke, Considerations upon the Nature and Tendencies of Free Institutions 124-25 (1848).

13 Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (1988); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1998); Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era (2001); Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War (2007); R.R. Palmer, The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800, I (1959); Merrill D. Peterson, ed., Democracy, Liberty,

Revolution, people throughout the country exercised their most fundamental right to alter or abolish government to write, re-write, and re-write again, their state constitutions, making the constitutional convention one of the most important political and constitutional institutions in the United States, and certainly the most innovative institution invented by the Americans.[14]

Today, while we still seem to view the convention as the embodiment of the people, it does not seem to carry the same meaning; the very idea of popular sovereignty has been "dulled."[15] Both juridically and politically there have been fundamental changes in how Americans think about and use the constitutional convention. John Jameson's legal treatise on constitutional conventions was a crucial turning point in that change in perspective. Prior to the Civil War, judges largely ignored the question of convention power and authority, and treatise writers tended to extol the virtues of constitutional conventions. There was little serious or sustained effort to critically examine the source and extent of the powers of the constitutional convention. The convention as an institution thus remained largely where it began, as an "offspring of revolution,"[16] as the embodiment of the people and their sovereign or constituent authority, as an institution that lay beyond law.

Nevertheless, by 1860, the constitutional convention had become a common and regularized institution, for both statehood and reform. Between 1790 and 1820, most of the conventions held were statehood conventions, organized to create a constitution in order to be admitted as a state into the Union. The early statehood conventions were organized at the initiation of the territorial governments. Eventually, however, Congress made it a requirement for the statehood process.[17] Slowly during this period, however, existing states began organizing constitutional conventions to reform their constitutions. In the 1820s and 1830s, a conventional revision culture began to emerge. One problem facing reformers was that many constitutions did not include provisions for conventions in their original constitution. This did not prevent states from assembling conventions, however. They relied upon the right to alter or abolish government for authority, and the state legislature for the assembling of a convention. Occasionally, conventions were organized without the aid of state legislatures. But this was more commonly a threat to prod the legislature into assembling a convention. As the nineteenth century wore on, constitution-makers regularly began to include convention clauses in their revised constitutions in order to resolve ambiguity about whether legislatures possessed the power to call or provide for the assembling of a convention.

By the middle of the nineteenth century two traditions of constitutional revision had emerged, although it was not quite apparent to constitution-makers at the time. One was a revolutionary tradition. In times of constitutional crisis, a convention

---

and Property: The State Constitutional Conventions of the 1820s (1966); Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (1986).

14 Palmer, *supra* note 13, at ch. 8.

15 Daniel T. Rodgers, Contested Truths: Keywords in American Politics Since Independence 80 (1987).

16 *Woods's Appeal*, 75 Pa. 59, 65 (1874). Stowe was the trial judge in the case.

17 Bayrd Still, *An Interpretation of the Statehood Process, 1800-1850*, 23 Miss.Valley Hist. Rev. 189 (Sept. 1936).

assembled to fill gaps in government, and to create a new constitutional order by drafting a new constitution. It was through the drafting and enacting of the new constitution that the constituent power revealed itself; this is popular sovereignty in its most elemental form. These were the conventions of the 1770s and1780s. The second tradition was a constitutional tradition. Conventions in this tradition were bodies used to create or change constitutions, but in times of peace not of violence, upheaval, or revolution; the regular governmental institutions continued to operate until the new constitution was ratified. Many constitution-makers believed that they had successfully combined the two traditions (if they even perceived a distinction), occasionally referring to the constitutional tradition as "peaceful revolution." Over the first half of the nineteenth century, the tension between the revolutionary and constitutional traditions became more apparent and more pressing, with the two traditions finally colliding in secession.

The dividing line between the revolutionary and constitutional traditions is the question of limits, the very question at the center of debates over Article V conventions. For many decades, constitution-makers were able to suspend the distinction, as they only occasionally pushed conventions in radical directions. But beginning with the Kansas crisis, and culminating in secession and a war-time convention in Illinois in 1862, the idea of an unrestrained people exercising their sovereignty at will through a convention appeared dangerous to both government and liberty. That this idea could potentially lead to disunion, or "anarchy" as President Lincoln termed it, made the question of limits urgent.[18]

The constitutional discourse of secession, like that of constitutional conventions, was grounded in popular sovereignty, particularly its connection to the constitutional convention. Nearly every state that seceded from the Union did so by way of a constitutional convention. As the embodiment of the people's sovereignty, the convention was the most constitutionally legitimate means of seceding. Secession, then, was not, as President Lincoln characterized it, "the essence of anarchy;" it was simply the people's exercise of their right to alter or abolish government. Secession was, to be sure, an extraordinary exercise of that right, but it was also thoroughly conventional, in both senses of the term.[19] And that was precisely the problem. Secession exposed dramatically the line between revolutionary and constitutional conventions.

Secession itself may have been enough of a spur for Jameson to write his treatise. He certainly pointed to it as a motivating factor. But as an Illinois Republican, Illinois' 1862 constitutional revision convention brought the issue immediately to his door. Illinois' convention was oddly timed, coming as it did amidst the early part of a war. The voters had approved a referendum for a convention in 1860, before the war, and when Democrats gained control of the legislature in 1861, they set about to provide for its organization. While most observers in the state agreed that the 1848 constitution needed reform, the timing and composition of the convention raised questions about the objectives of many of the delegates. In fact, the convention seemed to catch Republicans off-guard, or at least the Republican editors of the Chicago *Tribune*. They apparently paid little attention to the delegate

---

18 Abraham Lincoln, "First Inaugural Address" (Mon., March 1, 1861).

19 Roman J. Hoyos, *Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession*, *in* Signposts: New Directions in Southern Legal History 241 (Sally Hadden & Patricia Minter, eds., 2013).

elections. But after the election returns put Democrats clearly in control of the convention, 55-19, the editors suddenly became concerned.[20]

Upon realizing the Democratic dominance of the convention *Tribune* editors fretted that, "It is probably one of the most ultra Democratic bodies ever got together in this State, and there is nothing they may not do." It was this last aspect that proved most frightening, as "The more radical members are for refusing to submit the Constitution to the people and for turning out all the State officers."[21] As Republicans understood it, Democrats wanted control of the state government in order to subvert the Union military effort, and possibly even use the convention to take the southern part of the state (commonly known as "Egypt") out of the Union entirely. The election of John W. Merritt as Assistant Secretary of the convention seemed to indicate the secessionist leanings of the Democratic majority. Merritt, the *Tribune* explained,

> is (or was) editor of a newspaper at his place of residence in Marion county. At the time of the fall of Fort Sumter, he was sympathizer with the secessionists, loudly exulting over the triumph of the South Carolinians, and bitterly denouncing the President for calling our volunteers to maintain the supremacy of the Constitution and laws. If we mistake not, he went so far as to endeavor to raise men to fight on the side of the rebels.[22]

It was only after members of his community threatened to shut down his paper, the paper reported, that he backed down.

Republicans had been worried about secessionists in southern Illinois since the fall of Sumter, and the convention's early actions resonated with those fears. Although the military condition of the state had been strengthened by the end of 1861, Union victory was not imminent.[23] Moreover, Illinois' neighbor, Missouri, was being ripped apart by divisions within the state, which threatened to spill over into Illinois. Eventually, the *Tribune* entered into sensationalist reporting, inventing rumors that some delegates were engaged in secessionist activities, allegations the convention investigated but found no evidence to support.[24]

More ominous than the Merritt appointment, though seen in part through it, was the convention's appointment of a committee to draft a report on the extent of the convention's powers. "It is unfortunate," declared the *Tribune*, "that the very first act of the Constitutional Convention, at Springfield, should have been the appointment of a committee to consider and report 'how far the act of the Legislature calling the Convention limited the action thereof.'" The editor assumed that this was an attempt by Democrats to come up with a rationale for not submitting the constitution to the electorate ratification, which it deemed "a grave

---

20 O.M. Dickerson, *The Illinois Constitutional Convention of 1862*, 1 U. Illinois: The University Studies, no. 9 (1905).

21 Chicago Tribune, Jan. 8, 1862.

22 *Id.* at Jan. 9, 1862.

23 Tracy Elmer Strevey, *Joseph Medill and the Chicago Tribune During the Civil War Period* 103-104 (unpublished Ph.D. diss., University of Chicago, 1938).

24 Jack Nortrup, *Yates, the Prorogued Legislature, and the Constitutional Convention*, 62 J. Ill. St. Hist. Soc'y 10-11 (1969).

public danger."[25] The editor could not believe "the airs of supreme sovereignty which the Egyptian members of the Convention are putting on,"[26] and suggested that the convention adjourn until after the war.[27] When the convention failed to adjourn, the *Tribune* stepped up the attack, and began referring to the convention as "the great usurpation," "that mob at Springfield," and "King Mob."[28]

These epithets soon led to a more legalistic analysis of the convention. One problem, as the *Tribune* saw it, was that the convention was not even properly organized, as the delegates had not taken a proper oath. Instead of swearing to support the federal and state constitution, delegates were simply required to swear support to the federal constitution. Moreover, this oath was distinct from the one required by the state constitution.[29] What the paper failed to report was that that was a common practice in conventions by 1862. Nevertheless, the *Tribune* accused the convention of "defy[ing] the existing laws, set[ting] aside the Constitution, and arrogat[ing] to itself the right to exercise the supreme power of the State." The convention thus appeared to be "a revolutionary assemblage, which, under the name of law, attempts the most flagrant innovations upon private and popular right"— "a Jacobin Club encroaching upon the safeguards of public law and justice."[30]

Particularly rankling was that the Democrats did not deny these accusations. "Thirty-eight pro-slavery Egyptians, constituting a majority of the Convention, and representing constituencies numbering but one-third of the popular of the State, claim that the sovereign power of the whole people of Illinois is concentrated inside of their skins. As two sovereignties cannot exist in the State at the same time, therefore the people—the two millions of inhabitants of Illinois—at this moment are divested of the attributes of sovereignty, and can never recover them while the Convention chooses to exist. …[T]hey are no longer self-governing freemen. They have no political power left in their hands. The thirty-eight Egyptians have absorbed it all."[31] Such "crazy and absurd attempts to seize the reins of sovereign power, or climb into the saddle, … will only get just far enough up to show what

---

25 *A Grave Public Danger,* Chicago Tribune, January 9, 1862. According to Dickerson, the reason for this report was the determination of a printer for the convention. Dickerson identified three instances in which the convention considered its own powers: its right to appoint a printer, its right to ratify the proposed amendment to the federal constitution, and its authority to reapportion congressional districts. Dickerson, *supra* note 20, at 32-41.

26 *Too Big for Their Boots*, Chicago Tribune, Feb. 8, 1862.

27 *Let the Convention Adjourn Until the War is Over*, Chicago Tribune, Jan. 29, 1862.

28 *That Mob at Springfield*, Chicago Tribune*,* Feb. 17, 1862; *King Mob at Springfield*, Chicago Tribune, Feb. 24, 1862.

29 *King Mob.* The *Tribune* had taken up the oath issue more fully in a separate editorial. The issue was whether the convention was bound by the oath in the convention which required the delegates to swear to support both the U.S. Constitution and the existing state constitution. As the convention took an oath only to support the U.S. Constitution, the *Tribune* and others argued that the convention was an illegal body. *Is the Convention Legally Organized?* Chicago Tribune, Jan. 16, 1862.

30 *The Great Usurpation*, Chicago Tribune, Feb. 11, 1862.

31 *Usurpation*, Chicago Tribune, Feb. 12, 1862. Rumors were apparently rampant around Illinois, that Knights of the Golden Circle, secessionist sympathizers, were delegates. After the *Tribune* published an account of these rumors, the Convention created a committee to investigate them. Chicago Tribune, Feb. 13, 1862.

a prodigious ass it can make of itself."[32] As a "child of the people," and an unruly one at that, the convention was at best an immature embodiment of the people, governed by its passions rather than by deliberate reason.[33]

The *Tribune*, though, did not limit itself to a critique of the Democratic delegates and their decisions. It soon began a more positive exploration of the "plain and simple" powers of constitutional conventions. It wouldn't be surprising if Jameson wrote some of these editorials himself. Jameson was one of the earliest members of the Chicago Republican Party, and was described by a friend as "devoted to the perpetuation of its principles in power, [defending] its course at all times with argument and personal devotion."[34] Moreover, the ideas developed in the pages of the *Tribune* were strikingly similar to those later found in Jameson's treatise.

