CONVENTION OF STATES ACTION

BRIEFING BOOK

Convention *of* **States Action**
Briefing Book
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COS Legislative Dept.
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EXECUTIVE SUMMARY
Convention *of* States

America is spiraling out of control. Washington, D.C., today, enjoys almost unchecked power.

This is a systemic problem that requires a systemic solution. This is about more than elections. Elections cannot and will not solve the problems of a broken system. The only solution big enough to fix our nation's problems is an Article V convention for proposing constitutional amendments to rein in federal tyranny. This is the people's final "check" on D.C., exercised through their state legislators–the ingenious plan of the Founders to make state legislators' ambitions (for state power) counteract federal officials' ambitions (for federal power)–for the good of the people.

While there is nothing "wrong" with the Constitution as drafted and ratified, the problems we now face are undeniably the result of improper constitutional interpretations by the federal courts (i.e. the General Welfare Clause, the Necessary and Proper Clause, and the Commerce Clause). Conservatives like to say that federal officials "ignore" the Constitution, but what they actually do is creatively "lawyer" around its limitations via Supreme Court rulings expanding federal power.

We can and must restore the federal government to its proper, limited place by pushing back on the expansion and effectively overturning bad Supreme Court precedents that have eviscerated the Founders' intended limitations on our federal system.

The Convention of States Resolution seeks to do this by using the tool given to the states in Article V of the Constitution. It calls for an Article V convention limited to proposing amendments that **impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.**

OFFICIAL ENDORSERS


Hon. Rick Santorum, *COS Advisor*


Mike Farris, *COS Advisor/ Co-Founder*


Mark Meckler, *CEO COS Action*


Mark Levin, *The Mark Levin Show*


Sean Hannity, *Hannity & Colmes*


Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

How The Process Works

Article V of the Constitution provides two ways in which amendments may be proposed: Congress may propose them, or the states can call a "convention for proposing amendments" upon application of 2/3 of the state legislatures (34 state legislatures). Regardless of which way amendments are proposed, they must always be ratified by 3/4 of the states (38 states).

The amendments that can be proposed must be germane to the resolution, limited by the language of the resolution itself, passed by the state legislatures as the subject matter of the convention. Only the proposed amendments that pass by a simple majority (26 states) shall be put forth for ratification. They are mere suggestions until ratified.

COS Resolution Language

The COS Resolution's operative language defines the limits of the types of amendments that can be proposed. The operative language is as follows:

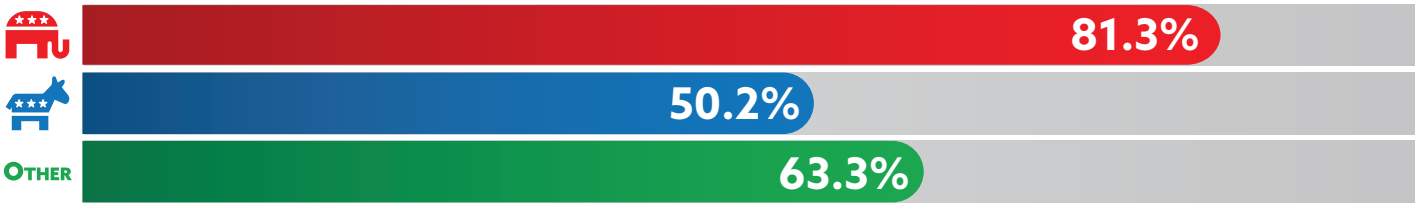
> Section 1. The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.

Types of Amendments That Could Be Proposed

- Limiting Supreme Court Justices to nine members of the court
- Preventing the federal government from adding states without the affirmative consent of three quarters of the existing states
- A limitation on using Executive Orders and federal regulations to enact laws
- A balanced budget amendment, including limitations on taxes and spending
- Imposition of Generally Accepted Accounting Principles (GAAP)
- Single Subject Amendment – One subject per bill in Congress
- A redefinition of the General Welfare Clause back to original intent (the original view was the federal government could not spend money on any topic within the jurisdiction of the states)
- A redefinition of the Commerce Clause back to original intent (the original view was that Congress was granted a narrow and exclusive power to regulate shipments across state lines–not all the economic activity of the nation)
- A prohibition of using international treaties and law to govern the domestic law of the United States
- Placing an upper limit on federal taxation
- Requiring the sunset of all existing federal taxes and a super-majority vote to replace them with new, fairer taxes
- Religious freedom amendment, prohibiting the government from further interference with our religious freedoms
- Regulatory curtailment by forcing Congress to vote on regulations instead of deferring law making to regulators.

Public Opinion Polling

Polling conducted across the nation indicates that, on average, 65.7% of voters across party lines support the Convention of States Resolution. That includes 81.3% of Republicans, 50.2% of Democrats, and 63.3% of "others." Polling was conducted by Robert Cahaly of The Trafalgar Group, America's most trusted and accurate pollster in the 2016, 2018 and 2020 elections.




Mark Meckler


Michael Farris

COS Founders

Convention of States was founded by **Mark Meckler,** Co-Founder of Tea Party Patriots and President of Citizens for Self-Governance, and **Michael Farris**, Founder of Home School Legal Defense Association, Patrick Henry College, and the former CEO of Alliance Defending Freedom.

COS Endorsers

Former **U.S. Senator Rick Santorum** now serves as Senior Advisor to Convention of States. Major endorsers include (but are not limited to): **Mark Levin, Sean Hannity, Ben Shapiro, Gov. Ron DeSantis, Rep. Mark Meadows, Charlie Kirk, Pete Hegseth, Lt. Col. Allen West, Dave Rubin, Rep. Chip Roy, David Barton, James O'Keefe, Steve Deace, David Horowitz, Eric Metaxas, Dr. James Dobson, Rep. Louis Gohmert, Sen. Rand Paul, Sen. Marco Rubio, Sen. Jim DeMint, Gov. Greg Abbott, The Honorable Jeb Bush, The Honorable Ben Carson,The Honorable Mike Huckabee, Gov. Sarah Palin, Gov. Bobby Jindal, Sen. Ron Johnson, Kenneth Cuccinelli, Rep. Jeff Duncan, Rep. Ralph Norman, Sen. Jim Talent,** and many more. The late **U.S. Senator Tom Coburn** was one of the leading proponents of COS and also served as a Senior Advisor.

Conservative legal heavyweights serving on the Convention of States Legal Board of Reference include:

- **Mark Levin**
- **Prof. Robert P. George**
- **Prof. Randy Barnett**
- **Ambassador C. Boyden Gray**
- **Mat Staver**
- **Andrew McCarthy**
- **Dr. John Eastman**
- **Charles Cooper**
- **Professor Nelson Lund**
- **Michael Farris**
- **Mark Meckler**


Mark Levin


Rick Santorum


Hon. Ben Carson


Ben Shapiro


Lt. Col. Allen West


Hon. Mike Huckabee


Rep. Mark Meadows


Sean Hannity


Gov. Ron DeSantis

View our full list of endorsers at conventionofstates.com

Strategy for Passage of the COS Resolution

The strategy for passage of the Resolution is state-specific and is carried out by the 5 Million+ citizen activists recruited from within 100% of the state legislative districts. Citizen activists put the appropriate pressure on their state representatives to sponsor or vote in support of the Resolution. To date this strategy has accomplished:

- **49** states filing the COS Resolution in their state legislatures.
- **31** states have passed the COS Resolution through at least one committee hearing.
- **26** states have passed the COS Resolution through one entire floor chamber.
- **19** states have passed the COS Resolution in its entirety.

The nineteen states that have already passed the Convention of States Resolution are: Florida, Georgia, Alaska, Alabama, Tennessee, Indiana, Oklahoma, Louisiana, Arizona, North Dakota, Texas, Missouri, Arkansas, Utah, Mississippi, West Virginia, Wisconsin, Nebraska and South Carolina.

Legislative makeup and Convention of States Legislative Victories

Filed COS Resolution (49 States)

AK, AL, AR, AZ, CA, CO , DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, MA, MD, ME, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, VT, WA, WI, WV, WY

Passed Committee Hearing (31 States)

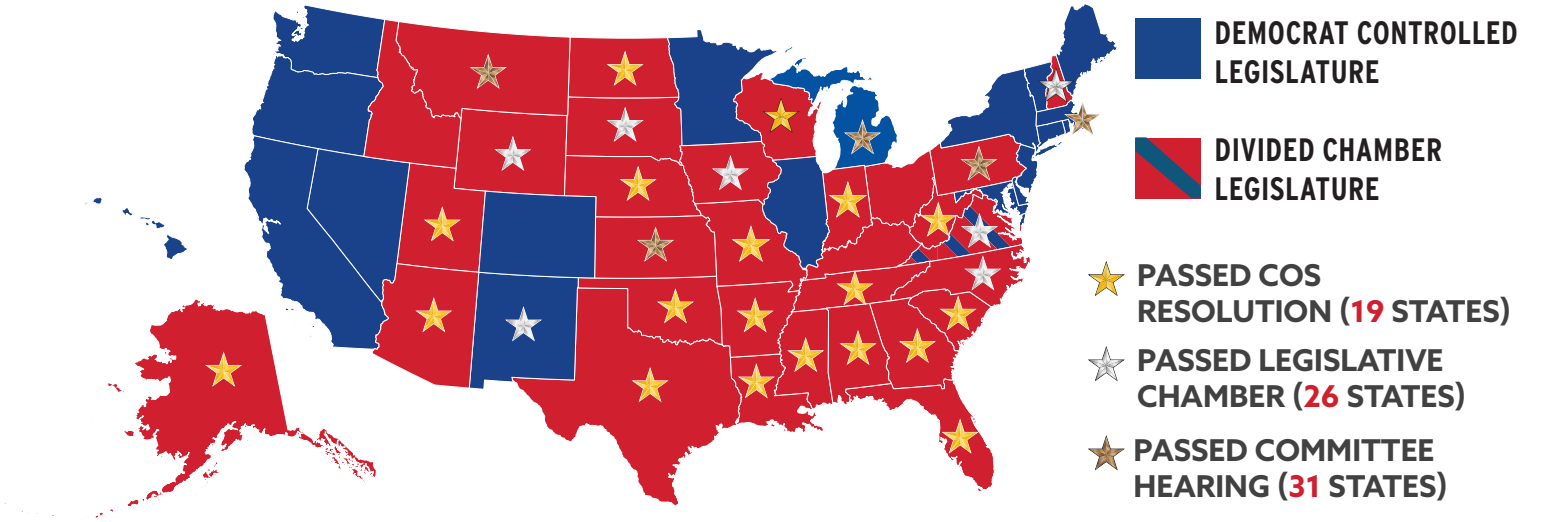
AL, AK, AZ, AR, FL, GA, IN, IA, KS, LA, MA, MI, MS, MO MT, NE, NH, NM, NC, ND, OK, PA, SC, SD, TN, TX, UT, VA, WV, WI, WY

Passed Legislative Chamber (26 States)

AL, AK, AR, AZ, FL, GA, IA, LA, MS, NE, NH, NC, ND, NM, TN, VA, SD, IN, UT, OK, MO, TX, SC, WI, WV, WY

Passed COS Resolution (19 States)

AK, AL, AR, AZ, FL, GA, IN, LA, MO, MS, ND, NE, OK, TN, TX, UT, WI, WV, SC



Updated 2/07/2023

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Responses to Common Objections

Objection 1: The Constitutional Convention in Philadelphia defied its authority in proposing a new Constitution, so we can expect an Article V convention to do the same.

Response: The 1787 convention did not run away. The runaway claim is based on the assumption that the Confederation Congress called the convention and defined its scope, but that is incorrect. The Constitutional Convention was called by Virginia in December, 1786, and its language gave the states power (under their reserved powers) to re-write the Articles of Confederation. The congressional resolution, issued months after Virginia had issued the call, was, by its own wording, merely an expression of "opinion" and a recommendation.

Michael Farris, former President and CEO of Alliance Defending Freedom, has published an article refuting the claim. It is published in Volume 40 of the Harvard Journal of Law and Public Policy, and you can find it here.

Objection 2: Nothing in Article V limits the convention to a single topic, and in fact, states cannot limit the scope of an amendment-proposing convention. Once convened, state delegations will be free to rewrite the Constitution.

Response: The states whose applications trigger the convention retain the right to limit the scope of the convention however they choose. This is inherent in their power of application. In fact, this is the only reason there has never yet been an Article V convention; while over 400 state applications for a convention have been filed, there have not yet been 34 applications for a convention on the same subject matter. Every scholar who has published articles or books on the subject in the 21st century agrees that a convention can be limited.

As the *agents* of the state legislatures who appoint and commission them, the commissioners only enjoy the scope of authority vested in them by their *principals* (the state legislatures). Any actions outside the scope of that authority are void as a matter of common law agency principles, as well as any state laws adopted to specifically address the issue.

The inherent power of state legislatures to control the selection and instruction of their commissioners, including the requirement that said commissioners restrict their deliberations to the specified subject matter, is reinforced by the unbroken, universal historical precedent set by the interstate conventions held at least 42 times in American history. Those who make a contrary claim cannot cite a single historical or legal precedent to support it.

Finally, keep in mind that under the explicit terms of Article V, the convention's only power is to "propose" amendments to "this Constitution" (the one we already have). Only upon ratification by 38 states does any single amendment become part of the Constitution.

Objection 3: Adding amendments to the Constitution won't help anything, because federal officials simply ignore the Constitution anyway.

Response: It is true that if our Constitution were being interpreted today—and obeyed—according to its original meaning, we would not be facing most of the problems we face today in our federal government. But the problem is today is more complex than that officials are "ignoring" or "disobeying" the Constitution. The real issue is that certain provisions of our Constitution have been wrenched from their original meaning, perverted, and interpreted to mean something very different. Federal officials today follow the Constitution as *interpreted* by the Supreme Court over the years.

As just one example, consider the individual mandate provision of the Affordable Care Act. Of course, nowhere in the Article I of the Constitution do we read that Congress has the power to force individuals to purchase health insurance. However, our modern Supreme Court "interprets" the General Welfare Clause of Article I broadly as a grant of power for Congress to tax and spend for virtually any purpose that it believes will benefit the people. Now we know from history that this is not what was intended. But it is the prevailing modern interpretation, providing a veneer of legitimacy to Congress' actions—as well as legal grounds for upholding them.

The federal government doesn't "ignore" the Constitution—it takes advantage of loopholes created through practice and precedent. The only way to close these loopholes definitively and permanently is through an Article V convention that reinstates limitations on federal power and jurisdiction in clear, modern language.

Objection 4: We have no idea how an Article V convention would operate, because it is not spelled out in Article V.

Response: The Constitution does not spell out the details of processes that were well-known to the Framers ("grand jury" and "habeas corpus" are other examples), and interstate conventions were common practice for them. We know the process from the historical records of past conventions. There have been at least 42 in American history. States always choose and instruct their commissioners, voting is always on a one-state, one-vote basis, and no interstate convention has ever become a "runaway."

Objection 5: Congress will use its powers under the Necessary and Proper Clause to control an Article V convention.

Response: This argument is based on ignorance of existing precedent, holding that Congress may not use any of its Article I powers in the context of Article V. *See Idaho v. Freeman*, 529 F.Supp. 1107, 1151 (D. Idaho 1981) ("Thus Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I.") This case was later vacated as moot for procedural reasons, but the central holding remains unchanged. Congress may not use its power under the Necessary and Proper Clause with respect to the operation of an Article V convention.

Objection 6: A convention could change the ratification process just like the Constitutional Convention did.

Response: (excerpted from an article by Professor Rob Natelson):

- This misinterprets the power of the 1787 convention, which met under the states' reserved powers and not under the Articles of Confederation;
- This contradicts the specific words of Article V, which lays out how amendments to "this Constitution" must be ratified;
- This contradicts 200+ years of Article V court decisions, which rule that every actor in the amendment process must follow the rules laid out in Article V; and
- This defies reality: The convention has no military force nor even any existence after adjournment. How will it enforce its decree? Call out the army?

Objection 7: The Article V process was intended only to correct drafting errors; not to correct abuses of power.

Response: At the Constitutional Convention in 1787, Col. George Mason promoted the convention procedure specifically as a remedy for abuses of power by the national government. A number of other historical documents confirm that this was the Founders' intention. (https://articlevinfocenter.com/the-founders-pointed-to-article-v-as-a-cure-for-federal-abuse)

Moreover, amendments have been used for this purpose before and have been extremely effective. The Eleventh Amendment was proposed by Congress and ratified by the states specifically to reverse a wrong Supreme Court decision, *Chisholm v. Georgia*, that had given the federal courts more jurisdiction than they should have had. The problem was corrected through the Article V amendment process.

Objection 8: An Article V convention would open up our beloved Constitution to massive changes, and the convention could even replace our entire Constitution with a new one.

Response: An Article V convention to propose amendments is not the same as a "Constitutional Convention." At a constitutional convention such as the one in 1787, the states gather pursuant to their reserved sovereignty and the basic right of the people to "alter or abolish" their government as recognized in the Declaration of Independence. At an Article V convention, on the other hand, the states gather pursuant to their power under Article V, and are limited by its provisions.

The only power an Article V convention will have is the same power that Congress also has under Article V every day it is in session–the power to *propose amendments* that would be *added* to the Constitution (if ratified by 38 states) just like the 27 amendments we already have.

