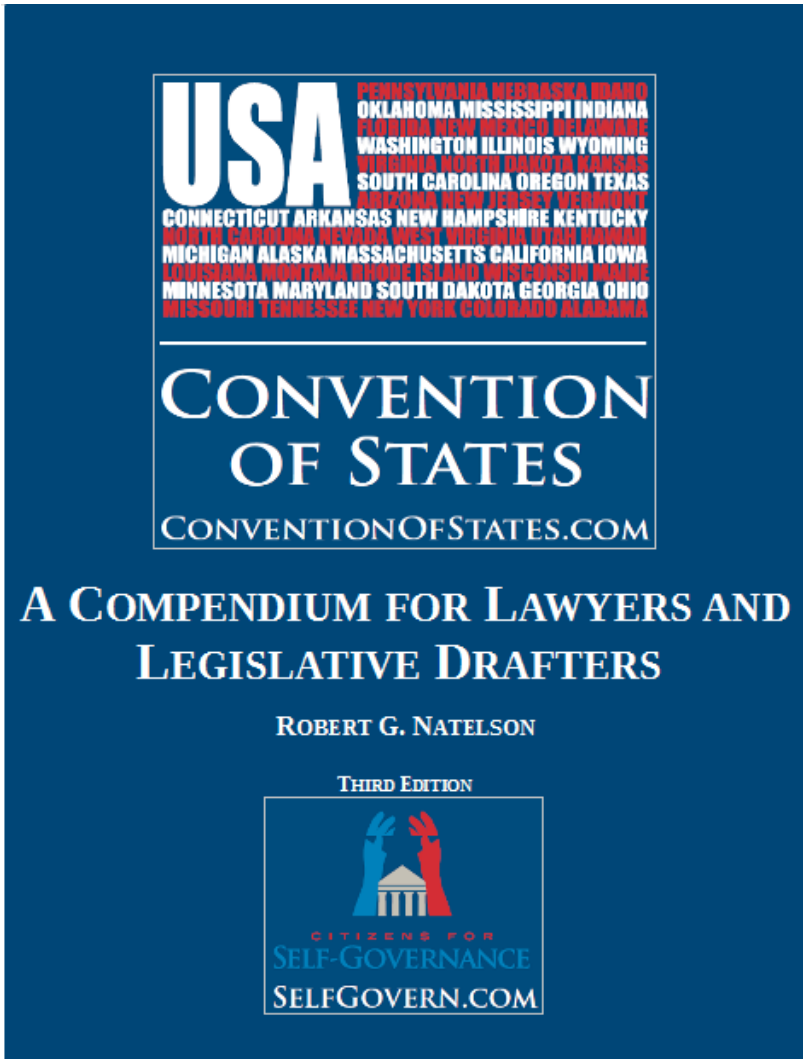

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CONVENTION of STATES

A PROJECT OF CITIZENS FOR SELF-GOVERNANCE

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State Initiation of Constitutional Amendments:

A Guide for Lawyers and Legislative Drafters
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Foreword by Michael Farris

This Compendium is written by the nation's foremost scholar on Article V, Professor Robert G. Natelson. It is designed to assist both legislators and legislative counsel with the legal issues most likely to arise in the process of calling for a Convention of the States under Article V.

Mark Levin's book, The Liberty Amendments, has focused a great deal of attention on the possibility of using Article V to rein in the growth of federal power. Many different proposals are being advanced by a variety of organizations. This Compendium should serve as a valuable tool to assist with the legal analysis of all of these different Article V proposals.

In general terms, supporters of Article V advocate three basic approaches. Some proposals call for a single amendment (e.g., a Balanced Budget Amendment). Some proposals call for an unlimited convention. We propose a convention for a single topic, rather than a single amendment.

The approach being advanced by Citizens for Self-Governance is essentially identical to the one advanced by Mark Levin. We seek a Convention of States that is limited to restraining the power and jurisdiction of the federal government and imposing fiscal restraints on Washington, D.C. Our proposal would also permit consideration of term limits on members of Congress, the judiciary, and other federal officials.

When state applications approach the same general subject, but differ in the operative language, it opens up the prospect of legal challenges when trying to determine whether thirty-four applications have been passed on the same subject. The Convention of States Project seeks to ensure that thirty-four states enact the exact same language in the operative sections. Language in preambles and introductory paragraphs can vary, but we are in the best possible legal situation when the formal resolution stating the purpose for the convention is uniform in all states.

The Bill of Rights was a package of amendments designed to preserve the rights of the people. Our Convention of States Project will allow the states to propose a package of amendments designed to limit the growth and curb the fiscal irresponsibility of the federal government. Other solutions have good

attributes. But our solution is the only approach that offers a solution that is as big as the problem. We need a comprehensive solution to the mess in Washington, D.C.

We invite your careful consideration to the Convention of States model. But, again, this Compendium should be of value in assessing all Article V proposals.

Thank you for your service to your state and our nation.

Michael P. Farris

Executive Summary

Article V of the United States Constitution prescribes methods of amending the instrument. It tells us that all amendments must be ratified by legislatures or conventions in three-fourths of the states—but that before they can be ratified, they must be duly proposed.

The Constitution provides for two modes of proposal: by Congress and by a "Convention for proposing Amendments." A convention must be called by Congress on "application" of two-thirds of the states.

Because a convention for proposing amendments has never been held, some commentators believe little is known about it or about the procedures leading to it. As a matter of fact, quite the contrary is true: we know a great deal about those subjects.