According to the writer, whoever it was, the first thing to understand was that a convention was no more than a committee, appointed by the people to perform a particular act. And it was only the joint act of the committee and the electorate that produced a constitution: "The one framed the amendments, put the changes wanted into proper shape, and the other, the people, gave them vitality by adopting them." As a "committee," the convention was more of an administrative body than a sovereign one. "The Convention has no power of attorney from the people beyond that described in the act of the Legislature, which declares that whatever amendments to the Constitution may be framed, shall be submitted to the people for ratification. In other words, it is simply a conveyancer employed to fill up the instrument for the people to sign, and until they do sign it, the ordinances are utterly lifeless." As a "conveyancer" the convention was limited simply to proposing a constitution, not enacting one. Thus, to "suppose the committee should take it into their heads that they possessed supreme power, and might draw up any resolutions they pleased, and declared them passed and binding upon the meeting" was usurpation and tyranny. Any constitution drafted and approved by the convention, the writer concluded, had to be submitted for ratification by the state's voters. There was "no wilder notion" than that the constitution making power allowed a convention to "seize the sovereign authority of the State, and make or unmake, set up or pull down, at once any law it pleases."[35]

Whatever broad claims Democrats had initially made about the convention's authority, the convention ultimately submitted its work to the electorate for ratification. Most of the amendments it proposed were rejected by the voters. The secessionist threat appeared to be thwarted. But this did not solve the larger problem. In fact, one historian has written, Republicans' "private correspondence discloses no elevated feeling" regarding the triumph of democratic politics.[36] Recent experience in Kansas, the seceding South, and Illinois seemed to suggest that only violence and disunion could result from broad claims about the convention's relationship to the people. Something more binding and enforceable was needed. As fortune would

---

32 *The Convention and the Ass*, Chicago Tribune, Feb. 26, 1862.

33 *The Convention — The Child of the People*, Chicago Tribune, Feb. 18, 1862.

34 Francis Newton Thorpe, In Memoriam: John Alexander Jameson 18 (1890).

35 *Power Necessary to Change the Constitution*, Chicago Tribune, Feb. 13, 1862.

36 Nortrup, *supra* note 24, at 20. *See also* Bessie Louise Pierce, 2 A History of Chicago, 1848-1871, 261-65 (1937). Chicago voted for the new constitution by almost 1,000 votes. *Id.* at 265.

have it, a legal entrepreneur witnessing the events unfold in Illinois, and perhaps seeking to make a name for himself,[37] recognized this need.

Secession and the Illinois convention had a profound impact on Jameson, a Republican activist, University of Chicago law professor, and future Chicago judge.[38] "In 1862," he explained in the preface to the 1887 edition of his treatise, "certain influential members of the Illinois Constitutional Convention … set up for that body, in debate, a claim of inherent power amounting to almost absolute sovereignty." "Alarmed by this claim of power," he continued, "the author commenced a study of the Convention as an American institution … with a view to ascertain whether the claim of power … was warranted either by history or by constitutional principles."[39] For four years following the Illinois convention, Jameson devoted himself to ascertaining and adumbrating the limits of constitutional conventions.[40]

Jameson easily could have let the arguments against the claims made by delegates in Illinois' convention lay in *Tribune's* editorials. This was the usual course following a battle over a convention's power. Occasionally, convention critics would gather materials into a pamphlet. This happened in South Carolina, for instance, where a debate over the scope of authority of its nullification conventions generated newspaper commentary and even judicial opinions. Those opposed to the conventions gathered the opinions into a pamphlet, suggesting that the debate was at least as political as it was legal.[41] A similar pamphlet containing the attorneys' arguments in *Luther v. Borden* concerning the scope of a constitutional convention in Rhode Island also appeared in the 1840s.[42] But that was as far as convention critics went. That Jameson pressed forward with a legal treatise was, alone, a major step toward creating a law of constitutional conventions.

---

37 This, according to Joel Bishop, was often a reason for writing a treatise. Joel Prentiss Bishop, The First Book of the Law, Explaining the Nature, Sources, Books, and Practical Applications of Legal Science, and Methods of Study and Practice. 127 (1868).

38 Thorpe, *supra* note 34, at 24. Jameson initially worked on his treatise as a lecturer in constitutional law at the first University of Chicago. *Id.* at 20. In 1865, while still working on the treatise, he was elected to the Superior Court of Chicago, where he served until 1883. He was also a founder of the American Academy of Political and Social Science, an editor for the American Law Review, and "an accomplished linguist." *Id.* at 22, 24. He also received an appointment to be a lecturer in American constitutional history at the University of Pennsylvania in 1890, but died before starting. He was 67. *Id.* at 24.

39 John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding, rev'd, corr'd, and enl'd ed. iii, (4th ed. 1887). The 1887 edition was the final edition of Jameson's treatise, and it was the only one in which he included a preface. The other editions were published in 1867, 1869, and 1873.

40 Thorpe, *In Memoriam*, *supra* note 34, at 18.

41 The Book of Allegiance; or A Report of the Arguments of Counsel, and Opinions of the Court of Appeals of South Carolina, on the Oath of Allegiance, Determined on the 24th of May, 1834 (1834). Jameson would rely upon the allegiance cases to help develop his arguments in his treatise.

42 The Rhode Island Question: Mr. Webster's Argument in the Supreme Court of the United States in the Case of Martin Luther v. Luther M. Borden and Others, January 27th, 1848 (1848).

II. Inventing a Law of Constitutional Conventions

Jameson picked up where the *Tribune* left off. Although he did have precedents from which to work, no one had undertaken a full-scale systematic study of constitutional conventions. Such a study required an in-depth examination not only of cases and the treatise literature, themselves sparse, but of the convention debates, as well. The project was enormous,[43] and Jameson's treatise remains the best and fullest account of the nature of the constitutional convention to date.[44] First published in 1867, the same year as the first set of congressional Reconstruction Acts requiring the constitutional reorganization of the ex-Confederate states, Jameson's treatise quickly went through four editions over the following two decades. The rapidity of revision indicates its popularity and significance, as well as the dynamic constitutional changes that occurred during Reconstruction. Constitution-makers at all levels of state and federal governments were wrestling with questions about the nature of constitutional conventions and their limits with a new-found urgency. That jurists would lead the transformation in making the constitutional convention an "offspring of law"[45] suggests just how dramatic a transformation it was.

Jameson's purpose was not simply to recount what the conventions had done, but to subject them to legal limits. The main problem, as Jameson saw it, was that the convention was an "ill-defined assembly," which had led to the "prevailing maxim" that the convention embodied the people.[46] The war-time experience with constitutional conventions had challenged that maxim. Secession and war were now evidence of the dangers posed by conflating popular sovereignty with constitutional conventions. Destroying the convention-secession-popular sovereignty connections entailed the construction of new relationships between law and popular sovereignty. Jameson's primary questions sought to address the problem of ill-definition, and should be of interest to anyone concerned with Article V conventions:

> Is this institution subject to any law, to any restriction? What claims does it itself put forth, and what do the precedents teach, in relation to its nature and powers? When called into existence, is it the servant of the master, of the people, by whom it was spoken into being?[47]

Two classification schemes were key to Jameson's reconstruction effort. Jameson first divided conventions into types, ranging from the spontaneous to the revolutionary. The "lower species of conventions" were the spontaneous and ordinary legislative. Spontaneous conventions were "voluntary assemblages of citizens, which characterize free communities in advanced stages of civilization," and are important

---

43 I can personally attest to the fact that such a project is an at-times mind-numbing experience, especially when dealing with the multi-volume, multi-columned octavo-sized books.

44 There are others, however, who prefer Roger Sherman Hoar's, Constitutional Conventions: Their Nature, Power, and Limitations (1917).

45 *Woods's Appeal, supra* note 16, at 74 (opinion of Agnew, C.J.).

46 Jameson, *supra* note 39, at 3.

47 *Id*. at 2.

"manufactories of public opinion." But they are "wholly unofficial" bodies; they could only help to shape public opinion. Spontaneous conventions were quite common in the nineteenth century, dealing with topics ranging from rivers and harbors to women's rights. But they could be even more spontaneous than that, like town meetings on a pressing local issue. The ordinary legislative convention (i.e. a legislature), on the other hand, was wholly official, "it can do nothing except by the authority contained in the [constitution]."[48] The legislative convention can help to shape public opinion, like spontaneous conventions, but its chief value was its duty to act. The legislative convention's duty was to translate public opinion into law, to govern.

But Jameson's more important distinction was between revolutionary and constitutional conventions. According to Jameson, revolutionary conventions are bodies that wield essentially illimitable power. Their "principal characteristics" are

> that they are *dehors* the law; that they derive their powers, if justifiable, from necessity,—the necessity, in default of the regular authorities, of protection and guidance to the Commonwealth, —or, if not justifiable, from revolutionary force and violence; that they are possessed accordingly to an indeterminate extent, depending on the circumstances of each case, *of governmental powers;* finally, *that they are not subaltern or ancillary to any other institutions whatever, but lords paramount of the entire political domain*.[49]

Because they exist outside of law, there are no definite forms of organization or operation for revolutionary conventions. Instead, a revolutionary convention is a "body which can, violently and *without law*, uproot all existing institutions."[50] During a time in which one form of government is being cast off, and no other institutions exist to take over some basic governing or constitution functions, a revolutionary convention fills the void. The obvious examples of such conventions are the committees of safety that appeared in the 1770s as the American colonies seceded from the British empire.[51]

What separated the constitutional from the revolutionary conventions was law. "If a Constitutional Convention step outside the circle of the law," Jameson explained, "it does not continue to be a Constitutional Convention, but, so far, becomes that whose powers or methods it assumes, - a Revolutionary Convention. It leaves the domain of law, which is one of specified and restricted powers, and enters upon that of arbitrary discretion, within which law is silent, and where he is master who wields the greater force."[52] A *constitutional* convention was thus "subaltern" to the constitution, or wholly within the "domain of law." The very notion of a *constitutional* convention implied that it was subject to limits.

A second classification scheme underscored the limited nature of constitutional conventions. Jameson added two branches to the traditional three-branch formula. The first addition, at the apex, was the electorate. The electorate constituted "the

---

48 *Id*. at 4-5.
49 *Id*. at 6.
50 *Id*. (emphasis added).
51 Adams, *supra* note 13.
52 Jameson, *supra* note 39, at 11.

people," but only in a "qualified" sense, as the true people could only be found in public opinion. Its distinguishing characteristic was that it acted without assembling, unlike the other branches; a sort of disembodied representative.[53] Jameson's second addition was the constitutional convention.[54] Jameson further divided these branches of government into "mediate" and "immediate" representatives of the people. Only the electorate was an immediate representative of the popular sovereign. But Jameson emphasized that none of the branches were actually sovereign. Instead, it was a question of proximity. The relative importance of the branch was determined by its proximity to the sovereign. According to these determinants, Jameson ordered the branches listing the constitutional convention third behind the electorate and the legislature. Now, not only was the convention no longer sovereign, it was no longer the institution closest to the sovereign. Jameson had reduced it to another branch of government, to which was delegated a specific, narrow task: the drafting of a constitution.[55]

Two more elements rounded out this new law of constitutional conventions—the convention act and ratification, both of which made the convention and its work "legitimate and safe."[56] To remain constitutional, a convention had to be assembled according to a proper mode, through a convention act passed by the legislature, which ensured both that "public opinion should have settled upon its necessity." This ensured that "all the legal restraints of which it is susceptible" would be thrown around it.[57] Second, constitutional conventions were charged with merely proposing specific changes; popular ratification of those changes was now required. The ratification vote placed limits on the back end of the convention process.[58] This was one of the lessons the 1862 Illinois convention had taught. Subsequent treatise writers would place great emphasis on ratification. Charles Borgeaud, for instance, referred to it as the "American system."[59]

Jameson, then, laid the basic foundation for the law of constitutional conventions. In distinguishing between revolutionary and constitutional conventions, he treated the *constitutional* convention as simply a branch of government, removing it from any association with the people's constituent power. By subordinating the

---

53 *Id*. at 23.