As was the case with the Bill of Rights, each amendment proposed by an Article V convention of the states would have to be ratified individually by 38 states. This is simply not a "re-writing" or "replacing" process. If the states wanted to do that, they would not need to use the Article V process. They would simply gather, as they did in 1787, pursuant to their residual sovereignty.

This chart highlights the distinctions between these two types of interstate conventions:

DIFFERENCES BETWEEN A CONSTITUTIONAL CONVENTION AND AN ARTICLE V CONVENTION		
ACTION	CONSTITUTIONAL CONVENTION	ARTICLE V CONVENTION
Propose	Propose New Constitution	Propose Amendments to Current Constitution
Power	Full Powers, Unlimited	Limited to Subject of State Applications
Authority	Outside of the Constitution	Under Article V of the Constitution
Requirement to Call	Unanimous Consent of States to be Bound	Application by Two-thirds of the States
Called By	The States	Congress
Scope of Passage at Convention	Entire Constitution as a Whole Document	Individual Amendments, Singly
Votes for Passage at Convention	Unanimous Consent Required	Simple Majority
Scope of Ratification by the States	Entire Constitution as a Whole Document	Individual Amendments, Singly
Votes for Ratification by the States	Only Binds States That Ratify It	Ratified by Three-fourths and Binds All States

Conventional Disinformation

Opponents of an Article V convention for proposing amendments to the U.S. Constitution are stoking fear with objections based upon disinformation.

A common objection to an Article V convention for proposing amendments is the belief that the convention will "runaway" by ignoring the limitations placed on it. The Constitutional Convention of 1787 is often cited as an example of a runaway convention.

Limitations on a convention arise from two sources: the call and the commissions. The call is the first resolution calling for a convention, and it places limitations on the convention as a whole. A commission is a set of instructions a state legislature gives to its representatives (commissioners) and can be more restrictive than the call.

The claim that the 1787 convention exceeded its call starts with incorrect identification of the call. Consider the table on page 14, listing each of the resolutions leading up to the 1787 convention. The claim is made that the Continental Congress made the call on February 21, 1787 and restricted the convention to revising the Articles of Confederation. How could this be the call if six states had already selected and instructed their commissioners prior to February 21, 1787? How would those states know the subject matter, date, and location of the convention? In fact, the Articles of Confederation did not grant the Confederation Congress the power to call a Convention of the States.

It was Virginia that issued the call on November 23, 1786, without restricting the convention to revising the Articles of Confederation. New York and Massachusetts did issue commissions that restricted their commissioners to revising the Articles of Confederation, but the convention as a whole was not so restricted.

There have been at least forty-two state conventions in our history (see the table on page 15), and not one has deviated from the scope of its call (runaway). It is also worth noting in that same table that all forty-two previous state conventions operated on the principle of one state, one vote.

Another common objection claims that we do not know how an Article V convention would operate. The list of forty-two previous state conventions would demonstrate that we have a great deal of experience with operating an Article V convention. In addition, the operation of an Article V convention is well established in a significant number of court cases on the subject. A sampling of these rulings can be found in the table on page 16.

Finally, it is self-evident that the framers knew exactly what they meant by a Convention of the States when they drafted that mechanism into Article V because they were participating in a Convention of the States at the time! In essence, the founders were saying, "if the states desire to propose amendments to the Constitution, use the same method we are using right now."

The data in the following three tables is clear evidence that an Article V convention for proposing amendments is the safe, reliable, and time-tested method the framers intended for such a time as this.

The 1787 Constitutional Convention Call and Commissions

Date	State	Commission
11/23/1786	Virginia	devising and discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate to the exigencies of the Union. [meet Second Monday in May 1787 in Philadelphia]
11/24/1786	New Jersey	for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof
12/3/1786	Pennsylvania	devising, deliberating on, and discussing all such alterations and further provisions as may be necessary to render the foederal constitution fully adequate to the exigencies of the Union
1/6/1787	North Carolina	To discuss and decide upon the most effectual means to remove the defects of our foederal union, and to procure the enlarged purposes which it was intended to effect.
2/3/1787	Delaware	devising, deliberating on, and discussing, such Alterations and further Provisions, as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union [each State shall have one vote]
2/10/1787	Georgia	Devising and discussing all such alterations and farther provisions, as may be necessary to render the federal constitution adequate to the exigencies of the union.
2/21/1787	Confederation Congress	the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.
3/6/1787	New York	the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.
3/7/1787	Massachusetts	amend the Articles of Confederation to render the federal constitution adequate to the exigencies of government and the preservation of the union.
3/8/1787	South Carolina	in devising and discussing all such alterations, clauses, articles and provisions as may be thought necessary to render the foederal constitution entirely adequate to the actual situation and future good government of the confederated states
5/17/1787	Connecticut	Such Alterations and Provisions, agreeable to the general Principles of Republican Government, as they shall think proper, to render the foederal Constitution adequate to the Exigencies of Government, and the Preservation of the Union.
5/26/1787	Maryland	considering such alterations, and further provisions, as may be necessary to render the federal constitution adequate for the exigencies of the union.
6/27/1787	New Hampshire	in devising and discussing all such alterations and further provisions as to render the federal constitution adequate to the exigencies of the Union.

Because it is first, the Virginia resolution is the call, placing limitations on the convention as a whole. These cannot be the call, because six states had already selected and instructed their commissioners.
https://conventionofstates.com/files/defying-conventional-wisdom-the-constitution-was-not-the-product-of-a-runaway-convention-by-michael-farris-1

42 Historical State Conventions

Year	Location	Purpose	Voting	Runaway
1677	Albany	Indian negotiations	1 State 1 Vote	No
1684	Albany	Indian negotiations	1 State 1 Vote	No
1689	Boston	Defense issues	1 State 1 Vote	No
1689	Albany	Indian negotiations	1 State 1 Vote	No
1690	New York City	Defense	1 State 1 Vote	No
1693	New York City	Defense	1 State 1 Vote	No
1694	Albany	Indian negotiations	1 State 1 Vote	No
1704	New York City	Defense	1 State 1 Vote	No
1711	Boston	Defense	1 State 1 Vote	No
1722	Albany	Indian negotiations	1 State 1 Vote	No
1744	Albany	Defense	1 State 1 Vote	No
1744	Lancaster	Indian negotiations	1 State 1 Vote	No
1745	Albany	Defense	1 State 1 Vote	No
1745	Albany	Indian negotiations	1 State 1 Vote	No
1747	New York City	Defense	1 State 1 Vote	No
1751	Albany	Indian negotiations	1 State 1 Vote	No
1754	Albany	Indian negotiations and plan of union	1 State 1 Vote	No
1765	New York City	Response to Stamp Act	1 State 1 Vote	No
1768	Fort Stanwyx	Indian negotiations	1 State 1 Vote	No
1774	New York City	Response to British actions	1 State 1 Vote	No
1776-77	Providence, RI	Paper currency and public credit	1 State 1 Vote	No
1777	Yorktown, PA	Price control	1 State 1 Vote	No
1777	Springfield, MA	Economic issues	1 State 1 Vote	No
1778	New Haven, CT	Price controls and other responses to inflation	1 State 1 Vote	No
1779	Hartford, CT	Economic issues	1 State 1 Vote	No
1780	Philadelphia, PA	Price controls	1 State 1 Vote	No
1780	Boston, MA	Conduct of Revolutionary War	1 State 1 Vote	No
1780	Hartford, CT	Conduct of Revolutionary War	1 State 1 Vote	No
1781	Providence, RI	War supply	1 State 1 Vote	No
1786	Annapolis, MD	Trade	1 State 1 Vote	No
1787	Philadelphia, PA	Propose changes to political system	1 State 1 Vote	No
1814	Hartford, CT	New England states response to the war of 1812	1 State 1 Vote	No
1850	Nashville, TN	Southern response to the North	1 State 1 Vote	No
1861	Washington, DC	Propose a constitutional amendment	1 State 1 Vote	No
1861	Montgomery, AL	Write the Confederate Constitution	1 State 1 Vote	No
1889	St. Louis, MO	Propose anti-trust measures	1 State 1 Vote	No
1922	Santa Fe, NM	Negotiate the Colorado River Compact	1 State 1 Vote	No
1928-29	Santa Fe, NM	Negotiate temporary Rio Grande Compact	1 State 1 Vote	No
1928-38	Colorado Springs, CO Santa Fe, NM	Negotiate the Rio Grande Compact	1 State 1 Vote	No
1937	Santa Fe, NM	Negotiate the Rio Grande Compact	1 State 1 Vote	No
1946-49	Denver, CO	Negotiate the Upper Colorado River Basin Compact	1 State 1 Vote	No
2017	Phoenix, AZ	Propose rules for an Article V convention to propose a balanced budget	1 State 1 Vote	No

https://articlevinfocenter.com/list-conventions-states-colonies-american-history/
https://articlevinfocenter.com/no-a-convention-of-states-could-not-change-the-one-state-one-vote-rule/

Selected Court Cases Related to Article V

Case	Holding
Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998)	Article V is the only constitutional method of amending the US Constitution.
Dodge v. Woolsey, 59 U.S. 331 (1855)	Amendatory conventions may be single issue. The States and/or the people cannot dictate the amendments. A state application is valid solely because it was made by the state.
Gralike v. Cooke, 191 F. 3d 911 (8th Cir. 1999)	Article V Conventions cannot be prohibited from deliberation and consideration of a proposed amendment and thereby limited to pre-written wording.
Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)	No signature of the President is required for a constitutional amendment to be valid and complete.
In Re Opinion of the Justices, 204 N.C. 306, 172 S.E. 474 (1933)	An Article V Convention may be limited in purpose to a single issue or to a fixed set of issues.
Leser v. Garnett, 258 U.S. 130 (1922)	The state legislature's discretion could not be supplanted by the rules imposed by a third party.
Opinion of the Justices to the Senate, 373 Mass. 877, 366 N.E. 2d 1226 (1977)	The governor plays no role in the approval process of an Article V Convention application.
Prigg v. Commonwealth of Pennsylvania, 41 U.S. 539 (1842)	No one is authorized to question the validity of a state's application for an Article V Convention.
Smith v. Union Bank of Georgetown, 30 U.S. 518 (1831)	An Article V Convention is a "convention of the States" and is therefore endowed with the powers of an interstate convention.
State of Rhode Island v. Palmer, 253 U.S. 320 (1920)	An Article V Convention will require only two-thirds of the quorum present to conduct business.
Ullmann v. United States, 350 U.S. 422 (1956)	The amendment and ratification processes cannot be changed to circumvent the Article V Convention.
United States v. Thibault, 47 F.2d 169 (2d Cir. 1931)	The federal or national government is not concerned with how an Article V Convention of a state legislature is constituted. Therefore, the Article V Convention is empowered to organize and conduct its business as the delegates or commissioners see fit.

https://rickbulow.com/Library/Books/Non-Fiction/ArticleV/FindingsOfCourtCasesRelatedToArticleVOfTheUnitedStatesConstitution.pdf

PROBLEMS IN THE TESTIMONY OF ROBERT BROWN

By Professor Rob Natelson

Problems in the Testimony of Robert Brown

By Robert G. Natelson[1]

[1]About the Author: *Professor Natelson is the director of the Article V Information Center at the Independence Institute in Denver and has published widely on many parts of the U.S. Constitution for the scholarly and popular markets. He is the most-published active scholar on the Constitution's amendment process, and the author of* The Law Of Article V, *a legal treatise. His research studies have been relied on by the highest courts of 16 states, by federal appeals courts in five cases, and by U.S. Supreme Court Justices in seven cases.*

Professor Natelson has a degrees in history and law, the latter from Cornell University (J.D. 1973), where he was elected to both the Cornell Law Review *and the University Senate. (He chose the latter.) After practicing law (1974-85), he served as a tenure-track and tenured professor of law (1985-2010).*

Professor Natelson has split his professional experience between the public and private sectors. He also has extensive political experience: In Montana, he led several successful statewide ballot campaigns to restrain taxes and spending, and he placed second in a five-candidate field in the open party primaries for governor (2000). A more complete biography is at https://i2i.org/about/our-people/rob-natelson/.

"It is much easier to alarm people than to inform them."

—William Davie
Constitutional Convention Delegate

Early in my 25-year career as a legal academic I had an experience both humiliating and invaluable.

I was enjoying success placing research articles in academic journals on common legal topics. Then I researched and composed an article on the more exotic subject of classical Roman law, and I submitted it to a peer-reviewed legal history journal.

A "peer reviewed" journal is called that because other scholars anonymously examine and report on your article before the journal agrees to publish it. This ensures the contribution is well-grounded and adds to human knowledge.

Based on peer review of my submission, the journal's editor rejected it and provided me with a copy of the review to explain why.

The reviewer's assessment was devastating. He said it was obvious that I was writing without prior education in Roman law—that I knew little about scholarship in the field, and, frankly, I was clueless as to how much I didn't know.

I was emotionally crushed, but I also recognized that the reviewer was correct. And although the reviewer could have remained anonymous, he kindly disclosed his identity to me. He helped me work through my disappointment. He outlined what I needed to do before I could contribute to the very specialized realm of Roman law. I don't remember all his recommendations, but I do recall that one of them was to acquire some formal education on the subject.[2]

The experience taught me that I had fallen into the common error of undervaluing other people's specialties. (Think of all the disasters wrought by overconfident husbands who imagine they can do their own plumbing!) The experience also taught me that when researching a subject, you should gather as much information about it as possible: Never limit your universe of sources.

The experience had some implications for the reviewer as well. He told me he had a hard time writing his assessment, precisely because my paper lacked the foundation of basic knowledge of the field. If he were responding to a scholar who had some foundational knowledge, the review could have simply pointed out the mistakes, and perhaps suggest ways to correct them. But to respond effectively to a beginner, he also had to outline and explain many of the fundamentals.

Later I learned how time consuming this is. For example, when a lawyer has to thoroughly explain a legal conclusion to a non-lawyer, the lawyer first must outline basic concepts taught in law school before proceeding to the issue at hand. The difficulty increases exponentially when the non-lawyer thinks he's already an "expert" in the subject, and has reached a different conclusion. Such people never want to believe the truth, so the lawyer has to pile up sources to support the most elementary propositions.

This is one reason lawyers tell each other, "Never argue law with a non-lawyer." Much the same is said in other specialties as well, and often less politely.

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[2] *After additional research over several years, I was able to publish a related article that did not require as much specialized knowledge: Robert G. Natelson,* The Government as Fiduciary: Lessons from the Reign of the Emperor Trajan, *35* Richmond L. Rev. *191 (2001).*

1

This is such a case: Robert Brown is a novice who promotes himself as an expert. So to explain why his conclusions are incorrect you often have to review the basics understood by all true experts. That is why this paper is so long.

Background

Robert Brown is an employee of the John Birch Society (JBS). Videos of his performances before legislative committees show that he holds himself out as a "nationally known constitutional scholar."[3] He or JBS apparently used like representations of expertise to obtain an interview with Joshua Philipp of the *Epoch Times*, an international newspaper.

However, Brown's biography shows none of the background or hard work necessary to make one a constitutional scholar, much less a "nationally known" one.[4] There is no evidence of formal, or even informal, training in law, history, or language. A search of an academic database revealed no evidence that he has published any scholarship on the Constitution or on anything else.[5]

Brown's biography shows none of the background or hard work necessary to make one a constitutional scholar, much less a "nationally known" one. There is no evidence of formal, or even informal, training in law, history, or language. A search of an academic database revealed no evidence that he has published any scholarship on the Constitution or on anything else.

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[3] https://www.youtube.com/watch?app=desktop&v=aeaAfCdQk18. The video shows Mr. Brown representing himself as a "nationally known constitutional scholar" at legislative hearings in North Dakota, South Dakota, and South Carolina.

[4] Mr. Brown's official JBS biography is sketchy. It tells us only that "he and some buddies started a bicycle design company for a few years," that he has worked for JBS since 2009 and that he raises chickens and goats on two acres of land.

Suppose John Q. Quacker regularly influenced government health policy by holding himself out as a "nationally known cardiac surgeon"–but had never gone to medical school . . . We should be equally concerned when a person offers constitutional and other legal advice, and affects legislative policy, without any reasonable basis for doing so.

I recognize, of course, that everyone has a First Amendment right to express his or her opinion, expert or not. But no one has the right to mislead legislators on important matters of law and policy under the cover of false credentials.

To use an analogy: Suppose John Q. Quacker regularly influenced government health policy by holding himself out as a "nationally known cardiac surgeon"—but had never gone to medical school, never served a residency, and never performed an operation. We would be justifiably concerned. We should be equally concerned when a person offers constitutional and other legal advice, and affects legislative policy, without any reasonable basis for doing so.