Our sources include convention practice both before and after the Constitution was adopted; numerous observations by leading Founders; hundreds of applications from state legislatures; two centuries of public discussion, resolutions, and legislation; and, finally, a string of court cases stretching from 1798 into the twenty-first century in which the judiciary has elucidated the principles and rules of Article V with satisfying clarity and consistency.

This Compendium is designed for lawyers involved in activities preparatory to the calling of a convention for proposing amendments. It contains textual exegesis, relevant legal authorities, and sample forms.

This book is divided into five Parts. Part I, which discusses bibliography, lists the major writings on Article V and classifies them into three groups or "waves," according to chronology and accuracy. It is designed to alert the reader *at the outset* as to which writings are generally reliable and which suffer from misunderstandings that were almost universal during the 1960s and 1970s.

Part II is a Table of Cases. Part III contains exegesis on the procedure, including extensive footnoting, in the manner of a legal treatise. Part IV is a collection of forms, and Part V reproduces some of the most recent scholarly treatments of the subject. I hope you find this material interesting and useful.

Robert G. Natelson

Table of Contents

Part I. Sources, "Science Fiction," and Article V Bibliography

§ 1.1. Sources

Many sources offer insight into the meaning of Article V. One's first inquiry is, of course, to the constitutional text. However, as is true on other questions of

constitutional law, the meaning of the text of Article V is not always self-evident. In such instances, the courts typically rely on Founding-Era or other historical evidence of meaning.[1)]

Historical evidence of the meaning of Article V is largely of the same kind used for other parts of the Constitution. It includes usages in eighteenth century dictionaries and other contemporaneous sources, the records left by the Constitution's drafters, the ratification debates in the state conventions and in public venues (such as newspapers), material from the first session of the First Congress, including the first two state applications for an amendments convention, and eighteenth century law and legal documents. In the case of Article V, another important source of information consists of extant records from approximately thirty conventions held among the colonies and states in the century before the Constitution was written.[2)]

Additional light is shed by a mass of material illuminating how the Article V convention—then usually called a “convention of the states”—was understood in the century *subsequent* to the Founding—that is, from the 1790s through the end of the nineteenth century. Three Supreme Court decisions cast light on the procedure.[3)] State legislatures issued applications and also issued resolutions responding to other states' applications.

During the century after the Founding, there were several further multi-state conventions.[4)] Regional meetings were held in Hartford, Connecticut in 1814 and in Nashville, Tennessee in 1850. The states held a general convention in Washington, D.C., in 1861 in an effort to ward off the Civil War. These conclaves did not qualify as Article V conventions for proposing amendments, but they were close relatives. Indeed, the Washington gathering was a fraternal twin: although called by Virginia rather than by Congress to propose an amendment to Congress rather than to the states, in every other particular it mimicked an Article V convention. It followed the long-standard convention rules, and produced a proposed amendment. Although Congress remained deadlocked, the Washington gathering itself was a successful dress rehearsal for an amendments convention under Article V.

The twentieth century witnessed at least one multi-state convention, a seven-state “commission” held primarily at Santa Fe, New Mexico in 1922 to negotiate the Colorado River Compact. In addition, much of the twentieth century was marked by intense Article V activity. State legislatures produced scores of applications.[5)] Twenty-nine were issued for a convention to propose an amendment providing for direct election of Senators.[6)] Congress rendered further proceedings unnecessary by proposing the Seventeenth Amendment in 1912, which three-fourths of the states had ratified by the following year. During the 1940s, five states applied for a convention for proposing an amendment limiting the President to two terms.[7)] Again, Congress responded by proposing the Twenty-Second Amendment in 1947.

Congress proved less responsive to later application campaigns, particularly those to limit its own power or the power of federal judges. For example, Congress stonewalled when, during the 1960s, thirty-three states applied for a convention to partially reverse Supreme Court decisions requiring all state legislative chambers to be apportioned solely by population.[8)] Congress was similarly unmoved when state legislatures repeatedly applied for an

amendment requiring a balanced federal budget.[9)]

The twentieth century also witnessed the first-ever ratification of a constitutional amendment (the Twenty-First) by state ratifying conventions rather than by state legislatures. Congress opted for that “mode of ratification” despite some forebodings of doom; as matters turned out, the procedure worked reasonably well.

Finally, there were nearly forty reported court cases construing Article V during the twentieth century, including some key decisions from the U.S. Supreme Court.[10)] Clearly, there is no lack for material for guidance on the procedures in Article V.

§ 1.2. "Science Fiction"

If an American Founder such as John Dickinson or Alexander Hamilton were to visit us today, he no doubt would be astonished at how little most Americans—even those working in constitutional law—know about the convention procedure of Article V. To the Founders, interstate convention protocols were familiar and well-understood, and they fully expected the application and convention process to be employed.

The loss of knowledge appears to have occurred sometime after the early twentieth century. Worse, that knowledge was replaced with a great deal of *misinformation* promulgated by authors, most of whom opposed the idea of states meeting together to propose amendments. Their statements and writings were characterized by little investigation and much speculation.[11)]

Of course, speculation in the absence of facts is always risky, and sometimes produces comical results. Before scientists were able to penetrate the clouds covering the planet Venus, science fiction authors posited a land of jungle and swamps—a vision obviously unconnected to the truth.[12)] In like manner, twentieth century writers portrayed an amendments convention as a congressionally-sponsored mob of placard-wavers. One writer has compared it to the Republican and Democratic National Conventions in which hordes of passionate delegates, untethered to any agenda, become flushed with the power to remake the country.[13)] This “science fiction” version of Article V largely dominated the writings of the 1960s and 1970s. In the last few years, however, we have been able to recapture the traditional knowledge.