54 *Id*.

55 *Id.* at 24.

56 *Id.* at 106.

57 *Id.* at 109 *et seq*. A separate but related issue was whether a legislature could bind the convention on substantive issues. For Jameson, it was a question of the extent to which a legislature could act. *Id.* at 350-89.

58 *Id.* at 381; *id.* at 440-77.

59 Charles Borgeaud, Adoption and Amendment of Constitutions in Europe and America 181-91 (1895). *See also* Charles Sumner Lobingier, 1 The People's Law, Or, Popular Participation in Law-Making From Ancient Folk-Moot to Modern Referendum: A Study in the Evolution of Democracy and Direct Legislation 340 (1909); Woodrow Wilson, The State: Elements of Historical and Practical Politics, rev'd ed. 476-77 (1904); H. von Holst, The Constitutional Law of the United States of America 263-67 (Alfred Bishop Mason, trans., 1887); James Quayle Dealey, Growth of American State Constitutions From 1776 to the End of the Year 1914 142-45 (1915). *But see* Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 62-71, esp. 69 (1910). Dodd, however, went on to hold that the convention "is in no sense a revolutionary or extra-constitutional body and does not supersede in any way the organs of the existing government." *Id.* at 72.

constitutional convention to convention acts and ratification votes, he rendered it incapable of independent action, and ultimately subject to judicial oversight.

Jameson's treatise was published to favorable reviews. Francis Thorpe thought his treatise took "rank with Story, with Hurd, with Cooley, and with Kent."[60] The *North American Review* thought it a timely work, especially "now, when the people of ten States are to make new or remodel their old constitutions, it contains matter of especial interest and importance, not only for those who are to make new constitutions, but for those who have declared that those constitutions shall be of a certain character."[61] The *American Law Register* also appreciated its timeliness. "In no other country could such a book have been produced, and certainly at no other time even here could it have been produced so opportunely." Moreover, the reviewer continued, Jameson

> has gone deeper, and in the present work has examined the legal powers of the people themselves in the formation of their governments and the principles by which they are properly guided in the establishment or change of constitutions under the forms of law. *In one sense this may be called an inquiry into the precise limits of the ultimate right of revolution and the proper or justifiable occasions for its exercise*.[62]

Reviewers understood the timeliness of Jameson's treatise, as "even now many of the rules which should govern [conventions] are undetermined," and "of all our institutions, [the convention was] the one through which sedition and revolution would most naturally seek to make their approaches, the only check upon it being the power of rejection which the people should have over all its recommendations."[63] The *North American Review* found Jameson's distinction between revolutionary and constitutional conventions particularly useful. "The confounding of the distinction between these two conventions has been the origins of dangerous misconceptions," the reviewer wrote.[64] Jameson's classifications, the reviewer perceived, were key to subjecting conventions to legal restraints. On this point, the noted Michigan jurist Thomas Cooley found Jameson's "work is so complete and satisfactory in its treatment of the general subject, as to leave little to be said by one who shall afterwards attempt to cover the same ground."[65]

But reviews were one thing. The more important question was the influence it would have on judges.[66]

---

60 Thorpe, *In Memoriam*, *supra* note 34, at 26. *See also* John W. Burgess, [*Review*], 3 Political Science Quarterly 545 (1888). Jameson had his critics of course. Dodd, *supra* note 59. Their criticisms did not, however, undermine Jameson's larger project of legalizing conventions.

61 *Review of Jameson,* The Constitutional Convention, 104 N. Am. Rev. 646, 647 (1867).

62 *Review of Jameson,* The Constitutional Convention, 16 Am. L. Register 382 (1868) (emphasis added).

63 *Id*. at 653.

64 *Id.* at 647.

65 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 33 (1868).

66 Or convention delegates themselves. It turned out that delegates were the first adopters of the treatise.

III. The "Offspring of Revolution" Reconsidered

After the war, convention cases became increasingly common. The earliest postbellum convention cases came out of the southern and border states. Courts in 1866 and 1867, but even as late as 1871, sought to avoid the issue of convention power. A Texas court in 1866, for instance, found that it was "unnecessary for us to consider that grave question, which in other states has frequently elicited discussion and differences of opinion among the ablest jurists."[67] A North Carolina court was invited to hold that the convention was subject to limitations, but sidestepped the issue, noting simply that, "without pursuing the argument, we do not admit that the powers of the Convention were limited, except by the Constitution of the United States."[68] An opinion from Maryland in 1864 suggests the pragmatism behind this abstention. Noting that it had been "invoked to enter into the constitutional powers of the convention, and express opinions upon the validity of their acts," the court declined. "If we cannot subdue the strife," the court explained, "we will not add fuel to the flame. All that we can do is, to show reverence for Constitutional government, by confining ourselves to the strict limits of our authority, as may induce others, who love 'liberty regulated by law,' to cherish all its muniments, and observe all their obligations."[69] In a case the following year, the Maryland court continued to abstain, determining that the "wisdom" of constitutional changes "is for the people to determine."[70]

It was becoming clear, though, that the convention's authority, and its relationship to law, was now in flux. Attorneys were pressing the issue before courts in ways they never had before. No doubt this was part of the factional politics of Reconstruction, as well as a dissatisfaction with congressional Reconstruction. But courts were beginning to understand that convention power broadly conceived was becoming problematic. As an Alabama court noted, "What the legitimate powers of a popular convention are, will possibly never be settled, so as to suit and harmonize with all the arguments upon this subject."[71] Similarly, a South Carolina court declared that, "It is not easy to define the powers which a convention of the people may rightfully exercise."[72] These doubts were generally absent in antebellum judicial opinions, whatever views they held about convention power. But courts were in a precarious position. Ruling on convention authority could call their own status into question. Thus the earliest acknowledgments of convention limits relied on the supremacy of the federal constitution, especially its prohibition of *ex post facto* laws and bills of attainder, and its protection of contracts, in addition to the guarantee clause.[73] But these limits did not quite get to the issue of convention sovereignty.

---

67 L.C. Cunningham & Co. v. Perkins, 28 Tex. 488, 490 (1866).

68 State v. Sears, 61 N.C. 146, 150 (1867).

69 Miles v. Bradford, 22 Md. 170, 185-86 (1864).

70 Anderson v. Baker, 23 Md. 531, 613 (1865); *see also* State v. Cummings, 36 Mo. 263 (1865); Duerson's Adm'r v. Alsop, 68 Va. 229 (1876).

71 Scruggs v. Mayor of Huntsville, 45 Ala. 220, 223 (1871).

72 Gibbes v. Greenville & C.R. Co., 13 S.C. 228, 242 (1880).

73 *See*, *e.g.*, Cochran v. Darcy, 5 S.C. 125 (1874); Calhoun v. Calhoun, 2 S.C. 283 (1870); State v. Keith, 63 N.C. 140 (1869); Bradford v. Shine, 13 Fla. 393 (1869); McNealy v. Gregory, 13 Fla. 417 (1869); State v. Sears, 61 N.C. 146 (1867). Implied in Brown v. Driggers, 62 Ga. 354, 357-58 (Ga. 1879).

After 1867, the year Jameson's treatise was published, courts became more aggressive. The Missouri Supreme Court, for instance, rejected its earlier position despite no change in its personnel. The idea of convention sovereignty, claiming "omnipotent powers and [holding] themselves emancipated of all restraints," the court denounced "as breathing the worst spits of the worst men in the worst times. Such has been the tyrant's plea from the beginning of the world." Convention sovereignty was now an "unqualified tyranny."[74] In 1871, the Arkansas Supreme Court held that it could "find no traces of any such dogmas or heresies" in the early history of conventions. The idea's first appearance, the court argued, was in New York's 1821 convention. But it wasn't until secession when "the infection assumed its most malignant character, and swept like an angel of death over" the southern states that the idea reached fruition. "Such force, fraud, usurpation, and treachery on the part of the servants of the people … was never beheld in the civilized world."[75] While the court did not cite Jameson's treatise, Jameson's fingerprints were all over it. By 1875, the Alabama Supreme Court, only four years after noting that the power of the convention might never be resolved, held that a court could in fact determine "the power and duty of the convention," "bear[ing] in mind the purpose to be accomplished."[76]

But the most important and influential cases arose out of Pennsylvania's 1873 convention, *Wells v. Bain*[77] and *Woods's Appeal*.[78] These cases built upon and extended Jameson's new conception of the relationship between law and conventions.

IV. Convention vs. Court

Pennsylvania's 1873 convention was largely a response to Simon Cameron's political machine,[79] one of "the most powerful political machine[s] in the nation's history."[80] Cameron had been one of the founders of the Republican party, and was Lincoln's Secretary of War briefly in 1861 before accepting a diplomatic post to Russia. Eventually, he was appointed as a U.S. senator from Pennsylvania, and became a key cog in President's Grant's spoils system. Cameron's political machine in Pennsylvania was centered in Pittsburgh and Philadelphia where its members held key local offices that controlled the main channels of legal and economic business, such as the recorder of deeds, receiver of taxes, the clerk of

74 Blair v. Ridgely, 41 Mo. 63, 98 (1867).
75 Penn v. Tollison, 26 Ark. 545, 572 (1871).
76 Plowman v. Thornton, 52 Ala. 559, 566 (1875).
77 75 Pa. 39 (1873). According to Thorpe, *Wells* was the first case to cite Jameson's treatise. Thorpe, *In Memoriam*, *supra* note 34. However, the earliest case I have found is Kirtland v. Molton, 41 Ala. 548, 564 (1868). The court there held that the convention did not possess legislative power. According to the court, "Its power was limited to the formation of a State constitution, and no legislative power was conferred on it by any competent authority...." *Id.*
78 75 Pa. 59 (1874).
79 Frank Bernard Evans, *Pennsylvania Politics, 1872-1877: A Study in Political Leadership* (1966).
80 John D. Stewart II, *The Great Winnebago Chieftain: Simon Cameron's Rise to Power, 1860-1867*, 39 Pennsylvania History 20-39 (1972).

the quarter sessions court, and the prothonotary (clerk) of the district court.[81] At the state level, the key post of treasury secretary was held by a Cameron adjutant, Robert Mackey, who used it to create the "Treasury Ring." In addition to these strategic financial positions the Cameron machine also controlled elections through the Registry Act of 1869, which gave the Republican Party complete control over the registration of voters.[82] This enabled the machine to control the state legislature, where it consolidated its power through special and local legislation designed to dole out party favors.[83] Reformers proved unable to break the control of the Cameron machine through party politics, and eventually turned to the constitutional convention.

Convention bills were introduced repeatedly in the state legislature between 1867 and in 1871, when reformers secured a referendum vote on whether to hold a constitutional convention, which passed overwhelmingly.[84] The Pennsylvania legislature then passed a second act providing for the organization of the convention that would ultimately spur the controversy that led to *Wells* and *Woods's Appeal*. The legislature's convention act provided for the mode of election, determined how many delegates would be elected and how, some limitations on what subjects the convention could consider, and required ratification of any proposed constitution or amendments. Two sections would become particularly important. Section 5 of the act required that the convention submit the new constitution to the people for ratification "at such time or times, and in such manner as the convention shall prescribe." Section 6, on the other hand, required that the ratification election would be held "as the general elections of this Commonwealth are now by law conducted." For many delegates, this appeared to give too much power to the Cameron machine.[85]

Fearing obstruction by the Philadelphia machine, the convention passed an ordinance in which they appointed five commissioners of election to carry out the election in the Philadelphia. It gave the commissioners power to register voters, and to appoint judges and inspectors for each election district. Treasury Secretary Mackey refused to distribute state funds to pay for these special election officials. But the convention's commissioners continued their work without pay.[86] Meanwhile the Philadelphia city council appropriated money to the regular election officials under the 1869 Registry Act. Those officials, though, supplied the convention's election officials with the materials for conducting elections. It was this machinery that led to the convention cases.

On November 24, Francis Wells and other "citizens and voters of Philadelphia," sought an injunction against the city commissioners to prevent them from spending money on the election. They also sought an injunction to prevent the election

---

81 *Id*. at 15.

82 *Id.* at 7-18.

83 Evans, *Pennsylvania Politics*, *supra* note 79, at 43. According to Evans, of more than 9,200 pieces of legislation passed between 1866 and 1874, over 8,700 were special legislation. *Id.* at 74.