Yet Brown has repeatedly purveyed constitutional and legal advice, frequently on the very important issue of whether state lawmakers should apply for a convention for proposing amendments to the United States Constitution. Brown's statements are based on citations, sometimes out of context, from only a narrow sliver of the sources constitutional scholars employ in their work.[6]

The Interview

To illustrate the problems in Brown's approach I have chosen his *Epoch Times* interview with Joshua Philipp. The interview is 30 minutes long. This paper quotes relevant excerpts, and then responds to each. The footnote below provides a link to the entire interview.[7]

* * * *

[5] *Publishing in scholarly journals subjects one's work to review and critique from others knowledgeable in the subject.*

[6] *Constitutional scholars work with 18th century law books, cases and statutes; the 18th century educational canon (including the Greco-Roman classics); British parliamentary records; political and philosophical works influential with the Founders, such as those by Aristotle, Cicero, Locke, Montesquieu and DeLolme; colonial charters and instructions to colonial governors; pre-*

Joshua Philipp: *"Hey, welcome back everyone. . . . Robert Brown. He's a constitutional expert with the John Birch Society. And Robert, it's a real pleasure to have you on Crossroads. . . . Now, I'm curious from your standpoint, what is the Convention of States? How would you describe it?"*

Robert Brown: *"Convention of States is an organization pushing to use the second method in Article V for obtaining changes or amendments to the Constitution. . . . . Yeah, in Article V it talks about two different ways of amending or changing the Constitution."*

Correction: Mr. Brown's response is inaccurate in two respects. First, he fails to distinguish between a "convention of states" as a constitutional mechanism and the movement of Convention of States Action, which is one of several organizations trying to bring about such a convention.

Second, he erroneously states that there are two ways of amending the Constitution. In fact, there are four: (1) proposal by Congress, ratification by state legislatures, (2) proposal by interstate convention, ratification by state legislatures, (3) proposal by Congress, ratification by state conventions, and (4) proposal by interstate convention, ratification by state conventions.

It would have been correct to say that there are only two ways of *proposing* amendments. However, Brown and other convention critics often fudge the difference between proposal and ratification to suggest, falsely, that a convention alone, without state ratification, could impose constitutional change. The Constitution and many other sources (see *Notes*) make it absolutely clear this is not so.

Brown conflates proposal and ratification elsewhere in the interview as well, as explained below.

* * * *

Brown: *"So, the second method has never been used before. We've been well over 200 years under the current constitution and it has been brought up a number of times throughout our nation's history."*

Correction: This is a half-truth, because it understates the role the Constitution's application-and-convention process has played in American history. Although the process has not been used to *completion*, states have adopted hundreds of "applications" for a convention, and on several occasions America has been quite close to one. On several occasions as well, application campaigns have forced Congress to propose amendments or take other action. Without the convention process, it is very likely neither the Bill of Rights nor the 17th nor 22nd amendments would have been adopted.

1787 state constitutions; debates in the state legislatures and state ratifying conventions; newspaper articles and speeches; and the records of the Continental, Confederation, and First Federal Congresses. These materials sprawl over hundreds of volumes. Practicing constitutional lawyers increasingly use the full range of this material as well.

Fully competent constitutional scholarship also requires some background in the Latin language. See Forrest McDonald, Novus Ordo Seclorum xi *(1985) (Professor McDonald was arguably our greatest 20th century constitutional historian).*

[7] *https://m.theepochtimes.com/video-arguments-against-the-convention-of-states-interview-with-robert-brown_3754686.html.*

★ ★ ★ ★

Brown: *"James Madison in particular. . . . strongly pushed against achieving the Bill of Rights through an Article V Convention, saying it was a more dangerous mode than Congress. He uh- in fact, a letter to George Turberville, November 2, 1788, he says he would* tremble *at the results of a convention. . . . ."*

Correction: JBS borrows many of its arguments from liberal sources opposed to a convention, and this is one example.

The myth that Madison—the principal author of Article V—opposed its provision for conventions apparently was invented by liberal lawyer Arthur J. Goldberg in 1983.[8] Madison's full correspondence on this subject includes at least twelve other letters, and it tells quite a different story.

Madison's full correspondence tells us that he did not oppose Article V conventions in general; he opposed only a specific proposal for a convention to re-write the entire Constitution. In that correspondence, moreover, Madison also wrote he would be fully agreeable to holding a convention in a year or two, after some experience under the new government. In a letter written later in life, Madison endorsed an amendments convention over the favorite JBS "solution" of nullification.[9]

★ ★ ★ ★

Philipp: *"Now, on the Convention of States, you mentioned that you—you kind of see the same problems but you—you don't think that—that the model of using it to amend the Constitution is a good model. Why not? What is the argument against it? What would you say?"*

Brown: *". . . Given today's political environment, if we were to pull up the anchor of the U.S. Constitution and drift to the* center *of political thought today, do you feel that would move us closer to the views of Marx or Madison? And obviously, our nation has moved far more towards the socialist mentality than we were in 1787 when the Constitution was originally written . . . ."*

Correction: Convention advocates explicitly rule out "pull[ing] up the anchor of the U.S. Constitution." They seek only (in the Constitution's words) *"a convention for proposing amendments" "to this Constitution."*

JBS claims it is a bad time for a convention, and it has been making that claim for decades, no matter what the political conditions. It is clear that JBS does not consider any time to be good.

Practically speaking, right now probably *is* a good time for a convention to propose conservative-leaning amendments: Thirty-one state legislatures are Republican. Congress is deeply unpopular, and its narrow Democratic majority is widely viewed as overreaching. The present justices on the Supreme Court and other federal courts are the most favorable in years.

★ ★ ★ ★

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[8] *Arthur J. Goldberg,* Commentary: The Proposed Constitutional Convention, *11 Hastings Const. L.Q. 1 (1983).*

[9] *I have collected Madison's correspondence on the subject at the Article V Information Center webpage at https://articlevinfocenter.com/what-madison-really-said-in-1788-and-1789-about-holding-a-second-convention/. On a Montana radio show several years ago, I informed Mr. Brown of this correspondence, what it said, and where to find it.*

Madison's full correspondence tells us that he did not oppose Article V conventions in general; he opposed only a specific proposal for a convention to re-write the entire Constitution. In that correspondence, moreover, Madison also wrote he would be fully agreeable to holding a convention in a year or two, after some experience under the new government.

Philipp: *"Now, I know proponents of it, they argue that—y'know, they can preven- they can propose amendments, but they're saying that you can't* undo *current rights within the Constitution. Is this accurate? What do you—what do you think on this?"*

Brown: *"It's really not [accurate] . . . . The problem is,* historical precedent *does say otherwise. And this is probably* the *number one most important argument between the two sides, is* what *does the historical precedent say?"*

Correction: There is no "important argument between the two sides" about historical precedent, because opponents really don't cite any.

Historical precedents include (1) about forty conventions of states and colonies since 1677, (2) hundreds of convention applications, and (3) a line of reported Article V court decisions dating back to 1798. (The case law is discussed in my treatise, *The Law of Article V*.) Out of all this material, Mr. Brown selects only one incident occurring more than 200 years ago—and as we shall see, even his understanding of that incident is wrong.

★ ★ ★ ★

Brown: *"The 1787 Convention, where our constitution was written, is really the* only *national constitution amending convention we've ever had."*

Correction: That's not true. A national amending convention was held in Washington, D.C. in 1861. More states participated in that convention than at any before or since.[10] In addition, the Albany Congress of 1754 and the First Continental Congress of 1774 were national conventions that proposed what were then basic constitutional changes.

Even if Brown's comment were technically true, it would be deceptive. This is because regional and national conventions of states operate under much the same protocols, including (1) limited and defined powers and (2) equal voting power for each state. The Article V Information Center provides a complete list of these conventions.[11]

★ ★ ★ ★

Brown: *"And in that case we have the existing constitution as the Articles of Confederation."*

Correction: The Articles of Confederation were not a constitution as we think of one, and the Confederation Congress was not a government. The Articles were a multilateral treaty something like NATO. The Confederation Congress was a limited coordinating body much like NATO's North Atlantic Council.

In thinking of the Articles as a "constitution" in the modern sense, Mr. Brown commits a common error in historical method called *anachronism*.

★ ★ ★ ★

Brown: *"States sent delegates to the 1787 Convention and gave them* specific delegate commissions, *or authority."*

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[10] *For a summary, see* It's Been Done Before: A Convention of the States to Propose Constitutional Amendments, *https://articlevinfocenter.com/its-been-done-before-a-convention-of-the-states-to-propose-constitutional-amendments/.*

[11] List of Conventions of States and Colonies in American History, *https://articlevinfocenter.com/list-conventions-states-colonies-american-history/.*

Correction: As noted above, the 1787 convention is the sole precedent opponents cite. Their fundamental argument is that the 1787 conclave exceeded its authority ("ran away"). From that, we are supposed to fear a more limited convention held under very different conditions over 230 years later.

Even if it were true that the 1787 convention had exceeded its authority (and, as explained below, it is not true) that is not very good evidence of what would happen in an Article V convention today.

First: There have been about forty conventions of states, many after 1787.[12] They were governed by procedures that have become standardized, including rules limiting their authority. Everyone concedes that the other conventions remained within their authority. Certainly thirty-nine offer much more precedential weight than just one.

Second: The 1787 convention was not called under the Articles of Confederation. It operated outside of any legal restraint other than the delegates' commissions. By contrast, a convention for proposing amendments is called under the Constitution and is subject to the rules of the Constitution. Over a century of decided case law affirms that.

Third: On the modern convention floor, any commissioner raising issues outside the prescribed agenda can be reined in with a simple point of order.

Fourth: Modern technology enables the state legislatures commissioning delegates to use video oversight to track them 24/7. If a straying delegate somehow were not brought back to order, a supervising state legislative committee would see the incident in real time and could immediately re-instruct or recall.

★ ★ ★ ★

Brown: *"States sent delegates to the 1787 Convention and gave them* specific delegate commissions, *or authority. You're authorized to make these types of changes, you're not authorized to change these things . . . Mark Meckler, Convention of States, organizations like that, will repeatedly claim those convention delegates were given* full *authority to make* any *changes they felt were necessary to the Articles of Confederation. Now,* if *that were true, do you think that delegates would have known that? And the reason I say that is because, as you look through Madison's notes from the federal convention, you see this issue came up* repeatedly *throughout the Convention: do we actually have the authority to be creating a* new *constitution, instead of just amending the Articles of Confederation? . . . .*

"First side said things like, 'We really don't have the authority and we should not proceed with changing the Constitution this drastically without first going back to the States and getting further authority.' That was the argument of William Patterson, uh Charles Pinckney, Elbridge Gerry[13], John Lansing.

"The other side of the argument was not *what Mr. Meckler says, 'They have full authority.' The*

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[12] *See the previous footnote.*

[13] *In this interview Brown makes an error no genuine constitutional scholar would make: He pronounced Elbridge Gerry's last name with a soft "g" (like "Jerry") rather than how Gerry actually pronounced it (with a hard "g"). It seems like a small mistake, but such mistakes are clues to whether the speaker knows what he or she is talking about.*

Madison points out in Federalist No. 40 that the state-issued commissions (or "credentials") defined the scope of the convention's authority. Founding-era law books confirm this rule.

other side of the argument represented by people like Edmund Randolph, Alexander Hamilton, even James Madison, was, 'You're right, we really don't *have the authorization to be doing this, but we need to do it anyways. This is an* urgent *need of our nation. . . . We must proceed.'*

"Nobody stood up in the 1787 Convention and claimed, 'Look at our commissions, we're fully authorized to make any changes we feel are necessary.'"

Correction: These comments depart from the traditional JBS line, which is that *Congress* called the 1787 convention and limited it to proposing only amendments to the Articles. However, modern research has made that position untenable, so I am glad to see Mr. Brown abandon it.

Madison points out in Federalist No. 40 that the state-issued commissions (or "credentials") defined the scope of the convention's authority. Founding-era law books confirm this rule. Now, among the 12 states participating in the 1787 convention, all but two (Massachusetts and New York) issued commissions conveying full power to propose a new form of government. The general public overwhelmingly shared the expectation that the convention would propose a new form of government—some imagined it might be a monarchy!

Brown points to statements by commissioners questioning the extent of their authority. *But what determines whether the 1787 convention "ran away" is what the commissioners' credentials said, not what anyone said they said!*

There were several reasons why commissioners might rhetorically question their authority. Some represented one of the two states granting narrower powers, such as New York's John Lansing and Massachusetts' Elbridge Gerry. Virginia's

Edmund Randolph clearly did not buy the "no-authority" argument, but like the good advocate he was, he conceded it *arguendo* (for sake of argument) and built his case on practical rather than technical legal grounds. William Paterson of New Jersey denigrated his authority for strategic reasons—to strengthen his case for equal state representation in the Senate. Once Paterson achieved his goal, he dropped the argument and urged creation of a strong government.

Brown's restriction to a narrow range of sources prevented him from learning that during the ratification debates the Constitution's advocates addressed the issue. They vigorously defended the delegates' actions as authorized by their commissions.[14]

★ ★ ★ ★

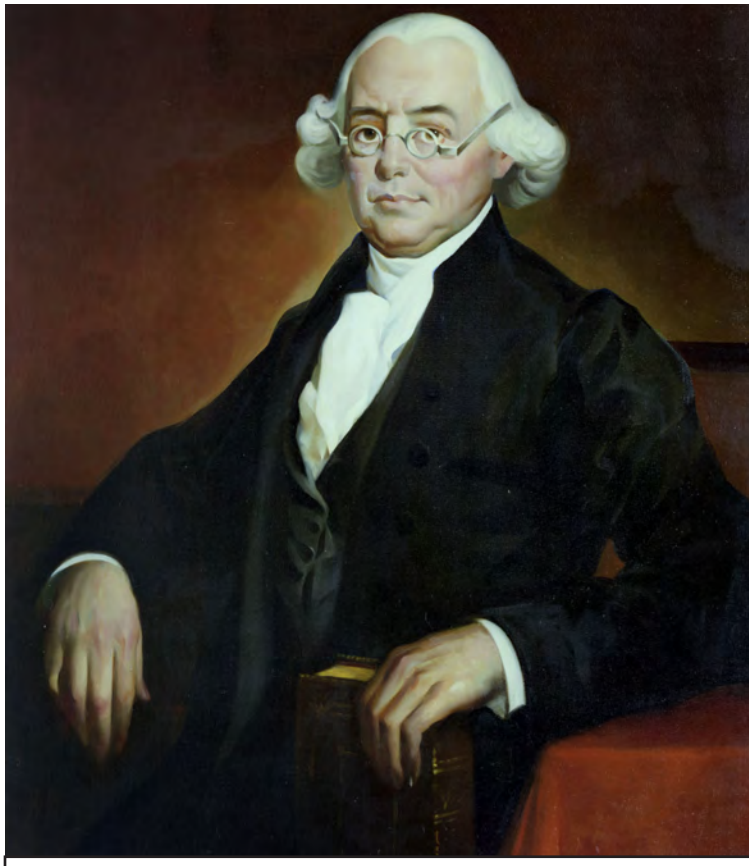
Brown: *"In fact, one of the challenges I* repeatedly *put out to the other side, they never want to answer this: show me the delegate. Show me the delegate who made that claim, 'We have full authority.'"*

Correction: Mr. Brown has never put the challenge to me. I would have responded by naming James Wilson, who told the Convention, "Relative to the powers of this convention—We have powers to conclude nothing; *we have power to propose anything."*

★ ★ ★ ★

Brown: *"Instead, what they did was, and this comes directly from James Madison, I'm going to read it to ou directly. They said that* people *were in fact, the fountain of all power, and by resorting to them, all difficulties were got over."*

Correction: This is another example of opponents conflating proposal with ratification. As Madison (in Federalist No. 40) and other Founders made clear, the power to propose came from the states via their commissions to



"We have powers to conclude nothing; we have power to propose anything."
- James Wilson

[14] *See, e.g.*, Carlisle Gazette, *Mar. 12, 1788, in* 34 Documentary History of the Ratification of the Constitution 1014, 1016.

the delegates. The power to *ratify* came from the people, who elected delegates to their state ratifying conventions.

★ ★ ★ ★

Brown: *"They were also given a constitutionally defined ratification process, they threw it out, retroactively created a much lower bar . . . ."*

Correction: Mr. Brown's claim is that (1) the Constitutional Convention provided for ratification by nine states rather than the thirteen required by the Articles, so therefore (2) a modern amendments convention might alter the ratification process as well.

Constitutional scholars consider this as one of the "runaway" alarmists' loonier ideas. It is based on utter ignorance of governing law, both in 1787 and now. Specifically:

- As noted before, the 1787 convention was not held under the Articles of Confederation. It was held under reserved state powers retained by signatories of treaties and recognized explicitly by the Articles. The convention could, therefore, propose any method of ratification it chose. Incidentally, the Confederation Congress approved the convention's actions when it forwarded the Constitution to the states and urged them to hold ratifying conventions.[15]

- A convention for proposing amendments, by contrast, receives its power from the Constitution and is subject to its rules, including ratification rules. One of the clearest principles from 223 years of Article V court decisions is that no participant in the amendment process may change the Constitution's amendment rules. But Mr. Brown never mentions case law. From listening to him you'd think the courts never issued an Article V ruling and all we have to go on is what allegedly happened in 1787. Yet there are hundreds of cases defining general constitutional principles and dozens more interpreting Article V.

- Nor do alarmists tell us how, if a convention purported to change the ratification rules, it could enforce its decision. Call out the army?

★ ★ ★ ★

Brown: *"[T]he precedent they set was, these types of conventions represent, not the States, not the legislatures, but they represent the people* themselves . . . ."

Correction: It is unclear what Mr. Brown means by "these types of conventions." If he is referring to conventions that deal with constitutional issues, then his statement is only a half-truth.

Conventions elected directly by the people within a particular state—sometimes called constituent conventions—represent the people. Constituent conventions were used to ratify the U.S. Constitution and the 21st amendment. They also are employed to propose and ratify state constitutions.