§ 1.3. The Three Waves of Modern Article V Bibliography

We can trace our recovery of Article V information by classifying modern bibliography on the subject into three phases or “waves”:

- *First Wave* publications date mostly from the 1960s and 1970s. These were authored predominantly by liberal academics who opposed conservative efforts to trigger a convention and who therefore emphasized uncertainties.
- *Second Wave* publications were issued between 1979 and 2000. The Second Wave was a transitional body of work relying on additional sources.
- *Third Wave* publications are those written since 2010. In the aggregate,

they fully reconstruct convention procedures and law from all the historical and legal sources.

First Wave publications tended to be agenda-driven. Even when they were not, they were sparse on research: First Wave authors seldom ventured beyond snippets of *The Federalist* and a few excerpts from the proceedings of the 1787 Constitutional Convention. Virtually all those authors seemed unaware of any precedents other than the 1787 Constitutional Convention.

In the absence of reliable facts, First Wave authors created a largely speculative version of Article V. Without models other than the 1787 gathering, they assumed that a convention for proposing amendments would be a "constitutional convention." They further assumed that the congressional power to "call" the convention gave Congress wide authority over the process and that the courts would have little role. Some envisioned a mob scene of hundreds or thousands of delegates popularly elected, without state legislative involvement. Most (but not all) First Wave authors claimed that this "constitutional convention" could not be limited to a single subject, and could venture anywhere it chose.

First Wave authors based their speculations on some interesting techniques. For example, some asserted that because some Founders had referred to an amendments convention as a "general convention," they must have meant that the gathering was necessarily unlimited as to subject. In fact, however, the Founders' term "general" refers to the number of states that participate in the assembly, not the scope of the agenda.[14)]

Dissatisfaction with such raw speculation encouraged a new breed of writers to revisit the issue. The Second Wave began in 1979 when John Harmon, a Justice Department lawyer, produced a legal opinion for the Department that, unlike First Wave publications, considered a range of materials drawn from the debates over the Constitution's ratification.[15)] The most elaborate Second Wave publication was Russell Caplan's book, *Constitutional Brinksmanship*, released in 1988 by Oxford University Press. Caplan utilized ratification materials and court opinions in his study, and even made brief reference to earlier interstate conventions.

Access to this wider range of sources led most Second Wave authors to understand that an Article V gathering could be limited as to subject. But their unfamiliarity with other aspects of the record induced them to persevere in other First Wave errors. For example, several continued to refer to an Article V conclave as a "constitutional convention," and some assumed that Congress had authority to prescribe the method of delegate selection. Some even committed new mistakes.[16)]

The Third Wave of publications began around 2010. Third Wave findings enlist not only the records of the Constitution's drafting and ratification, but also the pre-existing convention tradition and contemporaneous law. These materials are supplemented by case law and actual practice over the two centuries since the Founding. As a result, Third Wave writings have relegated earlier commentaries to merely historical interest.

Following are the principal conclusions of Third Wave scholarship:

- A convention for proposing amendments is a diplomatic meeting among delegations representing the state legislatures—truly a convention of states.
- It is a limited purpose gathering, not a “constitutional convention.”
- It was modeled after a long tradition of limited-purpose multi-state assemblies that followed established protocols and procedures.
- Not only can the convention be limited as to subject, but Founders expected all or most amendments conventions to be so limited.
- Congressional power over the convention process is limited to counting and classifying applications and setting a time and place for meeting.
- Article V questions can, and often have been, adjudicated by the courts.

§ 1.4. Major Publications

Third Wave Publications (after 2010)

Nick Dranias, States Can Fix the National Debt: Reforming Washington with the Compact for America Balanced Budget Amendment (Goldwater Inst., 2013)

———, *Use it or Lose it: Why States Should Not Hesitate to Wield their Article V Powers* (2012), Library of Law & Liberty (Jan. 2, 2012), http://www.libertylawsite.org/liberty-forum/use-it-or-lose-it-why-states-should-not-hesitate-to-wield-their-article-v-powers/

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

———, *James Madison and the Constitution's “Convention for Proposing Amendments*,” *in* Union and States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years after Sumter (Neil H. Cogan ed., 2013)

———, The ALEC Article V Handbook (Am. Legislative Exch. Council, 2d ed. 2013), *available at* http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf

———, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693 (2011)

———, Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers (Independence Inst., 2012) (updated and amended version of an earlier paper published by the Goldwater Institute)

———, Amending The Constitution by Convention: Lessons for Today from the Constitution's First Century (Independence Inst., 2011) (updated and amended version of an earlier paper published by the Goldwater Institute)

———, Amending the Constitution by Convention: A More Complete View of the Founders' Plan (Independence Inst., 2010) (updated and amended version of an earlier paper published by the Goldwater Institute)

Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012)

Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765 (2011)

———, *A Brief Reply to Professor Penrose*, 78 Tenn. L. Rev. 807 (2011)

Second Wave Publications (1979-2000) (superseded, but still often useful)

Russell L. Caplan, Constitutional Brinkmanship: Amending the Constitution by National Convention (1988) (the leading Second Wave publication and an important starting point for Third Wave scholarship)

Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 Harv. L. Rev. 386 (1983-1984) (correcting the view that the courts have no role in Article V)

Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 State of Am. Federalism 113 (1980)

John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 Op. O.L.C. 390 (1979) (an unusually thorough piece of work for its time, and the transition to Second Wave writings)

Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996)

Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677 (1993)

Grover Joseph Rees III, *The Amendment Process and Limited Constitutional Conventions*, 2 Benchmark 66 (1986)

Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 Marq. L. Rev. 227 (1996-1997)

U.S. Dept. of Justice, Office of Legal Policy, Limited Constitutional Conventions under Article V of the United States Constitution (1987)

Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 Hamline L. Rev. 1 (1990-1991)

First Wave Publications (generally before 1980) (no longer useful)

Am. Bar Ass'n, Amendment of the Constitution by the Convention Method under Article V (1973) (the best researched of the First Wave publications)

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

———, *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972)

Arthur E. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 Notre Dame L. Rev. 659 (1964)

———, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949 (1967-1968)

Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call a Constitutional Convention?*, 22 Ariz. L. Rev. 1011 (1980)

Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention,* 88 Yale L.J. 1623 (1978-1979)

Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of*

Amending the Constitution, 66 Mich. L. Rev. 875 (1967)

Bill Gaugush, *Principles Governing the Interpretation and Exercise of Article V Powers*, 35 Western Pol. Q. 212 (1982) (despite its date, this is essentially a First Wave publication)

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

Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 Mich. L. Rev. 903 (1967-1968)

Philip L. Martin, *The Application Clause of Article V*, 85 Pol. Sci. Q. 616 (1970)

John T. Noonan, Jr., *The Convention Method of Constitutional Amendment: Its Meaning, Usefulness, and Wisdom*, 10 Pac. L.J. 641 (1979)

Note, *Proposing Amendments to the United States Constitution by Convention*, 70 Harv. L. Rev. 1067 (1957)

Note, *Proposed Legislation on the Convention Method of Amending the United States*, 85 Harv. L. Rev. 1612 (1972)

William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 Geo. L.J. 1 (1963-1964)

Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 Pac. L.J. 627 (1979) (a list of questions about conventions, but without research to resolve them)

William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 Duke L.J. 1295 (an unusual First Wave article in that it concludes that conventions may be limited)

Part II. Table of Cases

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Hawke v. Smith (“Hawke I”), 253 U.S. 221 (1920)

Hawke v. Smith (“Hawke II”), 253 U.S. 231 (1920)

Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)

Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *judgment vacated as moot sub nom*. Carmen v. Idaho, 459 U.S. 809 (1982)

In re Initiative Petition 364, 930 P.2d 186 (Okla. 1996)

Kimble v. Swackhamer, 439 U.S. 1385 (1978)

League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997)

Leser v. Garnett, 258 U.S. 130 (1922)

Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999)

Morrissey v. State, 951 P.2d 911 (Colo. 1998)

Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977)

Opinion of the Justices, 172 S.E. 474 (N.C. 1933)

Opinion of the Justices, 673 A.2d 693 (Me. 1996)

Opinion of the Justices, 167 A. 176 (Me. 1933)

Opinion of the Justices, 107 A. 673 (Me. 1919)

Opinion of the Justices, 148 So. 107 (Ala. 1933)

Powell v. McCormick, 395 U.S. 486 (1969)

Prior v. Norland, 188 P. 727 (Colo. 1920)

Ray v. Blair, 343 U.S. 214 (1952)

Rhode Island v. Palmer (“National Prohibition Cases”), 253 U.S. 350 (1920)

Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997)

Smiley v. Holm, 285 U.S. 355 (1932)

Smith v. Union Bank, 30 U.S. 518 (1831)

State *ex rel.* Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933)

State *ex rel.* Donnelly v. Myers, 186 N.E. 918 (1933)

State *ex rel.* Erkenbrecher v. Cox, 257 F. 334 (D.C. Ohio 1919)

State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984)

Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973)

United States v. Chambers, 291 U.S. 217 (1934)

United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954)

United States v. Sprague, 282 U.S. 716 (1931)

United States v. Thibault, 47 F.2d 169 (2d Cir. 1931)

United States *ex rel.* Widenmann v. Colby, 265 F. 998 (D.C. Cir. 1920), *aff'd*, 253 U.S. 350 (1921)

White v. Hart, 80 U.S. 646 (1871)

Part III. Explanatory Text with Footnotes

§ 3.1. Historical Background

[17)]

In seventeenth and eighteenth century Anglo-American practice, a “convention” was an assembly, other than a legislature, convened to address ad hoc political problems.[18)] In England, conventions re-enthroned the Stuart royal line in 1660[19)] and granted the throne to William and Mary in 1689.[20)] The latter convention promulgated the English Declaration of Rights.

Americans also began to meet in convention during the late seventeenth century. Many conventions were bodies that convened only within a particular colony or state. Others were diplomatic assemblies of governments, which sometimes were called “congresses” as well as “conventions.” (The two terms were interchangeable.) We have records of about twenty conventions among colonies before Independence in 1776 and of eleven additional ones among states through 1787.[21)] Among the latter were meetings in Springfield, Massachusetts and York Town, Pennsylvania in 1777, in New Haven, Connecticut in 1778, in Philadelphia in 1780, in Annapolis in 1786, and of course the Constitutional Convention in 1787.