84 *Id*. at 27.

85 For a narrative account of the Pennsylvania ratification struggle, see Mahlon Howard Hellerich, The Pennsylvania Constitution of 1873, ch. 9 (1956) (unpublished Ph.D. dissertation, University of Pennsylvania).

86 *Id.* at 90.

commissioners appointed by the convention from holding an election. In addition, John Donnelly, an existing election commissioner, sought an injunction against the convention-appointed commissioners to prevent them from interfering with his duties as an inspector and from appointing other election officers. All of these plaintiffs were part of the Philadelphia political machine.[87] Each injunction was granted by the Pennsylvania Supreme Court. The special election commissioners created by the convention were enjoined and "strictly" prohibited from directing the election; they were also "especially enjoin[ed] and prohibit[ed]" from making appointments. A "special injunction" was issued to the city commissioners from spending any money on the election provided for by the convention. But the specific outcome of the case was less significant than how the court got there.

What was really at issue was the scope of the convention's power, which the Pennsylvania Supreme Court addressed in two separate cases. In *Wells*, the court addressed the revolutionary authority of the convention, while in *Woods's Appeal*, the court addressed the question of sovereignty. Chief Justice Agnew wrote both opinions. Agnew himself had been a delegate to Pennsylvania's 1837-38 convention, where he demonstrated his constitutional conservatism, as well as a first-rate legal mind. Throughout that convention Agnew insisted that the convention should take a narrow view of the convention's powers. He consistently argued against changes to the constitution, holding that the convention should be limited to those "evils" complained of, rather than "some imaginary evil."

As a delegate, Agnew insisted the convention should be guided by three inquiries. The first was whether a subject was within the convention's jurisdiction, or, as he put it, "the propriety of introducing such a subject into the constitution."[88] In particular, he argued that the convention did not possess, and should not exercise, legislative power. It was upon the legislative power, the power to make laws, that "*the preservation of the liberty the people*" depended, and its exercise should be limited to the legislature.[89] The second inquiry was to figure out "what evil is intended to be remedied."[90] As he put it later in the convention, "the question is, whether the practical operation of the present constitution, has been such as to show that it has failed of its objects in this particular."[91] Agnew believed that the convention should not engage in experimentation, especially when dealing with issues that were more within the province of the legislature.

The third inquiry involved consideration of the effects of a proposed reform.[92] Agnew believed that a proposed reform had to have "intrinsic merits," rather than merely "a choice of the less obnoxious, between two defective modes."[93] There had to be clear positive benefits to constitutional changes, not merely speculative ones. Thus Agnew opposed the election of justices of the peace, because it would

---

87 Meanwhile in Pittsburgh, the machine sought an injunction against the Secretary of the Commonwealth and the county sheriff from holding a ratification election, arguing that the convention acts themselves were unconstitutional. *Id.* at 91.

88 6 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, 402 (1837).

89 6 *Id.* at 403.

90 3 *Id.* at 440.

91 6 *Id.* at 404.

92 3 *Id.* at 617.

93 *Id.* at 619.

only marginally improve the problem of partisanship and patronage resulting from governor appointments.[94] Yet while he was no radical reformer when it came to constitutional change, at no point did he suggest that law could operate as a limit on the convention and its powers. He had directed his arguments to the delegates themselves, to consider the scope of their own authority. It was only as a supreme court justice that he began to elaborate legal limits on convention power.

In *Wells*, Agnew began with a discussion of popular sovereignty, specifically the right to alter or abolish government. This right had formed the basis of early constructions of convention authority, and was instrumental in connecting conventions to the people's sovereignty. But Agnew read this right narrowly, bending it away from revolution and toward law. "A self-evident corollary" to the right to alter or abolish government, he wrote, "is, that an existing lawful government of the people, cannot be altered or abolished unless by the consent of the same people, *and this consent must be legally gathered or obtained*."[95] He spent the remainder of the opinion discussing the implications of this idea. First, he argued that the right to alter or abolish government "in such manner as [the people] may think proper," referred to "three known recognized modes" by which the people could change their constitution: that provided in the constitution itself, "a law" calling for and organizing a convention, or by revolution.[96] "The first two are peaceful means through which the consent of the people to alteration is obtained and by which the existing government consents to be displaced without revolution." Law, Agnew reiterated throughout his opinion, was the defining element of popular sovereignty in times of peace.[97]

Between *Wells* and *Woods's Appeal*, the Pennsylvania convention weighed in with its views. In December 1873, the convention created a committee to inquire into the convention's powers.[98] The committee's majority report began with a preamble that was directed at *Wells*. "A proceeding, to which the Convention was not a party, has, in its effect and result, brought into controversy some of the fundamental principles of constitutional government," the report declared. "The opinion that has been pronounced in this proceeding contains doctrines, which, in our judgment, ought not to be left unchallenged. We believe them to be subversive of some of the absolute rights of the people."

The report then offered two resolutions. The first declared that the convention had been called by the people, and that the first convention act providing for a referendum vote was the only true mandate; "this vote was a mandate to the Legislature, which that body was not at liberty to disobey or modify." In other

---

94 *Id.* at 617-20.

95 *Wells*, *supra* note 77, at 46 (emphasis added).

96 Before he does this though he makes an important definitional point about who constitutes "the people." "The people here meant are the whole — those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the people." In the next paragraph, Agnew summed up this idea when he wrote, "the whole people, the state."

97 *Wells*, *supra* note 77, at 47. After the *Wells* opinion, Agnew published a letter in which he claimed to support the new constitution on its merits, and explained that the issue in the case dealt only with the powers of the convention. Hellerich, The Pennsylvania Constitution of 1873, *supra* note 85, at 503-04.

98 8 Debates of the Convention to Amend the Constitution of Pennsylvania, 732-33.

words, the legislature had no authority to place any limitations on the convention in providing for its organization. The second resolution declared that no institution, except for the federal constitution, could limit the convention, as the people had "expressly" reserved to themselves the right to alter or abolish government. Thus, "this Convention deems it to be its duty to declare that it is not in the power of any department of an existing government to limit or control the power of the Convention called by the people to reform their Constitution."[99]

A minority report, authored by Harry White, responded that it was "inexpedient" to offer such resolutions. Other delegates not on the committee agreed with White's argument that the time was not ripe for such a determination. John Martin Broomall, for instance, agreed that it was not only inexpedient but dangerous, despite the fact that he agreed with the principles of the majority report. "That the positions asserted are sound," he argued, "nine lawyers out of every ten in the State will agree; but the propriety of our asserting them at this time, I think an equal proportion of the lawyers will agree with me upon." Moreover, he feared casting aspersions on the Pennsylvania Supreme Court. "It is important to the people of the State that the respect in which the supreme court has been heretofore held should not be impaired by any action of their representatives here." He thus favored adjourning "without saying anything whatever about the unfriendly action of the Supreme Court recently had."[100] The convention nonetheless passed the resolutions contained in the majority report, proclaiming its authority sovereign.

The Pennsylvania Supreme Court, however, would have the last word. Indeed, the convention's resolutions would largely disappear from constitutional view. In *Woods's Appeal*, the court went out of its way to address the convention's claims, though without citing the report. Despite acknowledging that the question in the case was moot, and that, "the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case," the court nonetheless pressed forward in discussing the issue of convention sovereignty, an idea "dangerous to the liberties of the people."[101] Where the convention saw its authority as from the people, the Court saw "usurpation of power" by "a mere body of deputies." To guard against "an assumption of absolute power by their servants," Agnew argued that the convention held only delegated powers. Indeed, it seemed strange to him that the people would delegate their sovereignty to a convention, as it would make the servants masters.

Agnew then made an important move, separating rights from powers, and placing the judiciary in between to protect the people's rights. Because the people retained their rights against encroachment, only those powers "clearly expressed, or as clearly implied, in the *manner* chosen by the people to communicate their authority" could be imputed to the convention. Rather than the convention itself being the exercise and protection of the people's rights, it was now the job of the judiciary to make such a determination. Agnew placed great emphasis on the "manner" by which power was conferred, often using italics for the term. Thus, the right to alter or abolish government depended on "such *manner* as *they* may think proper." The people could delegate as much or as little of their right to alter or abolish government as they chose. This delegation of authority meant that "A

---

99 *Id.* at 742.
100 *Id.* at 743-44.
101 *Woods's Appeal*, *supra* note 16, at 68-9.

convention has no *inherent* rights; it exercises powers only." This was the very definition of delegated power, and delegated powers meant that courts had a role in determining the scope of that delegation. Only a revolutionary convention could be said to be possessed of the people's sovereignty.

In a telling paragraph at the end of his opinion, Agnew revealed the reasons why constitutional conventions needed to be subject to law. He began, like Jameson, with secession. "In our day," he wrote, "conventions, imputing sovereignty, to themselves, have ordained secession, dragged states into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien state governments and a Southern Confederacy." But that was not the end of the problem. The nation was still in the midst of great revolutions. "The negro is now a citizen and an elector, and yet the time is not long gone by since the word 'white' was voted by a former convention into the article on elections." The point here seemed to be two-fold. First, conventions might potentially engage in a social policy-making that may have disturbed Agnew's conservative mind. Second, new people were gaining political and electoral power, people who were ostensibly unschooled in self-government. The next sentence was telling: "Who can foretell the next subject of agitation?" If the convention was actually unlimited in its power, there was no telling what sort of tragic experimentation it might engage in. "The times abound in contests," Agnew continued. "Labor and capital are strife. Agriculture wars on transportation. Communism, internationalism, and other forms of agitation excite the world." These concerns seemed to tap into Agnew's deeply-held convictions against constitutional social policy-making. "Let conventions in such seasons possess, by mere imputation, all the powers of the people," he concluded, "and what security is there for their fundamental rights?"[102]

In this context, then, no longer could (or even should) the convention embody the people. Conventions may stray far from simply determining how to organize a government; they might instead use their power to legislate social reform, not just constitutional reform. This would not only subvert the purpose of the convention, but more fundamentally institutionalize conflict and violence into constitutional reform. "The fundamental rights of the people, the true principles of civil liberty, the nature of delegated power, and the liability of the people to temporary commotion, all rise up in earnest protect against such a doctrine of imputed sovereignty in the mere servants of the people."[103] This was the lesson of secession. In a turbulent, rapidly industrializing society, talk of sovereignty and revolution, peaceful or otherwise, could be dangerous. Thus, Agnew, like Jameson, and other jurists, positioned law as the protection against social and political dissolution.

V. An "Offspring of Law"

In a post-Jameson world, the idea of an unlimited convention, or convention sovereignty, appeared more like "Frankenstein's Monster," than as the fullest expression of popular sovereignty.[104] Some of the earliest cases to re-imagine the convention were directed at the Reconstruction conventions that were assembled

---

[102] *Id.* at 74. *See also* Koehler & Lange v. Hill, 60 Iowa 543 (1883).

[103] *Id*.

[104] Carton v. Secretary of State, 151 Mich. 337, 381 (1908).

under the Reconstruction Acts.[105] The Florida Supreme Court, for instance, held that Florida's Reconstruction Act convention was limited to considering only those alterations necessary to restore the state back into the Union.[106] The Arkansas Supreme Court was less equivocal. "Conventions are not omnipotent," it declared. Not only because "The Constitution of the United States is above them," but more fundamentally because "They assemble to frame a form of government for the protection of their constituents in the enjoyment of life, liberty, property, and the pursuit of happiness, … they have no power to subvert these great rights, and defeat the very purposes for which they assemble."[107] Race was undoubtedly a factor in southern courts attempts to rein in the so-called "black and tan conventions" created by the Reconstruction Acts.[108] But the developing jurisprudence also occurred in northern states, too, away from southern Reconstruction politics. In general, courts built upon Jameson's work, even if they did not always cite or discuss it.[109] The result was a well-developed jurisprudence adumbrating the limits of constitutional conventions.

Several courts have picked up Jameson's distinction between constitutional and revolutionary conventions. As the Kentucky Supreme Court explained, citing Jameson, "This conception or doctrine, that a constitutional convention inherently possesses unlimited sovereign power, seems to have had its origin in

---

105 For a discussion of southern conventions during and after the war, *see* Paul Herron, Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860-1902 (2017).