Interstate conventions whose commissioners are selected as directed by state legislatures are called *conventions of states* or *conventions of the states*. They answer to the states or state legislatures directly, so they represent the people

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[15] *Did Congress Approve the Constitution? A Member's Letter Says "Yes", https://articlevinfocenter.com/did-congress-approve-the-constitution-a-members-letter-says-yes/.*

only in a remote sense. When called under states' reserved powers, conventions of states meet to propose solutions to common problems—such as coordinating state laws or negotiating water compacts. When called under Article V of the Constitution, they may propose amendments to the states for ratification. My treatise, *The Law of Article V*, discusses the legal differences among conventions.

★ ★ ★ ★

Brown: *". . . and as such their power cannot be limited. Now, we've seen that same precedent upheld* repeatedly *in state conventions ever since. I mentioned the Montana one, for example."*

Correction: This is legal nonsense. Conventions—even those that represent the people directly—usually *are* limited. Brown cites the 1972 Montana constitutional convention as an unlimited body. But the Montana Supreme Court specifically held that its powers were limited. *State of Montana ex rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972).

Unless a convention is acting in absence of an established government (as in some states at the opening of the American Revolution), it is always limited to some extent. For example, a state convention called under an existing constitution may not be subject to the legislature, but it is limited by the terms of the existing constitution. When state conventions were being considered to ratify the 21st amendment, some people argued they would be unlimited—but court adjudication determined otherwise. As noted earlier, the courts have ruled repeatedly that all assemblies operating under Article V are bound by the rules laid out in the Constitution.

★ ★ ★ ★

Brown: *"In fact, if you look to the—the law journal that's called* Corpus Juris Secundum, *that's a collection of various Supreme Court rulings from*

If a convention purported to change the ratification rules, how could it enforce its decision? Call out the army?

Every first-year law student learns that Corpus Juris Secundum's text is not fully trustworthy and should never be cited as authority. It is used principally as a case finder.

the States all across the country and we've seen consistently *the same thing."*

Correction: Where do we begin with this one? There is so much error from which to choose!

First: Contrary to Mr. Brown's description, *Corpus Juris Secundum* (CJS) is not a "law journal." It is a legal encyclopedia that attempts to summarize law on all topics.

Second: CJS is not a "collection of various Supreme Court rulings." It is principally a legal text with supporting citations from federal and states appellate courts at all levels.

Third: Every first-year law student learns that CJS's text is not fully trustworthy and should never be cited as authority. It is used principally as a case finder. You have to read the cases it cites to find out what the law is, then expand your research to find other cases on the same topic.

Fourth: Mr. Brown apparently didn't read the cases referenced in the part of CJS he mentions. If he did, he'd know they have nothing to do with Article V conventions. He would also learn that those cases are all very old. They were decided long before most Article V court rulings were issued. Thus:

- In *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149 (1912), the facts were that in 1866, the former Confederate state of Texas was under federal military occupation. As commander-in-chief of the U.S. armed forces, President Andrew Johnson called for a Texas state constitutional convention. The court held that the state constitution did not have to be ratified by the people *because the president had not required it*. (Presumably he could have limited the convention by requiring it.)

- *Frantz v. Autry*, 18 Okla. 561, 91 P. 13 (1907) dealt with a local constitutional convention Congress had authorized in what was then the Territory of Oklahoma. The case held that the convention had all the power Congress gave it, and that Congress had imposed only a few limits. The cases said the convention needed to respect only the limits Congress imposed.

- *Koehler & Lange v. Hill*, 60 Iowa 543, 14 N.W. 738 (1883) held that when any constitution prescribes an amendment procedure, that procedure must be followed. It added "The powers of a convention are, of course, unlimited. The members thereof are the representatives of the people, called together for that purpose." But the court was speaking of state constitutional conventions, not federal conventions, and this case is contradicted by later authority, such

as State of *Montana ex rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972), mentioned above.

- *Loomis v. Jackson*, 6 W.Va. 613 (1873) says that "A [state] constitutional convention, lawfully convened, does not derive its powers from the legislature; but from the people. The powers of such a convention are in the nature of sovereign powers." But in this country, we frequently limit sovereignty, and a convention's authority can be limited by an existing constitution.[16]

- *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472 (1892) examined the power of a state constitutional convention called by the legislature. It ruled that the convention's power was very broad, but also acknowledged that its power could have been limited.

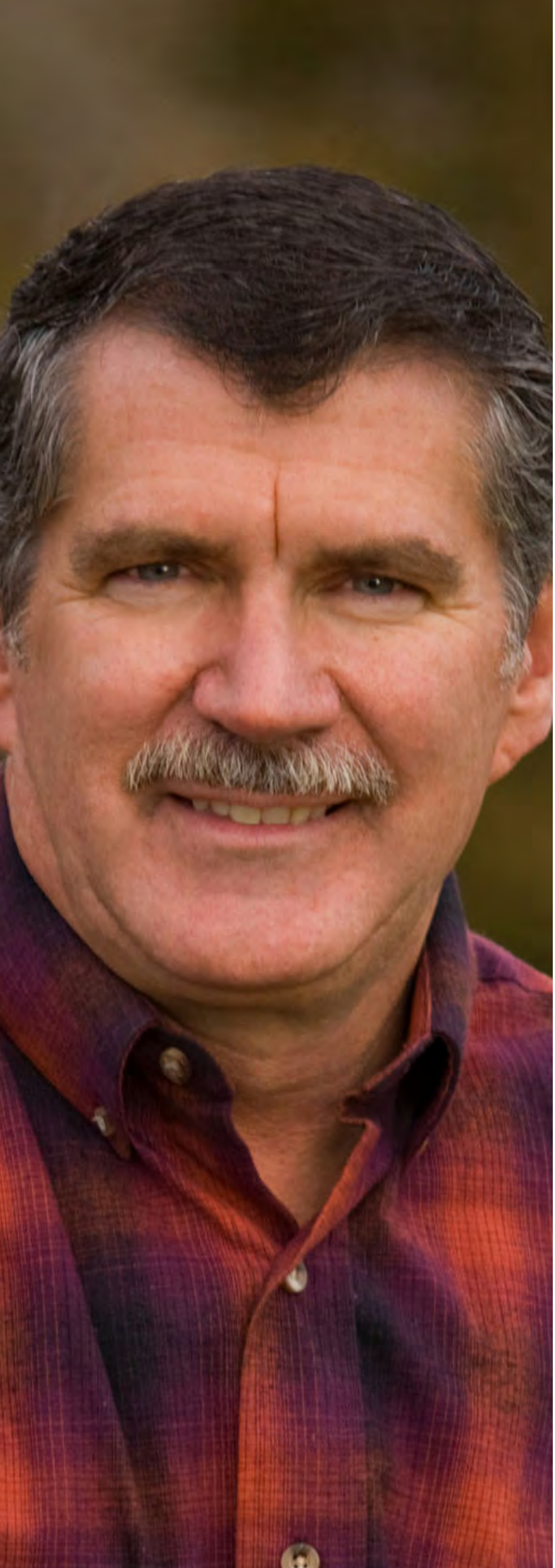
Again, nothing in these five decisions had anything to do with Article V.

So much for Mr. Brown's cases. I've taken some time to examine his misuse of CJS because it illustrates the conceptual chaos that ensues when someone ignorant of law starts interpreting legal texts and spouting legal advice.

* * * *

Brown: *"Congress is essentially—they often refer to it as a sitting constitutional convention themselves. Madison differentiated between them. Again, as I mentioned as he was putting out his opposition to an Article V Convention, he said that in his view, the* Convention *would feel much greater latitude in making sweeping changes to the Constitution than Congress would, which is why he said Congress is the safer mode."*

[16] *Incidentally, another line in the* Loomis *case contradicts the common JBS claim that Congress could control an amendments convention: "That the legislature can neither limit or restrict [conventions] in the exercise of these powers . . . ."*



MR. BROWN CLAIMS HE ORGANIZED A GROUP TO PRESSURE REP. DENNY REHBERG... BUT AFTER BROWN STARTED HARASSING HIM, REHBERG'S RATING DROPPED TO 80% IN 2011 AND 76% IN 2012—HIS LOWEST SCORES EVER.

Correction: As already discussed, Madison was not opposed to amendments conventions. The reason he opposed New York's 1788 proposal was because its scope was too wide and it came too early. But very few convention applications have been as broad as that. The applications being passed today are all quite focused.

In this passage Mr. Brown does inadvertently allude to an inconvenient fact: An amendments convention may do only what Congress may do at any time: propose amendments. But unlike a convention, Congress has unlimited, unrestricted power to do so.

★ ★ ★ ★

Brown: *"Congress already pretty much does whatever they want to with regards to what the Constitution says, for the most part. And the only reason they get away with that, is we the people don't hold them to it . . .*

"When I first moved to Montana about a decade ago, I organized a couple hundred people and we started holding our congressman accountable to his voting as it squared with the Constitution. At the time, his "constitutional rating," so to say, was somewhere around 40-60%. He was always right in the middle. About half the time he'd follow the Constitution, half the time he wouldn't. Within four months, he was at 80% and thereafter he was stated at 90%, because we started pushing on him on . . . ."

Correction: This prescription for curing the federal government is terminally naïve. The majority of members of Congress, particularly the leadership, are long-time holders of "safe" seats and immune to popular, pro-Constitution lobbying. Indeed, they hold their seats largely by *violating* the Constitution.

The Congressman referred to is Rep. Denny Rehberg (R.-Mont.), who was in office from 2001 to early January, 2013. Mr. Brown claims he organized a group to lobby Rehberg "about decade ago" — i.e., sometime between 2009 and 2011. Now, if anyone was amenable to "constitutionalist" lobbying, Congressman Rehberg should have been. He served a swing district and I know from personal acquaintance that he has conservative values.

But did Brown's lobbying really have any effect? The American Conservative Union ranks members of Congress by their commitment to smaller, constitutional government. The ranking is on a scale of zero to 100.

Rehberg was rated for the years 2001 through 2012. His ACU voting record for each year was as follows:

2001 - 84%
2002 - 100%
2003 - 84%
2004 - 96%
2005 - 92%
2006 - 83%
2007 - 88%
2008 - 84%
2009 - 92%
2010 - 96%
2011 - 80%
2012 - 76%

If there is any pattern in their figures at all—and I'm not sure there is—it suggests Brown's efforts may have been counterproductive. In the years including and up to 2010, Rep. Rehberg's ACU score had ranged from 84% to 100%. But after Brown started harassing him, Rehberg's rating dropped to 80% in 2011 and 76% in 2012—his lowest scores ever.

In theory millions of Americans could pressure members of Congress to change. But as a matter of historical record, this does not happen: The organizational costs for conservative Americans are too high. Professional lobbyists concentrated in Washington, D.C. are paid big money to lobby, and they do it continuously. They offer concrete benefits beyond what the conservative grassroots can offer, such as connections to many large political donors. They enjoy the support of the national media, which has strong incentives to concentrate power at the federal level.

There are good people in Congress. But as they acknowledge, they need firm rules to restrain their behavior and enable them to justify voting against certain programs. Only constitutional amendments can provide those rules.

★ ★ ★ ★

Brown: *"We look at Federalist 16, 26, and 33: Alexander Hamilto-Hamilton talking about the power that we the people and we the States have to push back against federal tyranny. Madison picks it up in Federalist 44 and 46, 46 especially. And what's interesting is, in all of those documents where they're talking about what to do to push back against federal tyranny, they never mention Article V. In fact, when you go onto Federalist 48 and 49, Madison directly addresses that."*

Correction: Notice how Mr. Brown's sources for the ratification debates consist solely of *The Federalist*—a minuscule fraction of the ratification record. He never mentions the other founding-era commentators who spoke to the amendments convention process.[17] Even his use of *The Federalist* is clumsy. For example, at this point he overlooks references to the Article V convention process in Federalist No. 43 and No. 85.

★ ★ ★ ★

Brown: *"In 49, [Madison] asks, 'Is it appropriate to use a Convention to address breaches in the Constitution when the federal government ignores it?' And his answer is absolutely not . . . ."*

Correction: This is another example of Brown's inept use of *The Federalist*. Trying to convert one of its essays into an argument against the Constitution's amendment process makes no sense at all. *The Federalist* was written to support the Constitution, not trash it.

Here's the real scoop on Federalist No. 49: When Madison was writing, Pennsylvania and Vermont had constitutions that provided for a "council of censors" to meet every seven years. The censors could decide whether their state constitution was working well. The censors could call a constitutional convention to address any problems.

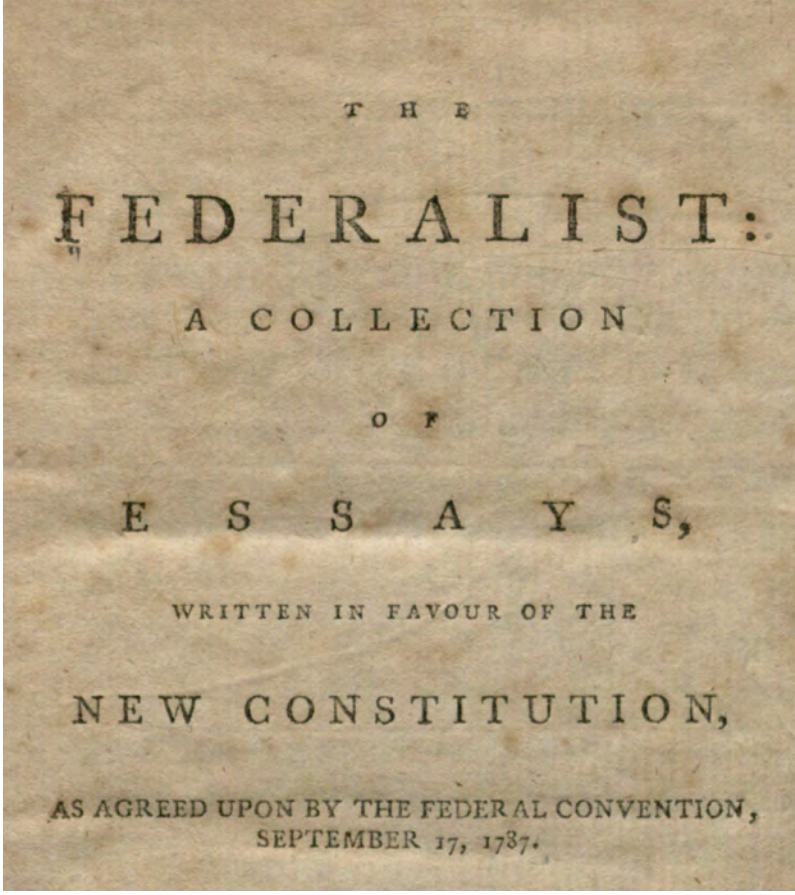
In 1783, Thomas Jefferson outlined his own ideas for a new Virginia constitution. In partial imitation of the Pennsylvania-Vermont approach, his draft would have permitted some state officials to call a convention for "altering this Constitution or correcting breaches of it." Strikingly, this new convention was to have all the powers enjoyed by a plenary constitutional convention—including power to write an entirely new document and impose all its changes without a ratification procedure.

Madison had four objections: (1) A rogue state legislature could block the process in various ways; (2) "frequent appeals" for constitutional revision could reduce public respect for government; (3) frequent referrals to the citizenry might cause constitutional turbulence; and (4) the legislature—the branch most likely responsible for the problems—might highjack the process.

Notice that *none* of these objections is relevant to calling a convention under Article V. The states, not federal officials, initiate and staff the convention, thereby preventing congressional obstruction or control. Article V is very difficult to trigger, eliminating the danger of "frequent appeals." A convention for proposing amendments has power only to propose specified amendments, not re-write

[17] For collections of this material, see, for example, my following two articles: Is the Constitution's Convention for Proposing Amendments a 'Mystery'? Overlooked Evidence in the Narrative of Uncertainty, 104 Marquette L. Rev. 1 (2020) and Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013). See also A Founder Gives Us a Lesson on the Constitution's Amendment Process, https://articlevinfocenter.com/founder-gives-us-lesson-constitutions-amendment-process/.

Trying to convert one of *The Federalist* essays into an argument against the Constitution's amendment process makes no sense at all. The Federalist was written to support the Constitution, not trash it.


THE
FEDERALIST:
A COLLECTION
OF
ESSAYS,
WRITTEN IN FAVOUR OF THE
NEW CONSTITUTION,
AS AGREED UPON BY THE FEDERAL CONVENTION,
SEPTEMBER 17, 1787.

the Constitution. And unlike Jefferson's idea for periodic plenary constitutional conventions, any proposal from an Article V convention is subject to a difficult ratification process.

In a portion of Federalist No. 49 Brown fails to quote, Madison assures us that, although he objects to Jefferson's plan, still "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."

Unlike the proposals Madison was criticizing, the convention procedure of Article V seems to meet his goal very well.

★ ★ ★ ★

Brown: *"Now, in Federalist uh, I think it was 43, yeah, in Federalist 43, Madison does address the Article V Convention. And in that case, he refers to it as "the remedy for errors" in the Constitution."*

Correction: Mr. Brown is repeating—perhaps is the author of—a common JBS claim that the only role for an amendments convention was to correct drafting errors in the Constitution.