Multi-colony and multi-state conventions developed standard protocols.[22)] The procedure would begin when a colony or state (or, less commonly, the Continental Congress or a prior convention) issued an invitation to other governments to meet at a prescribed place and time to discuss one or more subjects. The subjects might include Indian affairs, common defense, war supply, inflation, trade, or other topics. This invitation was the *call* or sometimes the *application*.[23)] The latter term also could refer to a request to Congress to issue a call.[24)] The proposed meeting might be *partial*—that is, limited to the governments in a certain region of the country—or *general*: including all or most of the colonies or states. The procedures for partial and general conventions were identical.

Because these were meetings among governments, the procedures were based on those prevailing in international law for meetings among sovereigns.[25)] Each colony or state sent a *committee* (delegation) of *commissioners* (delegates) empowered by documents called *commissions*. The call and the commissions defined the outer scope of the commissioners' powers. At the conclave each government received one vote, irrespective of the size of its committee. The convention elected its own officers and established its own rules.

Many of the Constitution's Framers and leading ratifiers had served as commissioners to multi-government conventions. Those who had not were familiar with the process from their experience in government service. Article V's “Convention for proposing Amendments” was modeled after these meetings.[26)] Indeed, the phrase “convention of the states”[27)] and similar expressions[28)] remained the usual way of referring to an Article V amendments convention from the time the Constitution was ratified and for many decades thereafter.

During the century following the Constitution's ratification, states continued to meet in conventions. Thus, the 1814 Hartford Convention was a “partial” gathering of delegates from the New England states designed to coordinate the response among those states to the unpopular War of 1812. It endorsed a series of amendments to the Constitution.[29)] Because, however, it met outside the sanction of Article V it could not issue ratifiable proposals. Another regional convention was the gathering of nine states at Nashville, Tennessee in 1850. It sought to coordinate response among Southern States to federal policy.[30)] Finally, at least one multi-state convention met during the twentieth century. This was the eight-state “Colorado River Commission,” a gathering that assembled, primarily in Santa Fe, New Mexico, to negotiate the Colorado River Compact.

The 1861 Washington Conference Convention—the largest multi-state convention ever held—was “general” in nature, with most of the non-seceding states in attendance. Its purpose was to propose a constitutional amendment to stave off the Civil War.[31)]) Because it, too, met outside Article V, it could not issue its proposal to the states directly, so it sought action from Congress—which was not forthcoming.

What is notable is that all four followed the convention protocols established during the seventeenth and eighteenth centuries.[32)] And the Washington, D.C., meeting acted as an Article V Convention in almost every particular.

§ 3.2. Types of Conventions

For constitutional purposes, one can classify conventions sponsored by American governments in several different ways: in-state and multi-state; conventions to propose, conventions to ratify, and conventions with power to do both; and those that are plenipotentiary and those limited in their powers.

§ 3.2.1. In-State and Multi-State Conventions

An *in-state convention* is a meeting of delegates from a single state. An example is a state constitutional convention or a state ratifying convention of the kind that approved the Twenty-First Amendment. In such gatherings, delegates usually are popularly elected by, and represent, the people—although during the Founding Era there were some in-state conventions composed of delegations from towns or other local governments. The Constitution authorizes two kinds of in-state conventions: those authorized to ratify the Constitution and those authorized to ratify amendments.[33)]

By contrast, a *multi-state*, *interstate*, *or federal convention* is a gathering of representatives of the states or state legislatures.

§ 3.2.2. Proposing and Ratifying Conventions

A *proposing convention* is charged only with proposing solutions to prescribed problems. As its name suggests, the convention for proposing amendments is of this kind. Other illustrations include the 1787 Constitutional Convention and the 1861 Washington Conference Convention.

A *ratifying convention* is charged only with ratifying or rejecting specific proposals. Examples of ratifying conventions are the in-state assemblies that

approved the Constitution[34] and those that approved the Twenty-First Amendment (repealing Prohibition).[35]

Some conventions possess power to propose and approve.[36] During the Revolutionary War, some in-state conventions enjoyed both proposing and ratifying power, particularly if the state's legislature was not functioning. By contrast, most multi-state conventions were authorized to propose only. However, the 1780 Philadelphia Price Convention was empowered to both propose and decide,[37] and an early draft of the Constitution would have granted an amendments convention authority to both propose and decide. Obviously, the Framers ultimately rejected that approach.[38]

§ 3.2.3. Plenipotentiary and Limited Conventions

A *plenipotentiary* convention is one with an unlimited mandate, or at least a mandate that is very broad. The term comes from international diplomatic practice. During the Founding Era, the in-state conventions that managed their governments in absence of the legislature enjoyed plenipotentiary authority. However, the Constitution does not authorize any plenipotentiary conventions.

A *limited* convention is restricted to one or more topics. The most extreme example of a limited convention is a ratifying convention, whose only power is to approve or reject a preset proposal.

Multi-state proposing conventions invariably have been authorized to deliberate, debate, draft, and recommend solutions to prescribed problems. Sometimes the agenda handed to them has been very broad, as in the case of the First Continental Congress (1774). Sometimes the agenda has been very narrow, as in the case of the 1781 Providence Convention, which was confined to New England military supply issues for a single year. But in no case has a proposal convention been told merely to approve or disapprove language prescribed in advance. Such a procedure would inhibit the deliberative purpose of a proposal convention, and would ill-suit the dignity of an assembly of semi-sovereigns.