106 Bradford v. Shine, 13 Fla. 393 (1869); *see also* Berry v. Bellows, 30 Ark. 198 (1875).

107 Berry, *supra* note 107, at 203. *See also Ex parte* Birmingham, 145 Ala. 514 (1905) (convention has delegated not inherent powers); Cummings, *supra* note 70 (nothing in state constitution prevents limited convention); Illustration Design Group v. McCanless, 224 Tenn. 284 (1970)(*reaffirming* Cummings); Snow v. City of Memphis, 527 S.W.2d 55 (Tenn. 1975).
But see Opinion of the Justices, 263 Ala. 152 (1955)(Alabama Constitution does not allow limits on conventions)(distinguishes Reconstruction Act and statehood conventions); Pryor v. Lowe, 258 Ark. 188 (1975)(Fogelman, J., concurring), 193 ("To me it is clear that this attempt to call a 'limited constitutional convention' would clearly remove the delegates from their status as agents of the people for the purpose of acting in their stead in the exercise of their inherent, sovereign power"); Malinou v. Powers, 114 R.I. 399, 402 (1975)("Obviously the convention did not consider itself bound by the Legislature's agenda restrictions, and neither the people nor the Legislature now challenges its actions. Indeed, the people voted their acceptance of art. XLII of amendments to the constitution, an amendment clearly not contemplated by the legislative call.").

108 Richard L. Hume and Jerry B. Gough, Blacks, Carpetbaggers, and Scalawags: The Constitutional Conventions of Reconstruction (2008).

109 For cases citing or discussing Jameson, *see* State *ex rel.* Wineman v. Dahl, 6 N.D. 81 (1896); *Ex parte Birmingham*, *supra* note 108; *Carton*, *supra* note 105 ("child of *organic* law," contra Jameson's "child of law"); State v. Taylor, 22 N.D. 362 (1911); Ellingham v. Dye, 178 Ind. 336 (1912); People *ex rel.* Stewart v. Ramer, 62 Colo. 128 (1916); Bennett v. Jackson, 186 Ind. 533 (1917)(Lairy, J., dissenting); State v. State Board of Canvassers, 44 N.D. 126 (1919); State ex rel. Donnelly v. Myers 127 Ohio St. 104 (1933); *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935); Wise v. Chandler, (Ky. 1937); Staples v. Gilmore, 183 Va. 613 (1945); Gaines v. O'Connell, 305 Ky. 397 (1947); Board of Supervisors of Elections v. Attorney General, 229 A.2d 388 (Md. 1967); Harvey v. Ridgeway, 248 Ark. 35 (1970).

what are generally termed 'Revolutionary Conventions.'"[110] Such conventions owe their existence not to law, but to "revolutionary conditions which make their existence contrary to pre-existing law, rather than in conformity to existing law."[111] Revolutionary conventions were not illegitimate, but they were distinct from the more ordinary constitutional convention. And, "In the science of politics, it is an important point gained to have settled the limit where normal action under the Constitution ends, and revolution begins."[112] "If the spirit of our free institutions and republican form of government is to be preserved," explained the Nebraska Supreme Court, "*some orderly and lawful way, avoiding tumult or revolution*, must exist to make Constitutions conform to the will of the vast majority of the people."[113]

Like Jameson, courts anchored the line between revolutionary and constitutional conventions in law. First, the right to alter or abolish government was refashioned from a revolutionary to a legal right.[114] "The history of constitutional conventions is suggestive of the reasons for constitutional provisions, pointing out the way that amendments may be lawfully made, and how the danger of illy considered or revolutionary amendments avoided or lessened."[115] Second, the legislature was made a necessary agent in the organization of conventions. The North Dakota Supreme Court has declared, for instance, that without the involvement of the state legislature, "the movement is revolutionary."[116] Finally, the convention has been determined to hold merely an advisory role; its work is required to be submitted for ratification by the first branch of government, the electorate.

Courts have continued to harden the line between revolutionary and constitutional conventions by reimagining the right to alter or abolish government. In effect, they separated the right into two rights, the right to alter government and the right to abolish government. The right to alter government was the legal right to revise an existing constitution. The right to abolish government was revolution. This distinction has been most important in those states that assembled conventions despite the lack of a convention clause in that state's constitution. As a single right, the right to alter or abolish government was the expression of the people's constituent power. Thus, a convention could, as they often have, make the claim that once assembled it could ignore a convention act that attempted to limit it, and address any issue it saw fit. Moreover, it could claim to enact a new constitution

---

110 *Gaines*, *supra* note 110, at 430. The court explained that "The reason for the view, therefore, fails under our firm and stable 'government of law.'" *Id.*; *see also* Riviere v. Wells, 270 Ark. 206 (1980)(acknowledging the death of convention sovereignty).

111 *Carton*, *supra* note 105, at 378.

112 *Ex parte Birmingham*, *supra* note 108,119-120 ("The result is that a convention cannot assume legislative powers. The safety of the people, which is the supreme law, forbids it.")

113 Baker v. Moorhead, 174 N.W. 430, 431 (Neb. 1919) (emphasis added). Francis Lieber made a similar point, describing conventions at "safety valves" for pent-up frustration with government. Francis Lieber, Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law, vol. 2 468 (1839).

114 *In re Opinion to the Governor*, *supra* note 110 ("It is settled that the people alone cannot, without revolutionary action, call a constitutional convention, unless the Constitution provides the necessary machinery for that purpose.").

115 *Carton*, *supra* note 105, at 385.

116 Wineman v. Dahl, 6 N.D. 81, 68 N.W. 418, 419 (1896) (secession, civil war, Jameson end that idea).

itself, without the need for popular ratification, as members of Illinois' convention attempted to do in 1862. Separating the right to alter government from the right to abolish mitigated this problem, and opened constitutional conventions to legal controls. The reconceptualization of the right to alter or abolish government was not explicit. It was implicit in discussions about a number of issues, including the distinction between amendment and revision, as well as in discussions about the role of the legislature in constitutional revision, and ratification of the new constitution.

Courts have relied upon the right to alter government, while keeping the right to abolish government at bay, in building up the jurisprudence upholding the work of conventions in the absence of a convention clause. As the Alabama Supreme Court in one of the earliest convention cases explained, "The constitution can be amended in but two ways: either by the people, who originally framed it, or in the mode prescribed by the instrument itself."[117] The Pennsylvania Supreme Court has agreed in almost identical terms: "The Constitution of the state may be legally amended in the manner specifically set forth therein, or a new one may be put in force by a convention duly assembled, its action being subject to ratification by the people, but these are the only ways in which the fundamental law can be *altered*."[118] Even in the absence of a convention clause, then, the legislature retained the power to assemble a convention, as "The power to make constitutions and to amend them is inherent, not in the legislature, but in the people."[119] The power to make and amend the constitution, in this framework, is the right to alter government, not to abolish it. The elaboration of an amendment mechanism within a constitution, then, does not exhaust the means available to the people to revise or amend it. They may always assemble a constitutional convention. During times of peace, in the absence of a convention clause, the right to assemble a convention is contained in the right to alter government; in times of revolution, the right to abolish it altogether.

A second component to the law of conventions that has helped to maintain the distinction between revolutionary and constitutional conventions is the convention act, which Jameson highlighted in his treatise. Although rare, conventions have been assembled without the aid of the state legislature. One historian has dubbed these "circumvention conventions."[120] The most notorious example resulted in Rhode Island's Dorr War. By the early 1840s, Rhode Island was the lone state lacking a constitution. After decades of attempts to create one, the towns of the state assembled a convention without the aid of the state legislature, drafted a new constitution, ratified it, organized a new government according to its terms, and demanded that the existing Rhode Island government recognize its authority, and dissolve. The state government declined the offer, and eventually put down

---

117 Collier v. Frierson, 24 Ala. 100, 108 (1854*). See also In re Opinion to the Governor*, *supra* note 110, at 438 ("It is also well settled that no other method can be legally employed for amending or revising a Constitution or substituting another one for it, unless such other method is expressly provided for in the Constitution itself."); Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966); Smith v. Cenarusa, 93 Idaho 818 (1970); State v. Manley, 441 So.2d 864 (Ala. 1983).

118 Taylor v. King, 284 Pa. 235, 239 (1925) (overruled on other grounds by *Stander v. Kelly*) (emphasis added).

119 Holmberg v. Jones, 65 P. 563, 565 (Idaho, 1901).

120 George Parkinson, *Antebellum State Constitution-Making: Retention, Circumvention, and Revision,* unpublished Ph.D. diss.

the rebellion.[121] Subsequently, the legislature provided for the assembling of a convention despite having no such power granted to it by the Charter. Nearly a century later, the Rhode Island Supreme Court relied upon this experience to identify a custom against circumvention conventions.

> The method of doing this, which had been recognized as the regular and ordinary method and which had been used before 1843 by many states, when there was no provision for it in their Constitutions, was first, by the holding of a convention under a legislative enactment, second, by the framing of a new Constitution or the revision of the existing one, and, third, by the adoption of such new Constitution or revision by the people at an election provided for by law.[122]

The Rhode Island Court turned this custom into law, concluding that "if a Constitution is silent on the subject of its own alteration, the Legislature and only the Legislature is authorized to provide an explicit and authentic mode for ascertaining and effectuating the will of the people on this subject, i.e., by the convention method."[123] The Court tied this requirement for legislative action to the right to alter or abolish government, which, it determined, required conventions to revise constitutions, and a legislative act providing for the assembling of such a convention. Circumvention conventions were thus unlawful and illegitimate. They could be legitimated only by the right to abolish government (*i.e.* revolution), not the right to alter it. In the absence of a convention clause, then, the people require the aid of the legislature to help them exercise their revisionary (not revolutionary) power, their power to alter, not their power to abolish.

But if the legislature is necessary to effect the right to alter government, why not allow it to revise the constitution itself?

Americans discussed this problem during the American Revolution, determining that a body separate from the regular institutions of government was necessary to establish a constitution based upon the people's sovereign authority. But once we separate the right to alter from the right to abolish government, can the distinction hold? Conventions can be expensive, and it can be cheaper for legislatures to amend or revise the constitution itself. This was the issue in *State v. Manley*.

In *Manley*, the Alabama Supreme Court determined that "counsel mistakenly relies on the cases for the proposition that if the legislature has the authority to call a constitutional convention without a specific constitutional provision to such effect, then surely it has the authority to propose a new or revised constitution to

---

[121] On the Dorr War generally, see Eric Chaput, The People's Martyr: Thomas Wilson Dorr and His 1842 Rhode Island Rebellion (2013); Rory Raven, The Dorr War: Treason, Rebellion, and the Fight for Reform in Rhode Island (2010); George M. Dennison, The Dorr War: Republicanism on Trial, 1831-1861 (1976); Marvin Gettleman, The Dorr Rebellion: A Study in American Radicalism, 1833-1849 (1973); Arthur May Mowry, The Constitutional Controversy in Rhode Island in 1841 (1895).

[122] *In re* Opinion to the Governor, *supra* note 110, at 438.

[123] *Id.* at 449.

the people." While the Court agreed that the legislature had the power to assemble a convention in the absence of a convention clause in the state, it nonetheless believed that counsel's "argument distorts the concept of the plenary power of the legislature as the arm of the state to which the legislative power has been given by the people…."

The Court then distinguished the legislative power from the power to revise the constitution. It recognized that the legislature has a plenary power, but it also recognized that that power concerns matters of governance – the powers to regulate, police, and tax. The power to revise a constitution does not fall within the legislature's plenary powers. Instead, the revision power belongs to the people, through their right to alter government.[124] The legislature's role in the revision process is simply to act as the people's agent, helping them to organize the appropriate institution to exercise the people's revisionary power.[125] As Chief Justice C. C. Torbert explained in his concurring opinion, "I think it clear that in the absence of specific constitutional provisions allowing for amendment or revision, the only method of proposing change in the Constitution is by action of a convention, not by legislative initiative, although the Legislature would be a proper authority to set in motion the convention process."[126]

So what does this tell us about the nature of the legislature's power to assemble a constitutional convention? First, the power to assemble a convention is distinct from a state legislature's power to legislate. The legislature's source of authority to assemble a convention is not its power to govern; rather, it flows out of the people's right to alter government. But the legislature's authority is not coterminous with the people's authority. Its role is merely to serve as a

---

[124] *See also Wineman*, *supra* note 117 ; *Ex parte Birmingham*, *supra* note 8; People *ex rel.* Stewart v. Ramer, 62 Colo. 128 (1916). The U.S. Supreme Court has reached the same conclusion, but directed it to a different end: "the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress." Hollingsworth v. Virginia, 3 U.S. 378 (1798). State courts have reached the same conclusion regarding the role of governors in the revision process. Opinion of the Justices to the Senate, 373 Mass. 877 (1977); Crenshaw v. Miller, 606 S.W.2d 285, 289 (Tenn. Ct. App. 1980) ("The Constitution does require the signature of the Governor on a measure submitting to the voters the question of calling a constitutional convention, even a limited constitutional convention such as that involved in the present suit.").