This is still more nonsense. The fact that Madison stated one purpose of the convention procedure does not mean he excluded other purposes. Other Founders itemized additional purposes. One was the need to correct federal abuses and overreach. That was the reason George Mason gave at the Constitutional Convention. During the ratification debates, prominent advocates cited the convention procedure again and again as a key safeguard against abuse.[18]

★ ★ ★ ★

[18] *See, e.g.,* The Founders Pointed to Article V as a Cure for Federal Abuse, *https://articlevinfocenter.com/the-founders-pointed-to-article-v-as-a-cure-for-federal-abuse/ (collecting examples).*

It also ill-behooves an organization to complain about length of time when it has had over 50 years for its own "solutions" to work.

Brown: *"Article V has never been used technically, as far as the convention mode. It has no track record of any success other than, well, it did pressure Congress into passing the 17th amendment, which I wouldn't really consider a good thing but, on the other hand, nullification is just one of many tools in our quiver."*

Correction: Mr. Brown incorrectly uses the term "nullification" to refer to all methods of what Madison called "interposition." In constitutional scholarship, "nullification" usually refers to formally adopting a state law or state convention resolution declaring that a federal law is void within state boundaries. The Constitution has no provision for nullification and, contrary to JBS claims, Madison firmly opposed it—recommending an Article V convention instead.[19]

★ ★ ★ ★

Brown: *"Well, y'know, in that light, it really gives a feeling of there's a sense of urgency here: we've gotta get something done, we've gotta do it soon. And if we look at the timetable, Convention of States is the example again, they've been around for seven years, they've gotten less than halfway to the thirty-four states mark. If they don't lose momentum . . . we're looking at another 10 years before they get to 34 states.*

"They also admit that there will be numerous legal challenges stalling the process along the way. When we eventually get to a convention, Congress calls the convention, they finally conclude their—their whatever amendment proposals they come up with, and then it goes out to the States for ratification. . . . You're looking at a minimum of 20 years for anything to actually go into effect from a convention. I don't think we have 20 years to turn this around."

Correction: It ill behooves someone who had been slowing down a process to gripe about it being slow. On several occasions in recent American history, we have been at the cusp of a convention only to see JBS and other alarmists frighten people away.

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[19] *James Madison to Edward Everett, Aug. 28, 1830, https://articlevinfocenter.com/wp-content/uploads/2021/02/1830-0828-JM-to-E-Everett.pdf.*

It also ill-behooves an organization to complain about length of time when it has had over 50 years for its own "solutions" to work. Of course, they haven't worked, and by any measure, the political system is more dysfunctional than ever.

History shows that once a popular amendment is proposed, it can be ratified in fairly short order—depending on the proposal, 15 months is a reasonable estimate. The 26th amendment was ratified in slightly more than three months.

As for litigation: Mr. Brown probably is wrong on this one as well. The Convention of States Project application is designed in a way to minimize the chances of lengthy litigation. (That is not true of the non-uniform applications promoted by some other Article V organizations.)

★ ★ ★ ★

Brown: *"... The moment... the balanced budget becomes a higher priority than all these other programs, then Congress will make it their highest priority as well and will pass a balanced budget.*

"So, the problem really isn't Congress, it really isn't the federal government, it really comes down to what we the people tolerate."

Correction: This reflects Mr. Brown's ignorance of how the federal government works. As the Public Choice school of economics has documented, politicians respond to incentives. Over the long term, these incentives are more important than the character of the politicians themselves. When the incentives are bad, the results usually are bad. When the incentives are good, the results usually are good. However, concentrated special interests, with media support, almost always can offer stronger incentives than the diffused public.

There are various ways to change incentives, but one of the most direct is to alter the system in which political actors work—by constitutional amendment.

When given the opportunity for constitutional change, people act differently than they do from day to day. Take the balanced budget amendment as an example: Right now, Congress has strong incentives to deficit-spend and very weak incentives to balance the budget. Special interests fight for as much federal booty as they can, knowing that if they don't do so, the spending will happen anyway—but it will go to someone else. Fiscal conservatives have never been able to match that clout, even though they probably comprise most of the U.S. population.

But when people are given a chance to adopt a rule that they know (1) is for the good of all and (2) will bind others as much as themselves, they act very differently. A carefully-worded Balanced Budget Amendment will *never* be proposed by Congress—the incentives to deficit spending are too strong. But if a convention of the states proposed it, it probably would be ratified fairly quickly.

Conclusion

Mr. Brown has little knowledge of constitutional history, constitutional law, law in general, or government operations. But his claims to expertise have certainly helped to disable a key constitutional check-and-balance. Brown proposes other remedies, but he and his predecessors have argued for those remedies for decades, while federal dysfunction grows ever worse.

Our ability to extricate ourselves from our current political problems depends heavily on whether we use the most powerful tool the Founders gave us for correcting federal dysfunction and abuse. The time for using it is here—in fact, it has been here for a very long time.

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the
Liberal Establishment's
DISINFORMATION CAMPAIGN
AGAINST
ARTICLE V

and how it
Misled
CONSERVATIVES

By Professor Rob Natelson

The Liberal Establishment's Disinformation Campaign Against Article V—and How It Misled Conservatives

By Robert G. Natelson[1]

Executive Summary

Some conservative organizations regularly lobby against using the Constitution's procedure for a "convention for proposing amendments." Those organizations may think they are defending the Constitution, but in fact they are unwittingly repeating misinformation deliberately injected into public discourse by their political opponents.

This paper shows how liberal establishment figures fabricated and spread this misinformation. This paper also reveals the reasons they did so: to disable a vital constitutional check on the power of the federal government.

Under Article V of the U.S. Constitution, any constitutional amendment must be ratified by three fourths of the states (now 38 of 50) to be effective. Before an amendment can be ratified, however, it must be proposed either (1) by Congress or (2) by an interstate task force the Constitution calls a "convention for proposing amendments." This gathering is convened when the people convince two thirds of the state legislatures (34 of 50) to pass resolutions demanding it. The convention itself is a meeting of the representatives of state legislatures—an assembly of the kind traditionally called a "convention of states."

The Framers adopted the convention procedure to ensure that Congress did not have a monopoly on the amendment process. The Framers saw the procedure as a way the people, acting through their state legislatures, could respond if the federal government became dysfunctional or abusive.

There is widespread public support for amendments to cure some of the real problems now plaguing the country. However, since repeal of Prohibition, Congress repeatedly has refused to propose any constitutional amendments limiting its own power and prerogatives. When reformers sought to check lavish congressional pay raises, for example, they could get nothing through Congress. Instead, they had to secure ratification of an amendment (the 27th) that had been formally proposed in 1789!

Such unresponsiveness would seem to be exactly the occasion for which the Founders authorized the convention for proposing amendments. Yet a handful of conservative groups—including but not limited to, the John Birch Society and Eagle Forum—have uncompromisingly opposed any use of the convention procedure to bypass Congress. They assiduously lobby state legislatures to reject any and all proposals for a convention, no matter how worthwhile or necessary they may be. This uncompromising opposition has become a mainstay of those groups' political identity and, perhaps, a useful fundraising device.

Although these groups bill themselves as conservative, their reflexive opposition to the convention process regularly allies them with the liberal establishment and with special interest lobbyists who seek only to protect the status quo. Since the 1980s, this strange coalition has blocked all constitutional efforts to address federal dysfunction. As a result that dysfunction has become steadily worse. For example, their long-held opposition to a balanced budget convention is a principal reason America now labors under a $26 trillion national debt.

THE ARGUMENTS AGAINST A CONVENTION AND THEIR SOURCE

Opponents present an array of stock arguments against using the Constitution's convention procedure. One such argument—the claim that "amendments won't work"—has been so resoundingly contradicted by history that it has little credibility.[2] The others can be distilled into the following propositions:

• Little is known about how the process is supposed to operate;

• a convention for proposing amendments would be an uncontrollable "constitutional convention;"

• a convention for proposing amendments could be controlled or manipulated by Congress under the Constitution's Necessary and Proper Clause;[3] and

• a convention for proposing amendments could unilaterally impose radical constitutional changes on America.

These arguments are largely inconsistent with established constitutional law and with historical precedent,[4] and (as the reader can see) some are inconsistent with each other.

Since repeal of Prohibition, Congress repeatedly has refused to propose any constitutional amendments limiting its own power and prerogatives.

This paper shows that these arguments did not originate with the conservative groups that rely on them. Rather, they were produced as part of a disinformation campaign run by America's liberal establishment. Members of that establishment injected these arguments into public discourse to cripple an important constitutional check on the federal government.

This disinformation campaign dates from the mid-20th century. Its participants included members of Congress who feared that a convention might propose amendments to limit their power, activist Supreme Court justices seeking to protect themselves from constitutional reversal, and left-of-center academic and popular writers who opposed restraints on federal authority.

The campaign succeeded because its publicists enjoyed privileged access to both the academic and the popular media. The fact that many conservatives swallowed the propaganda enabled liberal activists to recede into the background and rely on conservatives to obstruct reform.

SOME ADDITIONAL CONSTITUTIONAL BACKGROUND

The American Founders envisioned citizens and states using constitutional amendments to prevent federal overreach and abuse. They ratified the Bill of Rights in 1791 precisely for this reason. By the same token, in 1795 they ratified the 11th amendment to reverse an overreaching Supreme Court decision.

The Founders also recognized that federal officials might resist amendments to curb their own power. The convention procedure was designed as a way to bypass those officials. Tench Coxe, a leading advocate for the Constitution, explained the effect:

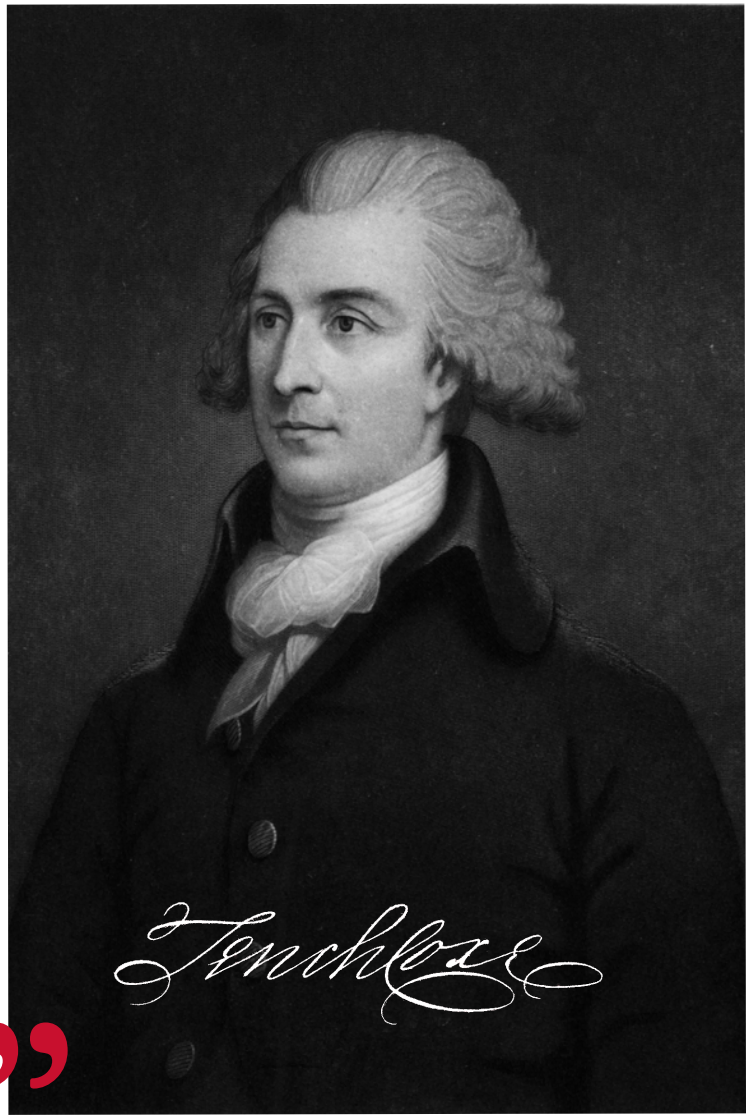
> *It is provided, in the clearest words, that Congress shall be obliged to call a convention on the application of two thirds of the legislatures; and all amendments proposed by such convention, are to be valid when approved by the conventions or legislatures of three fourths of the states. It must therefore be evident to every candid man, that two thirds of the states can always procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be unanimously opposed to each and all of them.*[5]

In adopting the convention mechanism, the Founders well understood what they were doing. Conventions among the states (and before independence, among the colonies) had been a fixture of American life for a century.[6] The Founding-Era record renders it quite clear that a "convention for proposing amendments" was to be a meeting of representatives from the state legislatures, and that the procedure and protocols would be the same as in prior gatherings.[7]

In the two centuries after the Founding, the judiciary, including the U.S. Supreme Court, decided over three dozen cases interpreting Article V, and in doing so generally followed historical practice. Thus, by the middle years of the 20th century, the composition and protocols of a convention for proposing amendments should have been clear to anyone who seriously examined the historical and legal record.

The trouble was that some people were not really interested in the facts.

“It must therefore be evident to every candid man, that two thirds of the states can always procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be unanimously opposed to each and all of them.”



TWENTIETH CENTURY EFFORTS TO ADDRESS FEDERAL OVERREACH

As the size, power, and dysfunction of the federal government grew, many Americans turned to the Founders' solution: the convention process.[8]

The first 20th century effort for a convention to address federal overreach began in 1939, with a drive to repeal the 16th Amendment.[9] By 1950, that drive had garnered the approval of 18 states. Another drive induced Congress to propose the 22nd Amendment, mandating a two-term limit for the President.

Early in the 1960s, the Council of State Governments suggested three amendments: one to streamline Article V, one to reverse Supreme Court decisions forcing state legislatures to reapportion, and one to check the Supreme Court by adding a state-based tribunal to review that Court's decisions. In the late 1960s, there was another, nearly-successful, push for a convention to address the Court's reapportionment cases. In 1979, the first effort for a balanced budget amendment began. Throughout the next two decades there were drives to overrule the Supreme Court's abortion ruling in Roe v. Wade, to impose term limits on members of Congress, and to enact other reforms. Some of these movements enjoyed wide popular support. The convention procedure was endorsed by President Eisenhower, by President Reagan, and (before he became a Supreme Court Justice) by Antonin Scalia.[10]

Charles Black, Yale law professor and zealous defender of liberal causes, penned a polemical article in 1963 on the Article V process that was lacking in history and case law.

Congress [should] retain control over the convention process.
It will probably be argued that the voting in any convention must be by states, since the voting in th
State legislatures do not accurately represent the
If the President believed the struct
and dangerous to the
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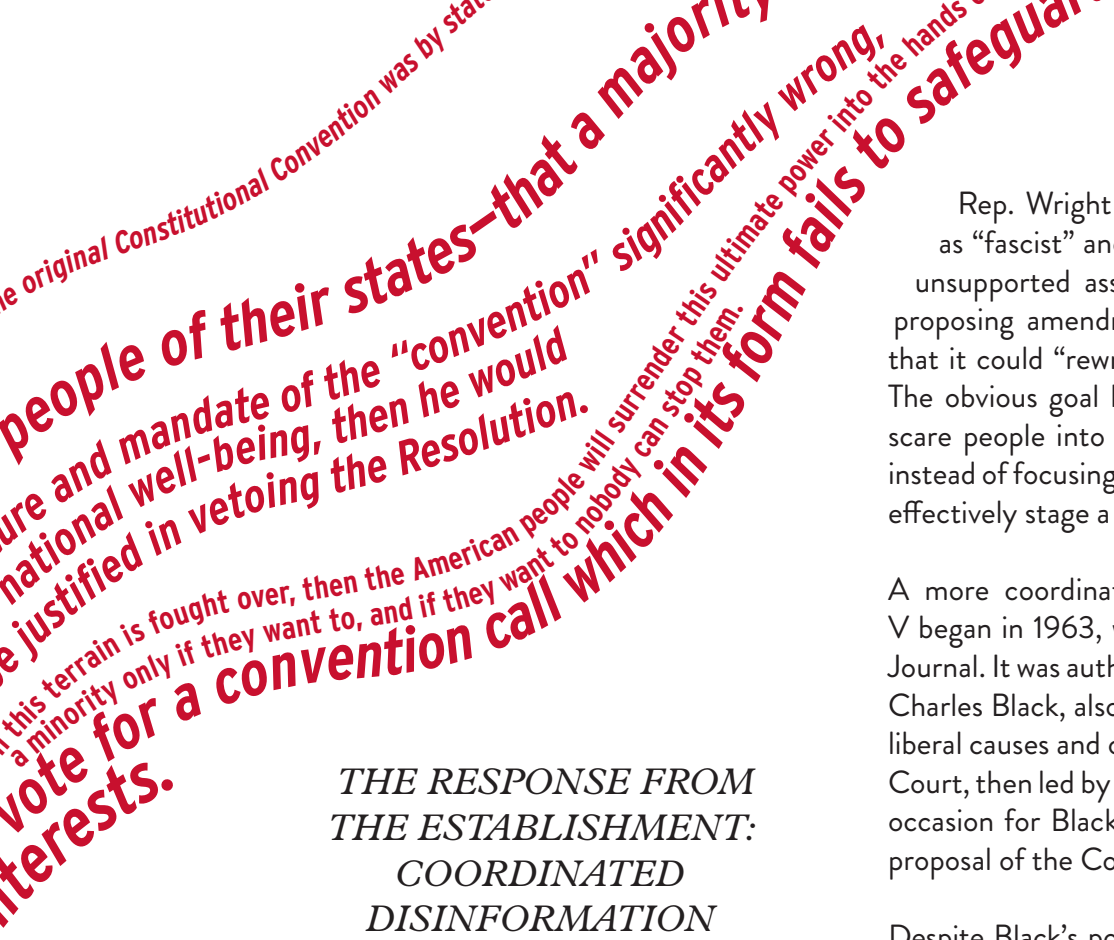
Insistence would be thoroughly justified on an allocation of voting power
by population rather than by states...to prevent racial and other discrimination.
No Senator or Representative is bound to
what he believes to be vital national in



THE RESPONSE FROM THE ESTABLISHMENT: COORDINATED DISINFORMATION

During the 1950s, '60s and '70s, establishment liberals were pleased with the growth of the federal government and the activist Supreme Court. They wanted no corrective amendments. Rather, they felt threatened by conservative and moderate efforts to use the convention process. Liberals developed, therefore, a campaign to effectively disable it.