§ 3.2.4. Categorizing the Constitutional Convention and the Convention for Proposing Amendments

The Constitutional Convention

There is an oft-repeated claim that Congress called the 1787 Constitutional Convention and restricted it to amending the Articles, but that claim is simply erroneous.[39]

What actually happened was that the 1786 Annapolis Convention issued a recommendation to its participating state governments (a resolution analogous to the application referred to in Article V). Pursuant to that resolution, two of the participating states, Virginia and New Jersey, called another federal convention for May of 1787. Neither the Annapolis resolution, nor the state calls, nor the convention itself occurred pursuant to the Articles of Confederation. They were exercises of the states' reserved powers. Nor was the convention limited to proposing amendments to the Articles. Instead, the call and the commissions issued by ten states empowered the convention to recommend any and all expedient changes to the “foederal constitution”[40]—a

phrase that in the language of the time referred to the entire political system.

The 1787 gathering in Philadelphia was obviously a *multi-state* or *federal* convention rather than one limited to a single state. Just as obviously, it was a proposing rather than a ratifying body. Although technically limited, the breadth of its charge caused it to lean toward the *plenipotentiary* side.

The Convention for Proposing Amendments

This also is a *multi-state* gathering or "convention of states."[41)] Unlike the Constitutional Convention, which was called by the states in their sovereign capacity, a convention for proposing amendments is called pursuant to the Constitution. It draws its authority from the Constitution, to the extent permitted by the applications and calls. Its authority is therefore limited to the scope of those documents, and is necessarily narrower than the authority of a constitutional convention. On the other hand, the fact that it is a *proposing* body suggests that its discretion cannot be confined to approving or rejecting prescribed language, as in the case of ratifying convention.

§ 3.3. Why the Founders Adopted the Proposal Convention in Article V.

An early draft of the Constitution permitted amendments to be proposed and adopted only by interstate convention.[42)] Then the Framers added provisions allowing Congress to propose amendments and requiring state ratification.[43)] Congress received the power to propose because the Framers believed that Congress's position would enable it readily to see defects in the system.

However, some delegates—notably George Mason of Virginia—pointed out that Congress might become abusive or exceed its powers.[44)] It might therefore refuse to adopt a necessary or desirable amendment, particularly one designed to curb its own authority. Accordingly, the Framers added the convention for proposing amendments as a vehicle for the states to present corrective amendments for ratification while bypassing Congress.[45)]

The purpose of the convention as a "congressional bypass" was much discussed during the debates over the ratification of the Constitution. Illustrative was the comment of Samuel Rose, a New York state legislator who supported the Constitution at his state's ratifying convention:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of government, if upon trial it should be found that they had given too much.[46)]

James Madison stated it more succinctly in *The Federalist No. 43*: The Constitution "equally enables the General, and the State Governments, to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other."

§ 3.4. Analyzing the Text of Article V

Article V of the Constitution can be analyzed in four distinct parts, designated below by different type faces:

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 Convention 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.

The underlined language is the procedure by which amendments are formally proposed. Formal proposal is a condition precedent to the remaining steps, so it occurs first in the amendment process.

The **bolded** language, although placed third, occurs second in the amendment process, when Congress designates a "Mode of Ratification" for formal proposals. Obviously, Congress has no authority to designate a mode of ratification unless the potential amendment has been properly proposed.

The *italicized* language outlines the ratification process, which occurs only after proposal and congressional selection of the mode of ratification.

The final proviso, set forth in ordinary roman type, prohibits certain kinds of amendments. It is a reminder that the Article V procedure is carried out subject to what Madison called "the forms of the Constitution."[47)] One cannot use Article V to obtain unconstitutional results. For example, neither Congress nor a convention for proposing amendments has power to alter the ratification procedure, as alarmists sometimes suggest. Any effort by the convention to do would be ignored by other agencies of government, including the courts.

Now, let us focus on the proposal and ratification portions of 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 Convention in three fourths thereof* . . . .

Observe that Article V provides two methods of proposal and two methods of ratification. Both methods of ratification have been employed: state conventions ratified the Twenty-First Amendment and state legislatures ratified all the rest. The congressional method of proposal has been used to completion, but the state application and convention method has not. Let us focus on the language that governs the latter: "[O]n the Application of the Legislatures of two-thirds of the several States, [Congress] shall call a Convention for proposing Amendments . . . ."

The following is clear from the language:

- If two-thirds of the states make “Application” to Congress for a convention,
- Congress “shall” (must) “call” one, and
- The power granted to the convention is “proposing Amendments.”

The text has taken us far, but has left some questions. They include:

- When the state legislatures act, do they act pursuant to powers delegated by Article V, or by virtue of the powers reserved by the Tenth Amendment?
- What is a state “Legislature”? Does the term refer to the entire legislative body of the state, including any participation by the governor and the people's initiative and referendum power? Or does it refer only to a state's representative assembly?
- What is an application?
- What is a call?
- What, in this context, is a “convention” and how is it constituted?

Fortunately, the answers to all of those questions are recoverable, and are provided in the next section.

§ 3.5. Applicable Legal Principles: Interpretation, Incidental Powers, and Fiduciary Obligations

Contrary to some suggestions,[48)] Article V questions are freely justiciable.[49)] Indeed, “the judiciary . . . has . . . dealt with virtually all the significant portions of that article,”[50)] and the courts apply similar rules of interpretation to Article V as to other parts of the Constitution. If there is a difference, it is that the courts' interpretive approach to Article V cases is more traditional than the sometimes freewheeling approach the Supreme Court adopts when construing the Commerce Power or the Due Process Clauses.