[125] The legislative drafting of new constitutions, outside of the Revolutionary period, does not appear to have gained much traction in the United States. Even a state like Mississippi, which has had conventions not only draft but enact new constitutions without a popular referendum, have understood the need for a convention rather than a state legislature for such purposes.

[126] *Manley*, *supra* note 118, 878 (2005)(Torbert, C.J., concurring); *see also In re Opinion to the Governor*, *supra* note 110, at 449 ("if a Constitution is silent on the subject of its own alteration, the Legislature and only the Legislature is authorized to provide an explicit and authentic mode for ascertaining and effectuating the will of the people on this subject, i.e., by the convention method."); *Holmberg*, *supra* note 120, at 565 ("While the power of the legislature to enact laws is inherent, so far as legislative enactment is concerned, yet the power to propose amendments to the constitution is not inherent. *The power to make constitutions and to amend them is inherent, not in the legislature, but in the people*.") (emphasis added).

conduit for assembling the institution that possesses the people's right to alter (or abolish) government. The conductive nature of the legislature's role within the convention process means that the legislature cannot act *sua sponte* in organizing a convention. It requires sanction from another agent of the people. As the Indiana Supreme Court has explained,

> It seems to be an almost universal custom in all of the states of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, to ascertain first the will of the people and procure from them a commission to call such a convention, before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention. 6 R. C. L. § 17, p. 27; Hoar, Constitution Conventions, p. 68 (1917).[127]

As an agent of the people, the legislature is charged with collecting the people's views on holding and assembling a convention, which requires, first, proposing the question of revision to the electorate.[128] If the electorate approves of assembling a convention, the legislature then passes a convention act, that is also subject to ratification, although sometimes the two votes are combined. In short, the legislature is a necessary agent in the convention process.

But if the convention act imposes limits upon a convention, how binding is it?

The convention act has been the source of a great deal of debate about the limits of constitutional conventions. Prior to Jameson's treatise, this question was debated at length by convention delegates themselves, without any particular resolution. Conventions largely stayed within their limits, even if they rejected the authority of the convention act. After Jameson's treatise was published, it was possible for courts to enter the discussion.

Courts have determined that a convention act limiting the scope of the convention's authority to specific topics or amendments is binding, because, as we've seen, the act comes from people's right to alter government. "The Legislature merely proposes the conditions. It is the vote of the people for the convention that ratifies them and makes them binding upon the delegates."[129] If the electorate accepts the legislature's proposal of a limited convention, then the convention may

---

127 Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921, 923 (1917).

128 The power to call for a convention is not unlimited. See, e.g., *id.* (no authority to call a convention after a state vote on question rejected).

129 *In re Opinion to the Governor*, *supra* note 110, at 452. *See also* Staples v. Gilmore, 183 Va. 613 (1945) (referendum on convention act makes limitations by people not legislature), 624 ("The convention does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers."); *Cummings*, *supra* note, at 70 (if limited convention act ratified, limited by people); Chenault v. Carter, 332 S.W.2d 623, 626 (1960) ("The delegates to the convention are the agents not of the legislature, but of the people themselves. As a principal may limit the authority of his agent, so may the sovereign people of this state limit the authority of their delegates. This they may do by accepting and approving, through a constitutional majority as set forth in sec. 258, a proposal for a limited constitutional convention.").

only be assembled according to the people's desire. "The constitutional convention is an agency of the people to formulate or amend and revise a Constitution. The convention does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers."[130] This is "the customary manner of calling constitutional conventions in the United States."[131]

Convention acts can, however, be used to thwart reform by unnecessarily limiting the scope of convention authority. The electorate might actually prefer an unlimited convention, or at least a convention with broader authority than that contained in a convention act. The electorate is then faced with a choice of either approving the act and getting the opportunity to achieve some reform, perhaps with the belief that once assembled the convention might go beyond its charge, or rejecting a proposed limited convention in the hopes of getting an act that more accurately expresses its desires. A convention act thus might not reflect the electorate's genuine preference.

Moreover, while on their face referendums and ratification votes appear to reinforce democratic norms of popular consent, they can also obstruct the desire for constitutional revision through voting exhaustion. As the Rhode Island Supreme Court explained, "If, after the Legislature has decided that such a convention ought to be called for the purpose stated, it is essential to the legality of the call that the people vote in favor of it at an election, then that makes necessary *four* popular elections, before their power of alteration can be effective. …The requirement of the second election clearly *impedes* rather than *facilitates* the exercise by the people of their power to control their governmental institutions."[132] This is not necessarily true, however. Multiple elections can be a legitimate technique to ensure that the constitutional changes accurately reflect the people's desire, and not simply the work of a fleeting majority. Moreover, failure to provide for any referendum on how a convention is to be organized could be seen as an attempt on the part of the legislature to limit or direct the convention in ways that would undermine the people's preferences.

It is probably unnecessary for a state to hold a referendum on a convention act providing for an unlimited convention, so long as there has been a vote on whether to hold a convention to draft a new constitution. However, the convention act can only reflect the vote on whether to hold a convention. So, for example, if the convention referendum question was whether to hold a convention to draft a new constitution, the convention act could not provide for a limited convention. Conversely, a convention referendum that posed the question of whether a convention should be assembled to address specific amendments, the legislature could not provide for an unlimited convention. In each case, the source of the legislature's power would be the convention referendum. If the referendum on the convention was contradicted by the convention act, the referendum on the convention act could be challenged as beyond the scope of the legislature's authority. But this could only occur prior to

---

130 Staples, *supra* note 131, at 53-54.

131 *In re* Opinion of the Justices, 172 S.E. 474, 478 (N.C. 1933) (citing Miller v. Johnson, 92 Ky. 589); State v. Dahl, 6 N.D. 81; Opinion of the Justices II, 263 Ala. 152 (1955).

132 *In re Opinion to the Governor*, *supra* note 110, at 458 (emphasis in original). The four votes would be on whether to hold a convention, on the convention act, on the selection of delegates, and then on the proposed constitution itself.

the election. Courts have proved unwilling to provide a post-referendum remedy, holding that ratification cures the legislature's original lack of power.[133]

The ratification vote is a third critical component of the law of constitutional conventions. In his treatise on constitutional conventions, Roger Sherman Hoar used this vote to turn acquiescence into a central *legal* doctrine of popular sovereignty.[134] A "reference to the people for their approval or disapproval is a necessary and final step without which the work of the convention is lacking legality. It seems to us that the better practice, and the one most likely to insure a final vote of the people on the convention's work, would be for the General Assembly to enact a law for this purpose."[135] Almost any defect in the process of assembling a convention, including substantive defects, could be cured by the acquiescence of the people. The answer to the question, then, of "how far the legislature may go, as an agency of the people, in drafting a subject or a proposal for consideration by a limited constitutional convention,"[136] is how ever far the people (as embodied in the

---

[133] A constitutional commission generally aids the legislature in identifying specific amendments, recommending them to the legislature for consideration. Commissions have also been charged with determining whether there is a need for assembling a convention.

While this discussion has focused mostly on questions of substantive limitations, there are also procedural question, such as the form of the ballot. This can often be a sign of whether the legislature is trying to obstruct the assembling of a convention. *See*, e.g., Priest v. Polk, 322 Ark. 673, 687 (1995) ("The form of the ballot proposed by a constitutional convention cannot be misleading."); Hawaii State AFL-CIO v. Yoshina, 84 Hawai'i 374, 377 (1997)("term 'ballots cast upon such a question' of constitutional convention, as used in State Constitution, means aggregate printed or written tickets, sheets, or slips of paper, on which convention question is printed, which are deposited in appropriate receptacle, and thus includes blank ballots and "over votes," or ballots in which both affirmative and negative votes are cast."); Chicago Bar Association v. White, 386 Ill.App.3d 955, 957 (2008)("We hold that the trial court was correct to characterize some of the language on the ballot as inaccurate and misleading, but we do not believe that any of the ballot deficiencies rise to the level of a constitutional question. As to the remedy ordered by the trial court, we affirm it in all respects as not constituting an abuse of discretion.")

[134] Constitutional Conventions, *supra* note 44.

[135] *In re Opinion to the Governor*, *supra* note 110, at 453; *see also Manley*, *supra* note 118 (ratification of legislatively proposed constitution would be lawful), 876 ("We have no doubt that if the electorate voted in favor of an amendment to §284, clearly giving the legislature the right to propose a new constitution under the procedure outlined in that section, such amendment would be effective to allow the legislature to act in the manner in which it attempted to act in this case. But until such time as that amendment is passed, the legislature's power to initiate proceedings toward a new constitution is limited to the provisions of §286."); 880 (Almon, J., Shores, J., and Beatty, J., dissenting) ("We not only dissent; we mourn the passing at the hand of six of our brothers of the most fundamental right upon which our government was founded. Until today in Alabama all political power resided in the people. The majority, by denying the people the fundamental and inherent right to express their will at the ballot box, has stripped them of the sovereignty they have held since this state was founded, by the simple expedience of ignoring the express language of our Constitution"). Once ratified, the legislature's duties become ministerial, and thus potentially subject to a mandamus action. *Chenault*, *supra* note 131.

[136] *Snow*, *supra* note 108, at 71 (Fones, C.J., concurring).

electorate) sanction, so long as it does not violate the U.S. Constitution.[137] As the Pennsylvania Supreme Court has explained,

> There may be technical error in the manner in which a proposed amendment is adopted, or in its advertisement, yet, if followed, unobjected to, by approval of the electors, it becomes a part of the Constitution. Legal complaints to the submission may be made prior to taking the vote, but, if once sanctioned, the amendment is embodied therein, and cannot be attacked, either directly or collaterally, because of any mistake antecedent thereto. Even though it be submitted at an improper time, it is effective for all purposes when accepted by the majority.[138]

The final ratification vote thus cures all defects related to the organization of the convention. Pennsylvania is not alone.

In *Kahalekai v. Doi*, the Hawai'i Supreme Court noted that "the cardinal principle of judicial review is that constitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt." This cardinal rule is based upon the "corollary" that "the people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that the amendment is for the public good and expresses the free opinion of a sovereign people."[139] Thus, "The courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment, after it has been ratified by the people."[140]

The state constitutional jurisprudence on conventions thus reflects the core of Jameson's project. Jameson's insight separating revolutionary from constitutional conventions, celebrated by one of the initial reviews of Jameson's treatise, is the central spring for the jurisprudence. The procedural requirements for assembling a convention are designed to maintain this distinction. From requiring the state legislature to be the motive force for assembling a convention to the consistent involvement of the electorate in the process, courts have been largely successful in placing legal limits upon conventions.

---

137 At least one judge, however, has analogized state legislatures to Parliament, which holds not only plenary authority, but the authority to change the kingdom's unwritten constitution, as well. This analogy, however, dissolves not only in the history of constitutional conventions in the United States, but also the norms of separation of powers and balanced government. *Manley*, *supra* note 125 (Beatty, J., dissenting) ("This same political authority exists presently. The Alabama legislature, as one of our branches of state government, is the people's representative, possessing all powers not allocated to the other branches of state government. No citation of authority is needed for this universally recognized principle. And '[a]ll that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do. The power of the legislature except as limited by constitutional provisions is as plenary as that of the British Parliament.'") (citations omitted). Justice Beatty joined in another dissent with two other justices. Those two justices did not join Beatty's opinion.

138 *Taylor*, *supra* note 119, at 239.

139 Larkin v. Gronna, 69 N.D. 234, 285 N.W. 59, 63 (1939).

140 *Snow*, *supra* note 108, at 64.