Their project was highly successful. It not only gained traction among liberals, but it pitted conservatives against conservatives by persuading many of them to abandon one of the Constitution's most important checks on federal overreaching. The campaign resulted in the defeat of every effort to propose amendments to reform or restrain the federal government. Its psychological and political force continued unabated for decades.[11]

The story begins in 1951. Faced with a conservative drive to repeal the 16th Amendment, liberal U.S. Rep. Wright Patman (D.-Tex.) attacked it as "fascist" and "reactionary." He added the unsupported assertion that a convention for proposing amendments could not be limited—that it could "rewrite the whole Constitution."[12] The obvious goal behind that statement was to scare people into thinking that the convention, instead of focusing on a single amendment, might effectively stage a coup d'état.

A more coordinated campaign against Article V began in 1963, with an article in the Yale Law Journal. It was authored by a law professor named Charles Black, also of Yale, a zealous defender of liberal causes and of the activism of the Supreme Court, then led by Chief Justice Earl Warren. The occasion for Black's article was the amendment proposal of the Council of State Governments.

Despite Black's position as a professor at one of the nation's premier law schools—and despite the nature of the journal that published it—Black's article was polemical rather than scholarly. You can deduce its tenor from the title: The Proposed Amendment of Article V: A Threatened Disaster.[13]

On its face, Black's article was responding to the Council of State Government's proposals. In fact, his propositions extended much further. Black objected to the whole idea of the states being allowed to overrule Congress or the Supreme Court. So he offered a wide-ranging plan of constitutional obstruction. In a nutshell, his position was as follows:

- The process enabled a tiny minority of the American people to amend the Constitution against the wishes of the majority, and

- if allowed to do so, the state legislatures might radically rewrite the Constitution. They "could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment,

"The placement of the Black and Swindler diatribes in two of the nation's top law journals can be explained only by the authors' institutional affiliations and/or by the agenda harbored by the journals' editors. That placement enabled them to reach a wide audience among the legal establishment."

make Catholics ineligible for public office, and move the national capital to Topeka."

To prevent such horrific developments, Black argued:

• that Congress should refuse to count state legislative resolutions that did not comply with standards he laid down;

• that "Congress [should] retain control over the convention process," and dictate allocation of delegates and determine how they were selected; and

• that the President should veto any congressional resolution calling a convention if the measure did not meet Black's standards.

It is clear to anyone familiar with the law and history of Article V that Black did virtually no research on the subject before putting pen to paper. Not only did he make no reference to the extensive American history of interstate conventions, but he recited little of the case law interpreting Article V. He also failed to read carefully the Necessary and Proper Clause, which actually grants Congress no power over Article V conventions.[14]

Later the same year, William F. Swindler, a law professor at the College of William and Mary, published an article in the Georgetown Law Journal.[15] Like Black's contribution, it was largely polemical and short on history and case law.

Swindler claimed that the Council of State Government's proposed amendments were "alarmingly regressive" and would destroy the Constitution as we know it: "For it is clear," he wrote, "that the effect of one or all of the proposals. . . would be to extinguish the very essence of federalism which distinguishes the Constitution from the Articles of Confederation." Like Black, Swindler argued that Congress could and should control the convention and impose obstacles to the convention serving its constitutional purpose. Indeed, Swindler went even further, maintaining that because "only a federal agency (Congress, as provided by the Constitution) is competent to propose" amendments, the convention procedure should be disregarded as "no longer of any effect."

The placement of the Black and Swindler diatribes in two of the nation's top law journals can be explained only by the authors' institutional affiliations[16] and/or by the agenda harbored by the journals' editors. That placement enabled them to reach a wide audience among the legal establishment.

Somewhat later, Chief Justice Warren, whose judicial activism was one of the targets of the Council of State Governments, mimicked Black and Swindler with the absurd declaration that

7

its amendment drive "could soon destroy the foundations of the Constitution."[17]

When Senator Everett Dirksen (R.- Ill.) joined the fight for an amendment partially reversing the Warren Court's reapportionment cases, his liberal colleagues pushed back hard. Senators Joseph Tydings (D.-Md) and Robert Kennedy (D.-NY) followed Black's lead and advanced various "reasons" why Congress should disregard state legislative resolutions it did not care for.[18] Senator William Proxmire (D.-Wis.) and the liberal New York Republican, Senator Jacob Javits pressed the claim that a convention would be uncontrollable.[19]

Kennedy's resistance was supplemented by other opinion leaders associated with the Kennedy clan. In 1967, Kennedy speech writer Theodore Sorensen wrote a Saturday Review article in which he repeated Black's "minority will control the process" argument. In congressional testimony the same year, Sorensen speculated that an Article V convention might "amend the Bill of Rights . . . limit free speech . . . reopen the wars between church and state . . . limit the Supreme Court's jurisdiction or the President's veto power or the congressional war-making authority."[20]

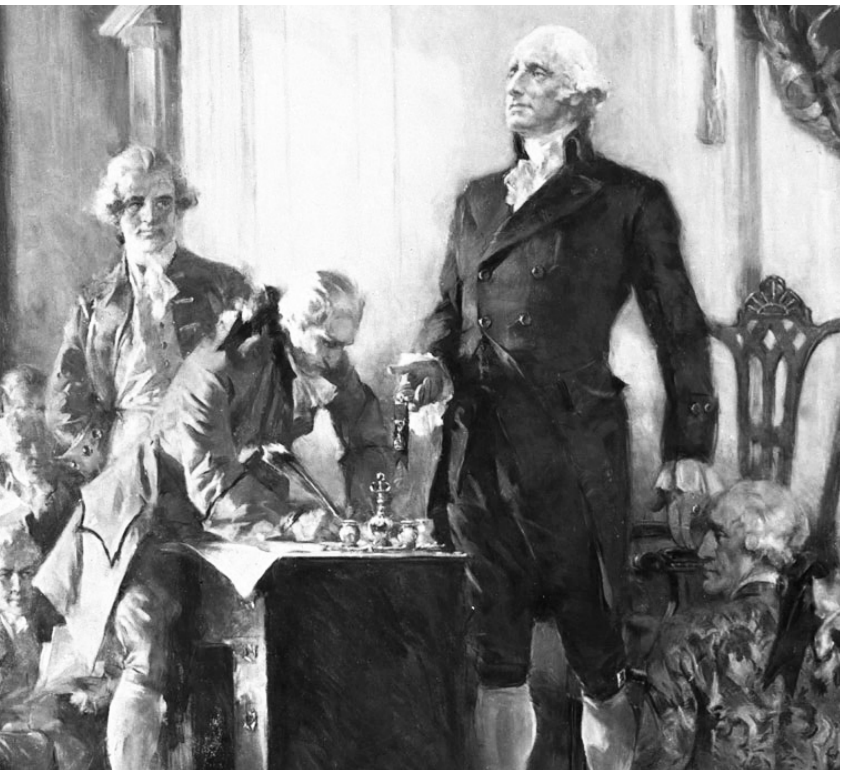
In 1968, University of Michigan law professor Paul G. Kauper contributed a piece to Michigan Law Review that likewise displayed almost complete disregard of Article V law and history.[21] Kauper admitted that Congress could not refuse to call a convention if 34 states applied for one. But he asserted that "Congress has broad power to fashion the ground rules for the calling of the convention and to prescribe basic procedures to be followed." Kauper also stated that "The national legislature is obviously the most appropriate body for exercising a supervisory authority. . ."—a conclusion in direct conflict with

Chief Justice Earl Warren (center), later parroted Black and Swindler with the absurd declaration that a convention "could soon destroy the foundations of the Constitution."

the convention's fundamental purpose as a device to bypass Congress. Kauper added that Congress could mandate that delegates be elected one from each congressional district, revealing his disregard of the Supreme Court opinion and other sources[22] that specifically identified the gathering as a "convention of the states" rather than a popular assembly.

In 1972, Black returned to the Yale Law Journal to oppose what he termed the "national calamity" threatened by a bill introduced in Congress by Senator Sam Ervin (D.-N.C.).[23] Ervin's bill, while well intentioned, was almost certainly unconstitutional because it was based on an overly-expansive reading of the Necessary and Proper Clause. But that was not Black's objection. Black's objection was that the "bill would make amendment far too easy." Black contended that the process permitted a minority to force amendments on the majority, that state legislatures should have no control over the procedure, and that the President could veto the congressional call.

Black's 1972 article was characterized by the same haste and lack of scholarly curiosity that had characterized his 1963 piece. For example, in defiance of precedent he claimed that governors should be permitted to veto state Article V resolutions. He also misinterpreted the founding-era phrase "general convention," assuming it meant a gathering unlimited by subject. A minimal amount of research would have informed him that a "general convention" was one that was national rather than limited to states in a particular region. Finally, in arguing that the convention could not be limited, Black stated that all legislative resolutions for a convention adopted during the Constitution's first century were unlimited as to subject. This was flatly untrue, and could have been disproved be simply examining the resolutions themselves.[24]



Throughout American history, conventions of states (and before them, of colonies) have been convened for many different purposes. But only two are referred to as "constitutional conventions" because only those two proposed a complete remodeling of the political system. The federal convention of 1787, which drafted the federal Constitution, was one of those conventions.

It is apparent that the goal of such writings was not to disseminate truth but to protect Congress and the Supreme Court from constitutional accountability for their actions. The campaign was successful in that it helped ensure the defeat of the efforts to propose a reapportionment amendment.[25]

In January, 1979, however, a new "national calamity" threatened. The National Tax Limitation Committee kicked off its drive for a balanced budget amendment to limit somewhat Congress's bottomless line of credit. In response, establishment spokesmen again resorted to the same misinformation propagated in the 1960s.

Kennedy admirer and eulogist Richard Rovere terrified the readers of the New Yorker magazine with the specter of a convention that might

> *reinstate segregation, and even slavery; throw out all or much of the Bill of Rights . . . eliminate the Fourteenth Amendment's due process clause and reverse any Supreme Court decision the members didn't like, including the one-man-one-vote rule; and perhaps for good measure, eliminate the Supreme Court itself.*[26]

(Rovere failed to explain how 38 states could be induced to ratify such proposals.)

Opponents amplified the histrionics by branding the amendments convention with a different, and more frightening, name. Rather than refer to it by the name given by the Constitution—"Convention for proposing Amendments"—opponents began to call it a "constitutional convention." This re-labeling reinforced the mental image of a junta that would not merely propose an amendment or two, but re-write our entire Constitution.

Some background may help explain the audacity of this re-branding. Throughout American history, conventions of states (and before them, of colonies) have been convened for many different purposes. But only two are referred to as "constitutional conventions" because only those two proposed a complete remodeling of the political system. They were the federal convention of 1787, which drafted the federal Constitution, and the 1861 Montgomery, Alabama gathering that drafted the Confederate Constitution.

The other 30-plus interstate conventions were summoned for more modest purposes. Among these were four that gathered to propose amendments or that did propose amendments: (1) the Hartford Convention of 1780, which recommended alteration of the Articles of Confederation, (2) the Annapolis Convention of 1786, called for the same purpose, (3) the Hartford Convention of 1814, which promoted several constitutional amendments, and (4) the Washington Convention of 1861, which proposed an amendment to stave off the Civil War. Although not convened to Article V, these assemblies were amendments conventions in every other respect. Yet to my knowledge, none had ever been referred to as a "constitutional convention." They were empowered only to suggest amendments, not to write new constitutions. Through the re-branding, however, Americans were encouraged to believe that a mere amendments convention was a constitutional convention.

Confusion between a "convention for proposing amendments" and a constitutional convention appears to be wholly a product of the 20th century. I have found no 18th or 19th century state resolutions, nor any reported 18th or 19th century state or federal court decision,[27] referring to an amendments convention as a "constitutional convention." On the contrary, the usual practice was to refer to a convention for proposing amendments by its proper name or as a "convention of the states" or by a variation of the latter phrase. In other words, affixing the "con-con" label on an amendments convention was an effort to alter English usage.

Where did the "dis-informants" get the idea of changing the convention's name? Perhaps they were inspired by a misunderstanding arising during the movement for direct election of U.S. Senators, and the manner in which opponents of direct election seized on that misunderstanding. In 1901 a congressional compiler gave the erroneous title "constitutional convention" to a state legislative resolution, and after 1903, a few resolutions actually used that term. The most famous example of how opponents capitalized on the confusion was a 1911 speech of Senator Weldon B. Heyburn (R.-Idaho). Senator Heyburn passionately opposed direct election, so to dissuade states from demanding a convention, he argued that:

> *When the constitutional convention meets it is the people, and it is the same people who made the original constitution, and no limit on the original constitution controls the people when they meet again to consider the Constitution.*[28]

The Heyburn view was not legally sound and seems not to have been persuasive at the time. By the following year the applying states were only one shy of the then-necessary 32 (of 48). The demand for a convention abated only because the U.S. Senate yielded, and Congress itself proposed a direct election amendment.

But the mid-20th century disinformation campaign did change public perceptions: Many people came think that a convention for proposing amendments was a "con-con." Professor Black bore some of the responsibility for this development as well. In his 1972 polemic he repeatedly referred to an amendments convention as a "constitutional

PROF. LAWRENCE TRIBE ISSUED A LONG LIST OF QUESTIONS ABOUT ARTICLE V TO WHICH, HE SAID, "GENUINE ANSWERS SIMPLY DO NOT EXIST." ALTHOUGH NEARLY ALL THOSE QUESTIONS HAVE SINCE BEEN ANSWERED, CONVENTION OPPONENTS STILL COMMONLY PRESENT STATE LAWMAKERS WITH VARIATIONS ON PROFESSOR TRIBE'S LIST.

convention." He had not used the term in that way in his 1963 article.

There were many additional contributions to the mislabeling campaign, particularly after the balanced budget drive began in 1979. An essay that year by Lawrence Tribe, a liberal Harvard law professor and Kennedy ally, referred to an amendments convention as a "constitutional convention."[29] Tribe also asserted that such a gathering would be an "uncharted course," and he issued a long list of questions about Article V

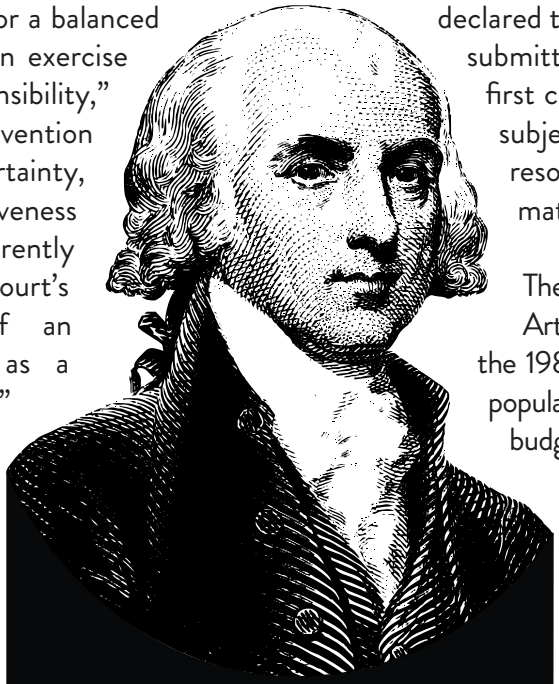
Jared Soares/Redux

to which, he said, "genuine answers simply do not exist." Although nearly all those questions have since been answered,[30] convention opponents still commonly present state lawmakers with variations on Professor Tribe's list.[31]

Gerald Gunther of Stanford University, yet another liberal law professor, had clerked for Chief Justice Earl Warren. Warren's decisions had been, of course, targets of some of the conservative amendment drives. In 1979 Gunther published his own tract branding an amendments convention a "constitutional convention."[32] He further asserted that the crusade for a balanced budget amendment was "an exercise in constitutional irresponsibility," and that the "convention route promises uncertainty, controversy, and divisiveness at every turn." Apparently unaware of the Supreme Court's prior characterization of an amendments convention as a "convention of states," Gunther said the assembly would be popularly elected. While claiming that "relevant historical materials" supported his arguments, he offered relatively little history to support them.

Yet another assault on Article V published in 1979 came from the pen of Duke University law professor Walter E. Dellinger. Dellinger had clerked for Justice Hugo Black (not to be confused with Professor Charles Black), one of the stalwarts of the activist Earl Warren/Warren Burger Supreme Court. Dellinger later served as acting solicitor general in the Clinton administration. He also labeled a convention for proposing amendments a "constitutional convention."[33]

Like other writers in this field, Dellinger did little original research but, like Charles Black, managed to get his essay published in the Yale Law Journal. Apparently the Journal was willing to compromise its supposedly rigorous standards of scholarship to accommodate such material. Like Charles Black as well, Dellinger inaccurately declared that all legislative resolutions submitted during the Constitution's first century were unlimited as to subject and asserted that any resolution imposing subject-matter limits was invalid.[34]



Supreme Court Justice Arthur Goldberg quoted out of context a 1788 letter written by James Madison, attempting to show that Madison opposed the Article V convention process. Madison actually supported the use of Article V for a convention of the states. This was a clear misuse of historical material, but some anti-Article V activists still follow Goldberg's lead today.