Accordingly, the judiciary holds that when Article V's language is indisputably clear—such as the grant of discretion to Congress to select a mode of ratification[51)]—the clear language must be enforced.[52)] But when the meaning is less obvious, courts consult Founding-Era evidence of meaning and, on occasion, evidence of subsequent usage.[53)]

The Supreme Court observed in one Article V case that “with the Constitution or other written instrument, what is reasonably implied is as much a part of it as what is expressed.”[54)] Accordingly, just as the Constitution's other express grants carry with them incidental powers,[55)] so do the grants in Article V.[56)] In other words, a grant of power to an assembly operating under Article V carries with it subordinate powers that, at the time the Constitution was adopted, customarily accompanied such a grant, or are otherwise reasonably necessary to carrying out the grant.[57)]

The Article V process includes some agency relationships. Congress serves as an agent for the states in counting applications and calling the convention. Commissioners at the convention serve as agents for their respective state legislatures. Traditional convention practice tells us that normal rules of

fiduciary conduct apply in these relationships.[58] These include (1) an obligation by Congress to treat all of its principals (the state legislatures) impartially (2) obligations by commissioners to remain with the scope of their powers and otherwise obey instructions, and (3) the power of state legislatures to recall commissioners.

§ 3.6. Assemblies Acting under Article V Do So Solely by Virtue of Powers Granted by Article V.

Like some other parts of the Constitution, Article V grants a list of enumerated powers. The grants are made to designated legislatures and conventions.[59] A legislature or convention exercising authority under Article V may be called an *Article V assembly.*

The grants under Article V, together with their incidental powers, are the sole source of authority for amending the Constitution.[60] Thus, Congress holds no amending authority by virtue of other grants in the Constitution. The state legislatures hold none by virtue of powers reserved under the Tenth Amendment.[61] The law governing the amendment process is federal, not state, law.[62]

Assemblies acting under Article V are not departments of the federal government, but they do exercise a "federal function."[63] In that capacity, Congress and state legislatures act as proposing or assenting bodies on behalf of the people rather than as legislatures.[64]

The Article V grants of power are as follows:[65]

- Authority to two-thirds of each house of Congress to "propose" amendments.
- Authority to two-thirds of the state legislatures power to make "Application" for a convention for proposing amendments.
- Authority to Congress power to "call" that convention.
- Authority to the convention "for proposing" amendments.
- Authority to Congress to decide whether ratification shall be by state legislatures or state conventions.
- If Congress selects the former method, authority to state legislatures to ratify or reject.
- If Congress selects the latter method, implied authority and a mandate to each state legislature to call a ratifying convention.
- Authority to three-fourths of those conventions to ratify.
- Authority incidental to the foregoing, such as the authority of all Article V assemblies to establish their own rules,[66] and the power of state legislatures to define the scope of their applications, to determine the mode for selecting commissioners (delegates), and to fix how state ratifying conventions are selected.

Additional information on both principal and incidental powers is found in later sections of this part.[67]

§ 3.7. Under Article V, a State "Legislature" Means the State's Representative Assembly, without Participation by the Governor or by Any Reserved Power of Initiative or Referendum.

Article V grants authority to assemblies as such, not to branches of the federal or state governments. A state “Legislature,” as Article V uses the term means the state's law-making representative body, not the entire legislative power of the states.[68)] Thus, the President need not sign, and may not veto, congressional amendment proposals.[69)] Similarly, state legislatures have authority to apply and ratify without gubernatorial intervention.[70)] On the other hand, a gubernatorial signature should not invalidate the application.

Other methods, including initiative and referendum, may not displace the methods outlined in Article V, either directly or indirectly.[71)] Thus, a referendum may not ratify in lieu of the state legislature[72)] or state convention,[73)]) nor may initiatives, referenda, or state constitutional or legal provisions be employed to coerce the state legislature or other Article V assemblies.[74)] An Article V assembly is a deliberative assembly, both at the ratification stage[75)] and at the proposal stage,[76)] and, in the words of Justice Brandeis, its function “transcends any limitations sought to be imposed by the people of a state.”[77)] A court will not countenance “an unconstitutional attempt effectively to remove the Article V power from legislators and place it in the hands of the people, thus substituting popular will for the will of the independent 'deliberative assemblage' . . . envisioned by the Framers of the Constitution.”[78)] However, the courts do permit advisory referenda on Article V questions.[79)]

Moreover, in the one case in which state conventions ratified a constitutional amendment, those conventions—although not actually coerced—acted less as deliberative bodies than as registers of the popular will.[80)] As ratification bodies, however, they were limited to a “yes” or “no” vote; a convention for proposing amendments is not.

Article V assemblies enjoy powers incidental to those expressly granted by Article V.[81)] The rule barring coercion of an Article V assembly in the exercise of its express powers should also apply to an incidental power, such as establishing its own rules or electing its own officers. Those matters may not, therefore, be dictated by a state's constitution or by its law or by legislative procedures adopted for other circumstances. A court may, however, find that an Article V assembly has impliedly adopted such a pre-existing rule.[82)]

§ 3.8. The State Legislatures' Applications

§ 3.8.1. Background

In Founding-Era practice, a state legislature, a prior convention, or Congress could invite states to send commissioners to a federal convention. The invitation usually was labeled the *call*, but sometimes an *application.*[83)]

The Framers standardized both vocabulary and usage. Article V denotes the

actual invitation as the call, and provides that it may be issued only by Congress. Article V denotes the petition to Congress as an application and provides that it may be issued only by a state legislature. However, when two-thirds of the states have applied on the same topic, Congress must call the convention to deal with that topic; Congress has no discretion in that matter.[84)]

§ 3.8.2. What Is an Application and How Is It Adopted?