VI. Article V Conventions Compared

Justice Black has argued that the Article V process is political from start to finish, and thus not subject to judicial review.[141] The state constitutional revision process is also political, but this has not stopped jurists from creating a law of constitutional conventions. The textual problems have been even more significant in those state constitutions that, unlike the federal constitution, lack or have lacked a convention clause. Beyond that, there are some differences between Article V and state conventions that make the Article V process more clearly legal than the state processes, and thus more easily susceptible to judicial regulation. At a general level, state conventions can be given more room for action because revision takes place within a larger constitutional context. The federal constitution remains a limit on state constitutional convention, for example. No such limit exists with respect to a federal convention.[142] But there are other more specific differences between state conventions and Article V.

A first difference is that Article V contemplates only "amendments." Article V delegates the power to "propose amendments" to Congress or a convention. As a point of comparison, consider that the Articles of Confederation included a power to "alter" the Articles.[143] This generic term—*alter*—is broader than *amendment*. We have seen this term elsewhere, in the people's right to alter or abolish government. But its use in the Articles has a slightly different reference point— the state legislatures. At the time the Articles were drafted, the state legislatures were virtually synonymous with the people. It was only after the Articles were drafted that institutions distinct from legislatures vested with the people's sovereign power to create constitutions became the norm.[144] It is curious, then, that the more specific term "amendment" is used in the federal constitution. It suggests at the very least that there was a desire on the part of the framers not only to make the alteration process easier, by not requiring unanimity, but also to limit the power of alteration to amendment only. Given what the 1787 convention did to the Articles of Confederation, and the extraordinary nature of the times in which it was done, the 1787 convention seems to have made a decision to delegate a lesser power of amendment to Congress and federal conventions in Article V. Article V does not say "alter," and so cannot be said to contemplate constitutional *revision* as a power delegated.

This distinction between amendment and revision is an important difference between the convention clause in Article V and convention clauses in state constitutions. In state constitutions, the amendment power is typically delegated to state legislatures, or to the electorate in the form of the initiative. The revision power, which includes the lesser amendment power, is typically delegated to conventions. That revision power is also reserved in right to alter or abolish clauses,

---

141 Coleman v Miller, 307 U.S. 433, 459 (1939).

142 Although, I do wonder whether the state constitutions place limits on what a federal convention could achieve. For instance, does the existence of state constitutions preclude an unlimited, revolutionary federal constitution from destroying them?

143 Art. XIII.

144 The Articles of Confederation was drafted in 1777 and ratified in 1781. The idea that some differently constituted legislative/deliberative body was necessary to draft a constitution had been growing since the move toward independence began. Fritz, *supra* note 13; Adams, *supra* note 13.

in the absence of a convention clause. Courts have used this distinction between amendment and revision to limit the initiative as a technique of constitutional change by limiting it to "amendment," striking down initiatives that have crossed the line into "revision."

One of the foundational cases elaborating this distinction is *Livermore v. Waite*,[145] where the California Supreme Court found that the legislature's power to initiate an amendment and submit it to the electorate for ratification is a "limited power." That limit is the line between amendment and revision. The Court explained, as so many others discussed here, that a state constitutional convention embodies the people's right to alter government. As the electorate decides whether to hold a convention, and ratifies its work, the convention holds the people's revision power, even if not expressly stated in the constitution itself. A convention may also possess the lesser power to amend a constitution. However, any institution possessing only an *amendment* power—usually a legislature, constitutional commission, or electorate—does not include the greater power of revision, unless specifically granted. The line between amendment and revision cannot be drawn precisely, and courts have been reluctant to develop bright line rules. Instead, it is a matter of scale and scope. As the number of amendments increases, for instance, the closer we get to revision. However, a single amendment could be a "revision" if it were a substitute amendment containing wholesale changes to the existing constitution. But the larger point is that there is a distinction between *amendment* and *revision* that courts can and have policed.[146]

This distinction between amendment and revision, along with the 1787 convention's decision to use the term *amendment* rather than *alteration* suggests that Article V does not envision a general revision power either for Congress or an Article V convention.[147] Instead, Article V merely offers two distinct paths to *amendment*. One allows Congress to propose amendments when in its discretion it has identified a defect in need of change. The other allows states themselves to demand that Congress assemble a convention for such a purpose.[148] So a congressional convention act that purported to create an unlimited Article V convention would be beyond Congress' authority. And since Article V conventions only possess an amendment power, any attempt by the convention to draft a new constitution *sua sponte* would also be void.

A second difference between state and federal conventions is that Article V does not contemplate a significant role for the electorate in the amending process. With

---

[145] 102 Cal. 113 (1894).

[146] State v. Taylor, 648 So.2d 701 (1995); Loring v. Young, 239 Mass. 349 (1921) (reorganization of a constitution is not revision); *In re Opinion to the Governor*, *supra* note 110; McFadden v. Jordan, 32 Cal.2d 330, 345 (1948)("It is amply sufficient, however, to demonstrate the wide and diverse range of subject matters proposed to be voted upon, and the revisional effect which it would necessarily have on our basic plan of government."); Rivera-Cruz v. Gray, 104 So.2d 501 (Fla. 1954)(daisy-chain ratification included 14 joint resolutions, none ratified unless all ratified is revision); Holmes v. Appling, 237 Or. 546 (1964); Opinion of the Justices, 264 A.2d 342 (Del. 1970).

[147] Cf. *In re* Opinion of the Justices, 254 Ala. 183, 184 (1950) ("The power to propose amendments to the Constitution is not inherent in the legislative department, and in the absence of a provision in the Constitution conferring such power on the legislature, it has no capacity thus to initiate amendments.")

[148] Dellinger, *The Recurring Question, supra* note 2; Van Alstyne, *supra* note 2.

respect to *state* constitutional revision, the electorate is the critical institution. Whether it is initiating amendments itself, or ratifying convention acts, legislative amendments, or amendments or constitutions proposed by constitutional conventions, the electorate can and does both initiate and legitimate the reform process. Throughout the state convention process, the electorate plays a critical oversight role. The electorate's sometimes-heavy involvement has curative properties, so that even if a convention goes beyond the charge contained in the convention act, electoral ratification will render the defect moot. This is the doctrine of acquiescence.

By contrast, Article V contemplates no significant role for electorates. Instead, state legislatures play the critical role in the Article V amendment process, as petitioners for a convention, as ratifiers, as assemblers of ratifying conventions, or as assemblers of the election process for delegates to a federal convention. The only space allowed in Article V for electoral participation is in the election of delegates. The doctrine of acquiescence is thus not available for Article V conventions, as it is for state conventions. Modern jurisprudence has made it clear that conventions themselves, even ratification conventions do not possess the people's sovereign authority. Only a referendum on a convention's work can trigger acquiescence. Importantly, state legislatures have no authority to add more electoral participation to the Article V process.

State legislatures' Article V power is narrower than their state constitutional amendment or revision power. First, the decision on the method of ratification of amending the federal constitution, either by state legislatures or by state ratification conventions, is delegated to Congress.[149] Congress has the discretion to choose the mode of amendment. This is a two-fold choice. The first is whether to propose amendments itself or to delegate that responsibility to a federal convention. The second is to direct ratification to state legislatures or state ratifying conventions.[150] If Congress chooses the convention method either for the drafting of amendments or for their ratification, the state legislatures power is limited to passing a convention act providing for the election of delegates, or for the assembling of a ratification convention. These processes are left to the state process governing the assembling of a convention, which, again, is the only space given to electoral participation in the process.[151] But they may not go any further.

---

[149] State *ex rel.* Tate v. Sevier, 333 Mo. 662, 667-68 (1933).

[150] Dillon v. Gloss, 256 U.S. 368, 374-75 (1921) ("First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."); *Coleman*, *supra* note 143 (1939)(political question); *Coleman*, 459 (Black, J., concurring)("The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.")

[151] Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975). Opinion of the Justices to the Senate, 373 Mass. 877 (1977) (legislature does not mean legislative process); Opinion of the

The state legislature's most discretionary role in the Article V convention process is petitioning Congress for a federal constitutional amendment or convention. Courts have protected this discretion against electoral interference. In the 1980s and 1990s, for instance, constitutional reformers impatient with state legislatures, who they thought were obstructing their efforts to achieve balanced budget and term limits amendments, turned to the initiative process to force legislatures to petition Congress for a convention. State courts turned back these efforts on state constitutional grounds, holding that the state law governing the initiative could be used only to enact laws.[152] *American Federation of Labor v. Eu* was one of the earliest and most influential treatments of this issue. In that case, an initiative would have required state legislators to vote for a petition to Congress for a federal convention or forfeit their salary. The California Supreme Court, however, refused to allow the initiative to be placed on the ballot.

The *Eu* Court identified a deliberation ethic in Article V, which "envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise."[153] Deliberation, another court found, requires that representatives be able to express themselves freely.[154] The Montana Supreme Court went a step further, holding "that whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage *acting in the absence of any external restrictions or limitations*."[155] So even if the state initiative process allowed for a vote on the state legislature's petitioning power, Article V would render it nugatory. But even this discretion is limited.

In the 1960s, for instance, some state legislatures sought an amendment to overturn the U.S. Supreme Court's one person, one vote doctrine.[156] Essentially applying a version of unclean hands to the petitioning process, federal courts held that a malapportioned legislature could not petition Congress for an amendment that would overturn Supreme Court jurisprudence that addressed directly the problem of malapportioned legislatures.[157] This defect is not curable by the electorate, as even a referendum or initiative supporting such a petition would have no legal effect.

Justices, 673 A. 693 (Me. 1996). The U.S. Supreme Court punted on the issue of whether a lieutenant governor could vote on a convention bill. *Coleman*, *supra* note 143.

152 *See, e.g.,* State *ex rel.* Harper v. Waltermire, 213 Mont. 425 (1984); Donovan v. Priest, 326 Ark. 353 (1996); Opinion of the Justices, 673 A.2d 693 (Me. 1996); *In re* Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996).

153 American Federation of Labor v. Eu, 36 Cal.3d 687, 694 (1984).

154 Simpson v. Cenarrusa, 130 Idaho 609 (1997) (instruction of non-incumbent candidates to pledge for petition violates free speech; requiring legislators who did not vote for amendment on ballot violates free speech).

155 State *ex rel.* Harper v. Waltermire, 213 Mont. 425, 432 (1984) (emphasis added). The idea that this tactic is an exercise of the right of instruction has not gained much traction. *But see American Federation of Labor*, *supra* note 155 (Lucas, J., dissenting)(people have power to direct legislature, distinguishing *Hawke* and *Barlotti*); *Simpson*, *supra* note 156 (Silak, J., concurring)(accord with right of instruction in constitution).

156 *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964)

157 Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Petuskey v. *Rampton* (10th Cir. 1970).

A more fundamental limit on state legislatures' Article V power is, of course, Article V itself. As Article V is the exclusive source of the federal amendment power, states cannot add to its requirements.[158] This includes adding institutions to the process. With respect to petitioning, Article V clearly identifies "legislatures" as the petitioning agent. As a federal court explained,

> The federal and state case law clearly reflect that Article V does not permit the people of a state to coerce their elected officers into acting in a specific way regarding proposal and ratification of amendments to the Constitution. *A citizen's role is outside the Article V process*. The citizen votes to elect the state's federal and state lawmakers. These elected officials, in turn, through a deliberative and independent process, propose and ratify constitutional amendments when this becomes necessary. Maine's Act, therefore, is legally incorrect in stating in its Preamble that "[t] he people, not Congress, should set Term Limits." 21-A M.R.S.A. 641-646, Preamble.[159]

The people's role in petitioning Congress for a convention is a political not a legal one. Citizens may attempt to persuade their state legislators and legislatures to act, but they cannot force them to act. Even initiatives that identify a candidate's position on petitioning Congress or on a proposed amendment are precatory. "The citizens' use of the initiative process to demand passage of a constitutional amendment clearly violates the strict language of Article V, which precludes state citizens from direct participation in the amendment process."[160] Outside of the election for delegates to an Article V convention or a state ratifying convention, there is no space elsewhere in the Article V process for electoral oversight that could provide evidence of acquiescence that would cure defects in the Article V process.