The establishment's war against Article V continued throughout the 1980s as its spokesmen resisted popular pressure for a balanced budget amendment and for amendments overruling the activist Supreme Court.

Arthur Goldberg was another member of the Kennedy circle: President Kennedy had appointed him successively as Secretary of Labor and Supreme Court Justice. In a 1983 article he labeled an amendments convention a "constitutional convention" and declared that its agenda would be uncontrollable.[35] He also quoted out of context part of a 1788 letter written by James Madison

As the drive for a balanced budget amendment started to grow in earnest in 1979, the liberal establishment renewed efforts to push the false "con-con" narrative about the Article V amending process.

in which Madison opposed a contemporaneous effort by two states to call a convention to completely rewrite the new Constitution. The quotation was out of context because Madison's letter criticized only that specific effort, not the process generally— a process Madison actually supported. This was a clear misuse of historical material by Goldberg, but some anti-Article V activists still follow Goldberg's lead today.

In 1986, New Jersey Governor Thomas Kean, a liberal Republican, wrote an article characterized by the usual hysteria: A Constitutional Convention Would Threaten the Rights We have Cherished for 200 Years.[36] As the title indicates, Kean applied the phrase "constitutional convention" to an amendments convention. Relying on the same out-of-context letter cited by Goldberg, Kean stoked the fear that such a convention might "run away."

The same year, Senator Paul Simon (D.-Ill.), one of the most liberal members of Congress, called the convention process "a very dangerous path."[37]

Twice in 1986 and again in 1988, Chief Justice Warren Burger—a participant in Roe v. Wade and other cases that belied his prior reputation as a "conservative"—wrote letters opposing what he called a "constitutional convention." Burger claimed the gathering might disregard its agenda. He based the latter speculation on the frequent, although inaccurate, assertion that the 1787 gathering did the same. Burger offered no other support for his claims, and I have found no evidence he ever researched the subject. He certainly never published anything on it.

I believe Burger absorbed his anti-Article V views from William F. Swindler. As mentioned earlier, Swindler was the author of possibly the most outrageous academic attack on the convention process. Burger was a self-described personal

Progressives and right-wing groups such as the John Birch Society use the same stock anti-convention of states arguments to spread disinformation about the important constitutional check on the federal government.

friend of Swindler and appointed him to two of the Supreme Court's advisory and administrative committees.[38] Burger apparently enjoyed Swindler's company, and upon Swindler's death Burger publicly eulogized him as "an analyst of history and a historian of the first rank."[39]

THE TURNING POINT

In the years since 2010, research by this author and other constitutional scholars has recaptured the history and law governing the amendments convention process. Arguments against that process have lost credibility among many conservatives[40] and moderates and among some honest progressives as well. This is reflected in a spate of formal state legislative demands for a convention.[41] As a result, establishment publicists who previously could afford to remain quiet have been forced to rally their own forces against the movement for a convention.

Illustrative is a December 4, 2013 posting in the Daily Kos, a left-wing website, which warns of the "threat" of a convention and repeats the Charles Black argument that it would represent only a minority of the population.[42] Illustrative also is an op-ed column in the Washington Post dated October 21, 2014. The column was entitled, "A constitutional convention could be the single most dangerous way to 'fix' American

government."[43] As the title suggests, the author opposed a convention using rhetoric almost precisely identical to that employed by groups such as the John Birch Society.

The author was no Bircher, however, but Robert Greenstein, a former member of the Clinton administration and an Obama ally, who heads an influential left-wing policy center in Washington, D.C. reportedly funded by socialist financier George Soros.[44] For reasons explained in this paper, the similarity between Greenstein's argument and those of misguided conservative groups is not accidental.

The identity of interest among left-wing and right-wing opponents emerged in sharp relief during a recent Montana legislative session. On February 2, 2015, a spokeswoman for the Montana Budget and Policy Center, a "progressive" state policy group with ties to Greenstein's think tank, sent an e-mail to Democratic lawmakers advising them on how to defeat a proposed balanced budget resolution. The spokeswoman's "Topline Message" (suggested talking points) closely mirrored those of conservative opponents and of Greenstein, including the use of the "con-con" label. She further told Democratic state lawmakers, "We strongly urge committee members to AVOID talking about a balanced budget amendment, instead focusing on the lack of certainty in calling a convention." She suggested that liberal lawmakers direct questions to John Birch Society lobbyists who would make the liberals' arguments for them.[45]

CONCLUSION

When conservatives and moderates use the stock anti-convention arguments, they merely repeat disinformation injected into American political life by their political opponents. The purpose of this disinformation was to weaken or disable an important constitutional check on the federal government.

In recent years, the inaccuracies spread in that campaign have been corrected. Accordingly, many conservative and moderate convention opponents have become supporters. Groups that persist in spreading misinformation have lost credibility.

To shore up the anti-convention position, therefore, spokespeople for the liberal establishment are now reemerging to rally their own allies with the same stock arguments. Conservatives, moderates, and responsible progressives should hold them accountable for doing so.

Notes

[1]Robert G. Natelson, the Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver, was a law professor for 25 years at three different universities. He has written extensively on the Constitution for both the scholarly and popular markets, and since 2013 has been cited increasingly at the U.S. Supreme Court, both by parties and by justices. He is the nation's most published active scholar on the amendment process, and heads the Institute's Article V Information Center. For a biography and bibliography, see http://constitution.i2i.org/about.

[2]The Lamp of Experience: Constitutional Amendments Work, http://constitution.i2i.org/2014/03/09/thelamp-of-experience-constitutionalamendments-work/

[3]U.S. Const., art. I, § 8, cl. 18.

[4]For a survey of the law of Article V, see Robert G. Natelson, A Treatise on the Law of Amendment Conventions: State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters (2014).

[5]*"A Friend of Society and Liberty," Pa. Gazette, Jul. 23, 1788, reprinted in 18 Documentary History of the Ratification of the Constitution of the United States, 277, 283. Coxe's writings were at least as influential with the general public as The Federalist Papers. He was a member of Congress and Pennsylvania's delegate to the Annapolis convention, and the first Assistant Secretary of the Treasury. By a "general convention," Coxe meant a national rather than a regional gathering.*

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

[7]*Id.*

[8]*Liberals occasionally crusaded for amendments as well, but by and large their clout in Congress, the bureaucracy, and the courts was sufficient for their purposes.*

[9]*Philip L. Martin, The Application Clause of Article Five, 85 Pol. Sci. Q. 615, 623 (1970).*

The Sixteenth Amendment did not, as some say, authorize the federal income tax; it merely dropped the requirement that federal income tax revenues be apportioned among the states by population.

[10]*Russell L. Caplan, Constitutional Brinksmanship (Oxford Univ. Press 1988) [hereinafter "Caplan"], 74 (Eisenhower), 85 (Reagan), 71 (Scalia). There are reports that Scalia changed his position after ascending to the Court.*

[11]*The disinformation has lost credibility in the last few years, as explained below. In 1992, reformers did success in obtaining ratification of the 27th amendment, limiting congressional pay raises, but that amendment had been proposed in 1789 as part of the Bill of Rights.*

[12]*Caplan, p.69.*

[13]*Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 Yale L.J. 957 (1963). Black engaged in similar histrionics in the title of another article: Proposed Constitutional Amendments: They Would Return Us to a Confederacy, 49 A.B.A J. 637 (1963).*

[14]*By its terms, the Necessary and Proper Clause applies to the 17 preceding powers in Article I, Section 8 and to powers granted to the government of the United States and to "Officers" and "Departments." A convention fits none of those categories. See The Constitution's Grants to Persons and Entities Outside the Federal Government, http://constitution.i2i.org/2014/12/18/theconstitutions-grants-to-persons-andentities-outside-the-u-s-government/ and No, the Necessary and Proper Clause Does NOT Empower Congress to Control an Amendments Convention, http://constitution.i2i.org/2014/08/23/n o-the-necessary-and-proper-clause-doesnot-empower-congress-to-control-anamendments-convention/.*

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

[16]*The overwhelming majority of law reviews are student-edited. Because students are often unable to judge the quality of articles submitted to them, the relative prestige of the author's academic institution is influential in the decision of whether to accept a submission. This is an open secret among law professors and supported by empirical research. Jonathan Gingerich, A Call for Blind Review: Student Edited Law Reviews and Bias, 59 J. Legal Educ. 269 (2009).*

[17]*Caplan, p. 74.*

[18]*Caplan, pp. 75-76*

[19]*Caplan, p. 76. Javits was liberal not just for a Republican, but (like some of his GOP colleagues at the time) liberal in an absolute sense. His voting record was regularly marked as above 80% by the left-of-center Americans for Democratic Action.*

[20]*Caplan, p. 147. See below for other comments by associates and allies of the Kennedy clan.*

[21]*Paul G. Kauper, The Alternate Amendment Process: Some Observations, 66 Mich. L. Rev. 903 (1968).*

[22]*Smith v. Union Bank, 30 U.S. 518, 528 (1831). For other sources, see http://constitution.i2i.org/2014/03/28/howdo-we-know-an-article-v-amendmentsconvention-is-a-%E2%80%9Cconventionof-the-states%E2%80%9D-because-boththe-founders-and-the-supreme-court-saidso/*

[23]*Charles L. Black, Jr., Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189 (1972)*

[24]*The 1832 resolution of Georgia and the 1833 resolution of Alabama were both limited as to subject. The 1788 Virginia resolution and the 1864 Oregon resolution were*

both arguably limited. Robert G. Natelson, Amending the Constitution by Convention: Lessons for Today from the Constitution's First Century, 3, 5 & 7 (Independence Institute, 2011), available at http://liberty.i2i.org/files/2012/03/IP_5_20 11_c.pdf

[25]Martin, p. 628.

[26]Caplan, p. Viii.

[27]According to the Westlaw database.

[28]Caplan, p. 64.

[29]Lawrence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 Pac.L.J. 627 (1979).

[30]Robert G. Natelson, The Article V Handbook 33-35 (2d ed., 2013).

[31]See, e.g., http://www.eagleforum.org/alert/2011/pdf/20Questions.pdf.

[32]Gerald Gunther, The Convention Method of Amending the United States Constitution, 14 Ga. L. Rev. 1 (1979).

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

[34]To give due credit: Four years later Dellinger also published an article correctly pointing out that Article V issues were justiciable in court. Walter E. Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv. L. Rev 386 (1983)

[35]Arthur J. Goldberg, The Proposed Constitutional Convention, 11 Hastings Const. L. Q. 1 (1983).

[36]Thomas H. Kean, A Constitutional Convention Would Threaten the Rights We have Cherished for 200 Years, 1986 Det. C.L. Rev. 1087 (1986)

[37]Caplan, p. 85.

[38]Warren Burger, William F. Swindler: A Tribute from the Chief Justice of the United States, 20 Wm. & Mary L.J. 595 (1979).

[39]William F. Swindler, 70, Dies; Scholar of U.S. Constitution, New York Times, May 7, 1984, available at http://www.nytimes.com/1984/05/08/obitu aries/william-f-swindler-70-dies-scholarof-us-constitution.html.

[40]One example of support for a convention by conservative and libertarian legal scholars and opinion leaders, including some former skeptics, is the "Jefferson Statement," http://www.conventionofstates.com/the_jef ferson_statement.

[41]For a scorecard of recent developments, see https://www.facebook.com/pages/FixWashington-By-Calling-an-Article-VAmendmentsConvention/598865556818994.

[42]http://www.dailykos.com/story/2013/12/04/1260066/-Alert-Art-V-ConventionThreat-Grows-Dec-7-2013-Assembly.

[43]http://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutionalconvention-could-be-the-single-mostdangerous-way-to-fix-americangovernment/.

[44]http://sorosfiles.com/soros/2011/10/center -on-budget-and-policy-priorities.html.

[45]The email can be read at http://constitution.i2i.org/files/2015/03/OL oughlin-email.pdf. The language quoted here was underscored for emphasis.

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ESSAY

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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6. *Id.*

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

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

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

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

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

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

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

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

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

Despite the widespread belief that the Constitutional Convention delegates viewed their instructions as mere suggestions which could be ignored with impunity, the historical record paints a different picture. In *Federalist No. 78,* Alexander Hamilton underlined the importance of acting within one's authority: "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[17] And in *Federalist No. 40*, James Madison had already answered the charge that the Convention delegates had exceeded their commissions.[18]

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

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

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

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

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

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

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

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

Each issue will be developed in the following sequence:

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

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

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

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

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

I. DID THE CONVENTION DELEGATES EXCEED THEIR AUTHORITY?

A. The Call of the Convention

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

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

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

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

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

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

> [T]o take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same . . . .[24]

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

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

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

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

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

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

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

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

1. The States Begin the Official Process

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

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

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39. *Id.*

40. *Id.*

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

42. *Id.*

43. *Id.*

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

45. *Id.*

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

ument. On December 4th, Virginia elected seven delegates to the Philadelphia Convention.[47] The act provided that "the Governor is requested to transmit forthwith a copy of this Act to the United States in Congress, and to the Executives of each of the States in the Union."[48] Edmund Randolph, who became governor just four days earlier, complied with the request.[49]

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

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

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47. *Id.*

48. *Id.*

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

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

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

52. *Id.*

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

54. *Id.* at 201.

55. *Id.* at 200–201.

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

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

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

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

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

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

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

62. *Id.*

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

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

2. Machinations in New York

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

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

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

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

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

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

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

68. *Id.*

69. *Id.*

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

71. *Id.* at 260.

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

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

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

3. Congress Responds to the Annapolis Convention Report

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

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

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

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

75. *Id.*

76. *Id.* at xxxvi–xxxix.

77. *Id*. at xl.

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

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

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

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

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

> Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.[87]

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

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

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

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 73.

85. *Id.*

86. *Id.* at 73–74.

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

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

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

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

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

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

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

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

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

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

4. The Six Remaining States Appoint Delegates

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

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

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

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

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

95. *Id.*

96. *Id.*

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

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

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

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

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

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99. *Id.*

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

101. *Id.* at 216.

102. *Id.*

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

104. *Id.*

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

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

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

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

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

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

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

108. *Id*. at 572–73.

109. *Id*. at 585–86.

110. *Id*. at 579–81.

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

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

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

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

B. Arguments about Delegates' Authority at the Constitutional Convention

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

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

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

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

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

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

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.* at 4.

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

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

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

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

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

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

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

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

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

130. *Id.* at 177.

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

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

133. *Id.* at 242–45.

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

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

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

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

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

On the following Monday, June 18th, Madison picked up the argument. He contended that the New Jersey Plan itself varied from some delegates' views of a federal system "since it is to operate eventually on individuals."[141] Madison contended that the States "sent us here to provide for the exigences [sic] of the Union. To rely on & propose any plan not adequate to these exigences [sic], merely because it was not clearly within our powers, would be to sacrifice the means to the end."[142] Here, and in other speeches and writings, Madison embraced the notion that the delegates would be justified in exceeding their strict instructions if necessary. But his moral argument was not a concession by him that, in fact, their proposed actions were a legal violation of their credentials. His argument was clearly in the alternative. He bolstered his argument based on the language adopted by ten states. This recitation makes it clear that he believed that their actions were justified under the language of their credentials.

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

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

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

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

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

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

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

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

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

C. Debates in the Confederation Congress

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

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

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

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

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

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

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

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

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

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164. *Id.* at 237–38.

165. *Id.* at 238–240.

166. *Id.* at 240.

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

168. *Id.* at 336.

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

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

D. Debates in the State Ratification Convention Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Who gave the delegates their instructions?

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

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

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

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

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

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

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

a. Anti-Federalist Views

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

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

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

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

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

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

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

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

183. *Id.* at 369.

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

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

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

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

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

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184. *Id.*

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

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

187. *Id*.

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

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

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

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

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

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

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

191. *Id.*

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

193. *Id.* at 79–82.

b. Federalist Views

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

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

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

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

195. *Id.*

196. *Id.* at 254.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

204. *Id.* at 817.

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

206. *See id.* at 674.

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

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

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

3. Was the Convention unlawful from the beginning?

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

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

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

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

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

211. *Id.*

212. *Id.* at 1156–57.

213. *Id.* at 1157.

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

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

214. *Id.*

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

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

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

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

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

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

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

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

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

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

221. *Id.*

222. *Id.* at 704.

223. *Id.*

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

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

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

225. *Id.* at 138.

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

227. *Id.*

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

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

230. *Id.* at 625–26.

231. *Id.* at 628.

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

II. WAS THE CONSTITUTION PROPERLY RATIFIED?

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

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

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

A. The Source of Law for Ratification Authority

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

244. *Id.* at 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Debates in the Confederation Congress

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

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

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

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

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

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

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

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

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

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

330. *See id.* at 335.

331. *Id.* at 336.

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

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

334. *See id.*

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

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

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

D. Thirteen Legislatures Approve the New Process

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

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

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

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

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

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

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343. *Id.*

344. *Id.*

345. *Id.*

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

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

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

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

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

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

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

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

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

355. *Id.*

356. *Id.* at 161.