Similarly, the state legislature's power to assemble a ratification convention comes from Article V, and cannot be subject to referendum law.[161] As the Supreme

---

158 *Tate*, *supra* note 151; *In re* Initiative Petition No. 364, *supra* note 154; Bramberg v. Jones, 20 Cal.4th 1045 (1999).

159 League of Women Voters v. Gradowski, 966 F. Supp. 52, 59 (D. Me. 1997) (emphasis added).

160 Morrissey v. State, 951 P.2d 911, 916 (Colo. 1998) (en banc). Neither can state legislatures instruct federal representatives. Opinion of the Justices, 673 A. 693 (Me. 1996). For other term limit amendment cases, see Gralike v. Cooke, 996 F. Supp. 901 (W.D. Mo. 1998) (amendment to state constitution requiring federal representatives use their powers to pass a term limits amendment, and requiring congressional candidates to support the amendment adds qualifications to Article 1); Barker v. Hazeltine, 3 F.Supp.2d 1088 (D. S.D. 1998); *Bramberg*, *supra* note 160; Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999). State legislatures also cannot bind future state legislatures to apply to Congress for a convention. *Opinion of the Justices*, *supra* note 153.

161 Leser v. Garnett, 258 U.S. 130, 217-19 (1922)("the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."); *In re* Opinion of the Justice of the Supreme Court of Maine, 118 Me. 544, 107

Court of Ohio explained, "the calling of such convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by the Congress. The action of the Legislature in performing this function rests upon the authority of article V of the Constitution of the United States. It is a federal function, which, in the absence of action by the Congress, the state Legislature is authorized to perform."[162] The legislature may solicit the voters' opinion with a non-binding initiative on whether to assemble a convention,[163] but a convention must remain free to deliberate.

Importantly, a convention's decision is not reviewable by the electorate. Referendums on legislative ratifications are barred, and there's no reason why that reasoning would not apply to a convention ratification. As the Ohio Supreme Court explained,

> It is the prevailing, though not unanimous, view of writers on the question that a resolution of ratification of amendment to the Federal Constitution, whether adopted by the Legislature or a

A. 673, 674 (Me. 1919)("the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body under the power expressly conferred upon it by article 5"); Prior v. Nolan, 68 Colo. 263, 269 (1920)("in the matter of the ratification of a proposed amendment to the federal Constitution, the General Assembly does not act in pursuance of any power delegated or given to it by the state Constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States."); Decher v. Vaughn, 209 Mich. 565, 571 (1920) ("The action of the Legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the federal Constitution.")

[162] State *ex rel.* Donnelly v. Myers, 127 Ohio St. 104, 105 (1933). *See also Tate*, *supra* note 151, at 668 ("Without doubt the enactment of House Bill 514, providing for the assembling of the convention, was but a necessary preliminary step preparatory to the final action of the state acting through the convention. If the final action of the convention is not a legislative act, it must logically follow that a preliminary step preparatory to such final action is not a legislative act."); Opinion of the Justices relative to the 18th Amendment, 262 Mass. 603, 605 (1928) ("Amendment of the Constitution of the United States and repeal of amendments thereof constitute federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any state. The voters of the several states are excluded by the terms of article 5 of the Constitution of the United States from participation in the process of its amendment. By that article all power over the subject is vested exclusively in the Legislatures of the several states."); *Opinion of the Justices*, *supra* note 133 ("But as the Constitution of the United States is silent on the subject, it would seem that the resolution calling a convention in the state solely for the purpose of ratifying or rejecting a proposed amendment to the Constitution of the United States need not be submitted to the electorate for approval.").

[163] Kimble v. Swackhamer, 439 U.S. 1385 (1978)(Rehnquist, J., circuit judge); Kimble v. Swackhamer, 94 Nev. 600 (1978)(merely assists legislature); State ex rel. Askew v. Maier 231 N.W.2d 821 (N.D.1975)("straw vote may be possible"); Howard Jarvis Taxpayer's Association v. Padilla, 62 Cal.4th 486 (2016)(part of the state legislature's investigation power); *Padilla* (Liu, J., concurring)(Article V power, not investigation power).

> convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in article V are 'precisely the same,' when a Legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection."[164]

Since the electorate can play only a limited role in the federal amendment process, electoral participation cannot cure procedural or substantive defects as it can in the state process.

Finally, an Article V convention could not itself provide for more electoral participation in the ratification of its work. Article V conventions can only "propose amendments." Its powers are exhausted once it returns its proposals to Congress, which it must, for Congress to distribute to the states for ratification. Thus, the convention could not *sua sponte* send its proposed amendments directly to state electorates. Nor could it require a national referendum on its work product. Congress does not possess such a power, either. Its decision with respect to ratification is limited only to choosing between state legislatures or ratification conventions.

VII. The Limited Article V Convention

And so we return to the ultimate question that we are all concerned about regarding an Article V convention: what would, or should, happen if an Article V convention deliberately exceeded its delegated powers, and either considered amendments not included in the convention act, or drafted an entirely new constitution?

---

[164] Wise v. Chandler, 1027. Hawke v. Smith, 253 U.S. 221 (1920) (referendum on legislative ratification void), 229 ("This argument is fallacious in this – ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."); National Prohibition Cases, 253 U.S. 350 (1920) (referendum provisions cannot apply to ratification); Hebring v. Brown, 92 Or. 176, 180 (1919)("To ascertain what is meant by the term 'bill' and 'act,' as used in the amendments quoted above, we must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed."); Whittemore v. Terral, 140 Ark. 493, 215 S.W. 686, 687 (1919) ("An analysis of this provision of our Constitution reveals the fact that the reserved referendum power of the people relates only to laws enacted by the General Assembly. The word 'act,' as there used, means an enacted law — a statute."); *Decher*, *supra* note 163 (referendum after amendment deemed ratified by Congress), 572 ("The right of the people to thus legislate in no way makes them a part of the Legislature, or changes the well-recognized meaning of that term."); State *ex rel.* Gill v. Morris, 79 Okla. 89 (1920) (issue settled by Hawke); State ex rel. Askew v. Maier 231 N.W.2d 821 (N.D. 1975); State ex rel. Hatch v. Murray, 165 Mont. 90 (1978) (per curiam); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972) (referendum has no effect as it is a federally derived power). *But see* State *ex rel*. Mullen v. Howell, 105 Wash. 167 (1919) (referendum on ratification is law for purposes of state constitution, referendum thus valid); Trombeta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973).

This problem was one of Jameson's central concern, what he called "usurping conventions." A usurping convention is a convention that begins as a constitutional convention but assumes revolutionary authority. Ultimately, the law of constitutional conventions has been designed to address this problem. Whether an Article V convention exceeded its authority would not be a political question. The question would simply be whether the convention exceeded its mandate by considering issues beyond those included in the convention act creating the convention. If so, an injunction prohibiting the distribution of the proposed amendments or constitution could issue. Or, if already distributed, states could be barred from considering ratification. The lack of a curative power in the electorate means that courts could even overturn an amendment after it has been ratified. I imagine that courts would be reluctant to do so, and would be highly deferential to the ratification vote. But ratification should constitute merely a persuasive argument (if that) for upholding the ratification of an amendment, not a dispositive argument. It should not provide any persuasiveness, however, with regard to changes that cross the line into revision.

The only potential source for an unlimited federal convention in the federal constitution is the ninth amendment. We have seen already how the right to alter or abolish creates a power within a state legislature to assemble a constitutional convention when a state constitution lacks a convention clause. A similar logic could extend to the federal constitution. According to Akhil Amar, it does. "Indeed," he writes, "the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention."[165]

So what would be the difference between an Article V and ninth amendment convention? Most fundamentally, Congress's duty to assemble a ninth amendment convention would be discretionary, in contrast to its more ministerial duty under Article V. Congress would have to determine whether an unlimited convention was actually desired by the people, and not merely a portion thereof, a cabal perhaps. In fact, Congress could require a near-unanimous, or even a unanimous call for an unlimited convention, rather than the three-fourths required by Article V. Congress's main duty would be to determine a) whether a constitutional emergency existed, and b) whether the emergency demanded an unlimited convention. It was such an emergency that justified the first unlimited federal convention in 1787.

If Congress's convention act providing for the assembling of a constitutional convention intentionally provided for an unlimited convention, the first question would be whether Congress was acting under Article V or the ninth amendment. If Article V, then the act would be void, and a court could enjoin the assembling of the federal convention. If Congress relied upon the ninth amendment, on the other hand, two things would have to occur. First, electorates would have to be given a more prominent role in the convention process in order for it to reasonably reflect the people's exercise of their right to alter or abolish government. Second, some explanation of the need for the extraordinary choice of the ninth amendment rather than Article V should be required. But this would not necessarily place the convention beyond the reach of law.

---

[165] Akhil Amar, The Bill of Rights: Creation and Reconstruction 120 (1998). For a fuller elaboration see Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. .Chi. L. Rev. 1043 (1988).

A court could decide whether a legitimate emergency existed justifying the creation of an unlimited convention.[166] This is an important difference from the 1787 convention, which existed in a world without a U.S. Supreme Court. Until a new constitutional order has been created, the federal courts still exist, and can consider the legal limits of conventions, in this case by considering the basis for the emergency, and issuing an injunction prohibiting the assembling of a convention if necessary. Obviously, this would be a very high-stakes constitutionalism, so a court would want to move cautiously here. But the larger point is that the possibility that a constitutional convention could be assembled under the ninth amendment, and that even that convention could be limited, simply confirms the limited nature of an Article V convention.

VIII. Conclusion

The law of constitutional conventions has achieved Jameson's primary aim of subjecting conventions to limitations imposed by law. This jurisprudence, especially the distinction between revolutionary and constitutional conventions that lay at its core, can also provide a way for courts to think through the nature and scope of power of even an Article V convention. Having said that, the case for a limited Article V convention that I have just laid out provides me no comfort. I suspect that a case for an unlimited convention would neither. It only confirms to me how far we've come from popular sovereignty's original promise. As David Kyvig has written, "By the end of the eighteenth century, particularly in North America, optimism regarding human capacity for reason fostered the belief that fundamental changes could be wrought in otherwise enduring governments through a preordained and agreed-upon process that embodied republican values." "[C]onstitutional amendment," he continued, "offered a means of successfully balancing competing desires for stability and change, tradition and innovation, the wisdom of accumulated experience and democratic preferences for new definitions of government responsibility."[167] A well-developed law of constitutional conventions, by contrast, indicates a declining belief in the "human capacity for reason" as expressed through "democratic preferences," and a growing concern with the will to power.[168]

Perhaps conventions are simply no longer necessary to self-government. The constituent power was a necessary element in the move away from monarchies toward constitutional republics in the eighteenth and nineteenth centuries. It may well be that conventions have little role to play in post-democratic societies. But

---

[166] Compare *Priest*, *supra* note 134 682 ("it is a judicial determination whether facts constituting an emergency are stated.") ("The test for determining if a real emergency has been stated is whether reasonable minds might disagree as to whether the enunciated facts state an emergency. If so, the emergency clause is upheld; if not, then the emergency clause is invalid. Emergency is defined as "some sudden or unexpected happening that creates a need for action.""") The court in *Priest* was interpreting an emergency statute.

[167] David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995 ix (1996).

[168] For a brief discussion of "Recent Developments" in Article V advocacy that reinforces my skepticism, *see* Vile, Conventional Wisdom, *supra* note 8, at viii-x.

without conventions, through which the people have exercised their constituent power, the people no longer play a defining role in American constitutionalism. The people can no longer enact or constitute. Instead, they are simply left to offer "opinion," and the minor power of election and acclamation.[169] The turn to popular constitutionalism has attempted to unearth various ways in which groups of people outside of governmental institutions have effected constitutional change.[170] But such acts have rarely been positives exercises of a sovereign will. Given the scope and scale, the totality, of the modern state, this may be as much as the people can handle. In this context, the constitutional convention appears to be little more than a super-administrative body. Its function is no longer to embody and facilitate the people's ability to deliberate and reason, but simply to perform an administrative task. The important question, then, may not be whether a convention can be limited, but why a convention at all.

[169] Roman J. Hoyos, *Who Are the People?*, 11 Elon L. Rev. 23 (2019).

[170] *See, e.g.*, *A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 Chi.-Kent L. Rev. 809 (2006).