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

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

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

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

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

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

359. *Id.* at 164.

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

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

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

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

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

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

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

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

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

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

365. *Id.* at 133–34.

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

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

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

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

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

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

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

370. *Id.* at 704–07.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

380. *Id.*

381. *Id.*

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

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

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

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

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

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

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

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

386. *Id.*

387. *Id.* at 161.

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

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

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

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

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

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

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

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

393. *Id.*

394. *Id.* at 975–81.

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

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

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

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

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

Robert Natelson devotes six pages of a 2013 law review article to the defense of the fidelity of the delegates to their commissions.[401] By examining the texts of the credentials from each state, he concludes that "the delegates all were empowered through commissions issued by their respective states, and were subject to additional state instructions. All but a handful of delegates remained within the scope of their authority or, if that was no longer possible, returned home."[402] However, he concludes that it is reasonable to question the fidelity of New York's Alexander Hamilton and Massachusetts' Rufus King and Nathaniel Gorham—all of whom signed the Constitution.[403]

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

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

399. *Id.*

400. *Id.*

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

402. *Id.* at 679.

403. *See id.* at 678.

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

B. Answering Ackerman and Katyal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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412. *Id.* at 476.

413. *Id.*

414. *Id.*

415. *See id.* at 476–77.

416. *Id.* at 478.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

425. *Id.* at 539–540.

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

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

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

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

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

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

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

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

429. *See id.* at 501.

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

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

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

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

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

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

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

433. *Id.*

434. *Id.* at 1157.

435. *Id*.

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

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

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

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

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

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436. Draft Instructions (Nov. 26, 1787), *reprinted in* 5 DHRC, *supra* note 4, at 959.
437. Ackerman & Katyal, *supra* note 14, at 539.

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

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

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

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

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

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

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

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

a. The Call

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

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

442. *Id.* at 487.

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

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

445. *Id.* at 483.

446. *Id.* at 496.

447. *Id.* at 497.

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

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

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

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

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

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449. *Id.*

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

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

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

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

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

b. The Delegates' Authority

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

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

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

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

456. *Id.* at 508–509, 514.

457. *Id.* at 481.

458. *Id.* at 508.

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

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

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

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

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

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

461. *Id.* at 482–83.

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

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

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

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

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

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

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

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

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

469. *Id.* at 483.

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

c. The Delaware Claim

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

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

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

3. The Legality of the Ratification Process

a. Article XIII

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

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

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

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

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

479. *Id.*

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

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

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

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

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

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

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

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

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

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

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

b. State Constitutions

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

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

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

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

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

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

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

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

491. *See id.*

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

493. *See id.* at 958.

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

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

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

4. The Professors' Real Agenda

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

495. 258 U.S. 130 (1922).
496. *Id.* at 135.
497. Brief for Petitioner at 100, Leser v. Garnett, 258 U.S. 130 (1922) (No. 553).
498. *Id.* at 110.
499. *See Leser*, 258 U.S. at 137.

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

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

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

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

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

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

501. *Id.* at 570–71.

502. *See id.* at 571–72.

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

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

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

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

IV. CONCLUSION

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

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

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

COS CONVENTION *of* STATES ACTION

In mid-April, on Good Friday, the George Soros funded left-wing policy group Common Cause declared war on COS, announcing the formation of the largest radical left alliance in US history.

Almost every radical, liberal, progressive, Marxist group in America signed onto a coalition to oppose the use of Article V and the Convention of States movement as provided in our Constitution. In doing so, they accomplished something that even Hillary Clinton and Bernie Sanders couldn't: ***they unified the radical left with one voice.***


HILLARY CLINTON

PLANNED PARENTHOOD


GEORGE SOROS

What you see below is taken directly from the press release Issued on Good Friday, April 14, 2017, by Common Cause:

"The undersigned organizations strongly urge state legislatures to oppose efforts to pass a resolution to call for a constitutional convention. We also strongly urge state legislatures to rescind any application for an Article V constitutional convention in order to protect all Americans' constitutional rights and privileges from being put at risk and up for grabs." ~ Common Cause

Access to Independence, Inc. (Madison, WI)
ACE-AFSCME Local 2250
ACLU of Colorado
African American Health Alliance
African American Ministers In Action
AFSCME 2960
AFSCME 4041
AFSCME Council 3
AFSCME Council 32
AFSCME Council 67
AFSCME Iowa Council 61
AFSCME Retirees
AFSCME Retirees Chapter 32
AFSCME Retirees Chapter 97
Alaska AFL-CIO
Alliance for Justice
America Votes Colorado
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County and Municipal Employees
American-Arab Anti-Discrimination Committee
Americans for Democratic Action (ADA)
Asian and Pacific Islander American Vote
Baltimore Neighborhoods, Inc.
Bend the Arc Jewish Action
Benedictine Sisters of Baltimore
Better Idaho
Bhutanese Community Association of Pittsburgh
Brennan Center for Justice
California Common Cause
Campaign Legal Center
Center for American Progress
Center for Community Change
Center for Law and Social Policy (CLASP)
Center for Media and Democracy
Center for Medicare Advocacy
Center for Popular Democracy
Center on Budget and Policy Priorities
Children's Defense Fund
Citizen Action of Wisconsin
Citizens for Responsibility and Ethics in Washington (CREW)
City of Chino Housing Division
Clean Elections Texas
Cleveland Nonviolence Network
CNY Fair Housing, Inc
Coalition on Human Needs
Colorado AFL-CIO
Colorado Common Cause
Colorado Ethics Watch
Colorado Fiscal Institute
Colorado Sierra Club
Colorado WINS
Common Cause
Common Cause Connecticut
Common Cause Delaware
Common Cause Florida
Common Cause Georgia
Common Cause Hawaii
Common Cause Illinois
Common Cause Indiana
Common Cause Kentucky
Common Cause Maryland
Common Cause Michigan
Common Cause Minnesota
Common Cause Nebraska

Common Cause New Mexico
Common Cause New York
Common Cause North Carolina
Common Cause Ohio
Common Cause Oregon
Disability Rights Oregon
Common Cause Pennsylvania
Common Cause Rhode Island
Common Cause Texas
Common Cause Wisconsin
Communications Workers of America (CWA)
Community Advocates Public Policy Institute
Community at Holy Family Manor (Pittsburgh, PA)
Congregation of the Humility of Mary
Connecticut Fair Housing Center, Inc.
Conscious Talk Radio
Courage Campaign
Culinary Union
CWA Local 1081
Daily Kos
Democracy 21
Disability Rights Maine
Disability Rights Maryland
Disability Rights North Carolina
Disabled in Action of Greater Syracuse Inc.
Dominicans of Sinsinawa - Leadership Council
Downstreet Housing & Community Development
Dream Defenders
Earthjustice
Eclectablog
Economic Policy Institute
EMILY's List
End Domestic Abuse Wisconsin
Equality Ohio
Every Voice
Fair Elections Legal Network
Fair Housing Advocates of Northern California
Fair Housing Center of Central Indiana
Fair Housing Center of Northern Alabama
Fair Housing Center of West Michigan
Faith in Florida
Faith in Public Life
Family Values at Work
Florida Consumer Action Network
Food Research & Action Center (FRAC)
Franciscan Action Network
Fuse Washington
Grandparents United for Madison Public Schools
Greater New Orleans Fair Housing Action Center
Greenpeace USA
Harlingen Community Development Corporation
Holy Family Home and Shelter, Inc
Idaho AFL-CIO
Independence First
Independent Living Resources (Durham, NC)
International Association of Fire Fighters
Iowa AFL-CIO
Jobs With Justice
Just Harvest (Pittsburgh, PA)
Kansas AFL-CIO
Kentucky AFL-CIO
League of Women Voters of Colorado
League of Women Voters of Minnesota
League of Women Voters of New Mexico
League of Women Voters of the United States
League of Women Voters of Wisconsin
Long Island Housing Services, Inc.
Madison-area Urban Ministry
Main Street Alliance
Maine AFL-CIO
Maryland Center on Economic Policy
Massachusetts AFL-CIO
Metropolitan Milwaukee Fair Housing Council
Mi Familia Vota
Midstate Independent Living Consultants
Minnesota AFL-CIO
Minnesota Citizens for Clean Elections
Mississippi AFL-CIO
Monarch Housing Associates
Montana AFL-CIO
NAACP
Nashville CARES
National Asian Pacific American Families Against Substance Abuse
National Association of Social Workers
National Association of Social Workers, Wisconsin Chapter
National Council of Asian Pacific Americans (NCAPA)
National Council of Jewish Women
National Council of La Raza Action Fund
National Disability Institute
National Disability Rights Network
National Education Association (NEA)
National Employment Law Project (NELP)
National Fair Housing Alliance
National Korean American Service & Education Consortium
National Partnership for Women & Families
National WIC Association
National Women's Law Center
Nebraskans for Civic Reform
New Era Colorado
New Hampshire AFL-CIO
New Jersey Association of Mental Health and Addiction
New Mexico Hospital Workers Union (1199NM)
North Dakota AFL-CIO
Oak Park River Forest Food Pantry
Ohio Voice
Oklahoma AFL-CIO
OMNI Center for Peace, Justice & Ecology
One Wisconsin Now
Options for Independent Living Inc. (Green Bay, WI)
P.S., A Partnership
People Demanding Action
People For the American Way
Planned Parenthood of Southern New England
Progress Colorado
Progress Florida
Progress Michigan
Progress Now
Progress Ohio
Project IRENE
Public Justice Center
Schenectady Inner City Ministry
School Sisters of Saint Francis (Milwaukee)
SEIU Colorado
Service Employees International Union (SEIU)
Sierra Club
Sisters of Charity of Nazareth Congregational Leadership
Social Security Works
Solidarity Committee of the Capital District
South Carolina AFL-CIO
South Dakota AFL-CIO
Southwest Fair Housing Council
State Innovation Exchange
Survival Coalition of Disability Organization of Wisconsin
Tabitha's Way
The Arc of the United States
The Arc Wisconsin
The Forum for Youth Investment
The Public Interest
The Voting Rights Institute
The Wisconsin Democracy Campaign
The Xaverian Brothers
Toledo Area Jobs with Justice
Toledo Fair Housing Center
UNITE HERE
United Food and Commercial Workers (UFCW)
Virginia AFL-CIO
Virginia Civic Engagement Table
Vision for Children at Risk
Voice for Adoption
Vote Vets Action Fund
Washington AFL-CIO
Washington Community Action Network
West Virginia Citizen Action Group
Wisconsin AFL-CIO
Wisconsin Aging Advocacy Network
Wisconsin Coalition of Independent Living Centers, Wisconsin Community Action Program Association (WISCAP)
Wisconsin Council on Children and Families
Wisconsin Democracy Campaign
Wisconsin Faith Voices for Justice
Wisconsin Voices
Women's Voices Women Vote Action Fund Working America
Wyoming AFL-CIO

When the nation's finest legal minds gathered at the Jefferson Hotel in Washington, D.C., they set out to consider arguments for and against the use of Article V to restrain federal power. But like the Founding Fathers in 1787, they soon realized that they agreed unanimously that the Article V option is safe, effective, and necessary.

These experts, who subsequently signed the Jefferson Statement reproduced below, rejected the argument that an Article V convention is likely to be misused or improperly controlled by Congress. They shared the conviction that Article V provides the only constitutionally effective means to restore our federal system, and they formed the core of our Legal Board of Reference, whose names you can find on the opposite side of this document.

The Article V mechanism is safe, and it is the only constitutionally effective means available to do what is so essential for our nation.

The Constitution's Framers foresaw a day when the federal government would exceed and abuse its enumerated powers, thus placing our liberty at risk. George Mason was instrumental in fashioning a mechanism by which "we the people" could defend our freedom—the ultimate check on federal power contained in Article V of the Constitution.

Article V provides the states with the opportunity to propose constitutional amendments through a process controlled by the states from beginning to end on all substantive matters.

A convention to propose amendments is convened when 34 state legislatures pass resolutions (applications) on an agreed topic or set of topics. The Convention is limited to considering amendments on these specified topics.

While some have expressed fears that an Article V convention might be misused or improperly controlled by Congress, it is our considered judgment that the checks and balances in the Constitution are more than sufficient to ensure the integrity of the process.

The Article V mechanism is safe, and it is the only constitutionally effective means available to do what is so essential for our nation—restoring robust federalism with genuine checks on the power of the federal government.

We share the Founders' conviction that proper decision-making structures are essential to preserve liberty. We believe that the problems facing our nation require several structural limitations on the exercise of federal power. While fiscal restraints are essential, we believe the most effective course is to pursue reasonable limitations, fully in line with the vision of our Founders, on the federal government.

Accordingly, I endorse the Convention of States Project, which calls for an Article V convention for "the sole purpose of proposing amendments that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress." I hereby agree to serve on the Legal Board of Reference for the Convention of States Project.

Signed,

*Randy E. Barnett**
*Robert P. George**
*Andrew McCarthy**
*Charles J. Cooper**
*C. Boyden Gray**
*Mark Meckler**
*John C. Eastman**
*Mark Levin**
Mat Staver
*Michael P. Farris**
Nelson Lund

**Original signers of the Jefferson Statement*

"The Article V mechanism is safe, and it is the only constitutionally effective means available to do what is so essential for our nation."

Randy E. Barnett is a graduate of Harvard Law School and a professor at the Georgetown University Law Center. He represented the National Federation of Independent Business in its constitutional challenge to the Affordable Care Act.

Charles J. Cooper is a founding member and chairman of Cooper & Kirk, PLLC. A member of the Reagan Administration, Mr. Cooper has argued before the Supreme Court, and he spent much of his career defending constitutional rights as a top lawyer for the National Rifle Association.

John C. Eastman is the Founding Director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute. Prior to joining the Fowler School of Law faculty, he served as a law clerk with Justice Clarence Thomas at the Supreme Court of the United States and served in the Reagan administration.

Michael P. Farris is the co-founder of the Convention of States Project, the Chancellor of Patrick Henry College, and Chairman of the Home School Legal Defense Association. During his career as a constitutional appellate litigator, he has served as lead counsel in the United States Supreme Court, eight federal circuit courts, and the appellate courts of thirteen states. Mr. Farris is widely respected for his leadership in the defense of homeschooling, religious freedom, and the preservation of American sovereignty.

Robert P. George is one of the nation's leading conservative legal scholars and is the founding director of the James Madison Program in American Ideals and Institutions. He is chairman of the United States Commission on International Religious Freedom (USCIRF) and has served as a presidential appointee to the United States Commission on Civil Rights.

C. Boyden Gray is the founding partner of Boyden Gray & Associates, in Washington, D.C. Prior to founding his law firm, Ambassador Gray served as Legal Counsel to Vice President Bush (1981–1989), as White House Counsel in the administration of President George H.W. Bush (1989–1993), and as counsel to the Presidential Task Force on Regulatory Relief during the Reagan Administration.

Mark Levin is one of America's preeminent constitutional lawyers and the author of several New York Times bestselling books including *Men in Black* (2007), *Liberty and Tyranny* (2010), *Ameritopia* (2012) and *The Liberty Amendments* (2013). Mr. Levin has served as a top advisor to several members of President Ronald Reagan's Cabinet—including as Chief of Staff to the Attorney General of the United States, Edwin Meese.

Nelson Lund is University Professor at George Mason University School of Law. After clerking for Justice Sandra Day O'Connor, he served in the White House as Associate Counsel to President George H.W. Bush.

Andrew McCarthy is a bestselling author, a Senior Fellow at National Review Institute, and a contributing editor at *National Review*. Mr. McCarthy is a former Chief Assistant U.S. Attorney in New York.

Mark Meckler is President of Convention of States Foundation, the parent organization of the Convention of States Project. Mr. Meckler is one of the nation's most effective grassroots activists. After he co-founded and served as the National Coordinator of the Tea Party Patriots, he founded Citizens for Self-Governance in 2012 to bring the concept of "self governance" back to American government.

Mat Staver, B.A. M.A., J.D., B.C.S., serves as Senior Pastor, Founder and Chairman of Liberty Counsel; Chairman of Liberty Counsel Action, Faith and Liberty, National Pro-life Center, Freedom Federation, Salt & Light Council, and National House of Hope; Founder and Chairman of Liberty Relief International; Vice President and Chief Counsel of the National Hispanic Christian Leadership Conference (which includes over 42,000 Evangelical Hispanic churches); Trustee, Timothy Plan, a family of mutual funds traded in New York and Tel Aviv; and former dean of Liberty University School of Law. Mat has the highest AV rating for attorneys and is board certified in Appellate Practice by the Florida Bar. He has argued before the U.S. Supreme Court. He has published many scholarly and popular articles, brochures, numerous booklets and books, including *Why Israel Matters*, *Covenant Journal*, and *Eternal Vigilance*. He has produced the "Why Israel Matters" original TV, as well as produces and hosts Faith & Freedom, an 11-minute daily radio program, Freedom's Call, a 60-second daily radio program, and Freedom Alive, a 30-minute weekly TV program. He is married to Anita, who is president of Liberty Counsel. Mat and Anita have one daughter, three grandchildren, and two great grandchildren.

Support the only solution that is as big as the problem.

Sign the petition at ConventionofStates.com.

www.conventionofstates.com **info@conventionofstates.com**

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CONVENTION of STATES ACTION

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