An application is a resolution of a state legislature formally requesting Congress to call a convention for proposing one or more amendments.[85)] The resolution may include statements of purpose (preambles or “whereas” clauses), but need not do so.

Article V grants power to make application to the state legislatures alone.[86)] Neither the state constitution, state laws, nor normal legislative procedures are binding on the legislature when it acts under Article V.[87)] If, however, the legislature does follow those procedures, a court may rule that the legislature has assented impliedly to them.[88)]

Generally, bicameral state legislatures have adopted applications by individual chambers successively voting for the same resolution. However, the legislature may decide to vote on applications in a joint session. Similarly, the legislature may require a supermajority vote to adopt an application. In the absence of a decision to do so, action is by a majority of those present and voting, assuming a quorum.[89)]

Applications may be adopted only pursuant to the grant of power in Article V. That grant is to the state legislature as an Article V assembly, not to the state itself.[86)] There is no formal role in the process for either the governor or for the people acting through initiative or referendum.[90)] Purely advisory initiatives and referenda are permitted.[87)]

Although it is wise to provide for certain formalities after adoption, such as transmission to other states, no formalities are required for the application to be valid other than that mentioned in the Constitution[91)]—i.e., transmission to Congress. Generally, official state certification that an application has been passed precludes congressional and judicial investigation into the appropriateness of the process adopted.[92)]

§ 3.8.3. State Legislatures May Limit Their Applications to a Single Subject.

The normal practice of political bodies suggests power to define the scope of their resolutions. There should be, therefore, a presumption that a state legislature may apply for a convention to consider only certain topics rather than be required to apply only for an unlimited convention.[93)] Nevertheless, during the 1960s and 1970s various legal writers (predominantly those opposing a convention) argued that all conventions must be unlimited. Some even contended that limited applications were void by reason of their limits.

These contentions were made on very slender evidence, and subsequent research has discredited them.[94)] Founding-Era practice, upon which the Constitution's amendment convention was based, was to limit in advance the

topic and scope of multi-government conventions.[95] Discussions from the Founding Era reveal a universal assumption that applications would be made to promote amendments addressing prescribed problems.[96] The first application ever issued, that of Virginia in 1788,[97] was arguably limited as to subject, and hundreds of later applications have been limited as well.[98] Indeed, the central purpose of the state application and convention procedure—to grant state legislatures parity with Congress in the proposal process—would be largely defeated unless those legislatures had the same power Congress does to define an amendment's scope in advance.

It also follows from historical practice, not to mention common sense, that Congress should aggregate together towards the two-thirds threshold only those applications that address the same general topic.[99]

The limits on the ability of the convention to "run away"—that is, exceed the scope of the applications and call—is not within the present scope of this work. Suffice to say that no prior American inter-governmental conventions have run away, and contrary to some claims, this is also true of the 1787 Constitutional Convention.[100] There are numerous and redundant legal checks on an Article V convention exceeding its authority.[101]

§ 3.8.4. Application Format, Conditions, and Subject Matter

An application should be addressed to Congress. It should assert specifically and unequivocally that it is an application to Congress for a convention pursuant to Article V. The resolution should not merely request that Congress propose a particular amendment, nor should it merely request that Congress call a convention. An example of effective language is as follows:

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 [*here state general topic for convention*].

The application form proposed by Citizens for Self-Governance is set forth in the Forms section of this book.[102] This form includes a preamble in a set of "whereas" clauses.

Conditions on applications may or may not be valid, depending on the nature of the condition.[103] However, they are not recommended. Besides the fact that a court may declare a condition invalid, there is a risk that conflicting conditions among state applications otherwise covering the same subject may prevent Congress from aggregating them toward the two-thirds threshold. There is also the risk that conditions may be seen as coercing Congress or the convention in a manner not permitted by Article V.

As noted above, single subject applications are almost certainly valid and enforceable. The same cannot be said for applications that purport to dictate to the convention specific amendment wording. The courts and Congress may, with some justification, see them as invalid because they interfere with the normal discretion afforded to a proposal convention. To the extent that specific wording varies among applications, it also will impede congressional aggregation toward the two-thirds threshold. Although some scholars believe applications mandating specific wording are constitutionally valid, legal issues

and potential aggregation problems place them in doubt.

§ 3.8.5. State Legislatures May Rescind Applications.

Some have argued that states cannot rescind applications, and that once adopted an application continues in effect forever, unless a convention is called. In part, this is based on judicial deference to congressional suggestions that a *ratification* cannot be rescinded.[104)] However, the position that applications cannot be rescinded is contrary to the principles of agency the Founders incorporated into the process. An application is a deputation from the state legislature to Congress to call a convention. Just as one may withdraw authority from an agent before the interest of a third party vests, so may the state legislature withdraw authority from Congress before the two-thirds threshold is reached.[105)]

This theoretical conclusion is consistent with traditional multi-government convention practice. The power of a state to rescind its resolutions, offers, and ratifications was well-established by the time Article V was adopted, ending only when the culmination of a joint process was reached. The historical record contains specific examples of rescission of convention applications and calls.[106)]

§ 3.8.6. Unrescinded Applications Do Not Grow "Stale" with the Passage of Time.

[107)]

Some have argued that applications automatically become “stale” after an unspecified period of time, and no longer count toward a two-thirds majority. However, there is no evidence from the Founding Era or from other American practice implying that applications become stale automatically, or that Congress can declare them to be so. On the contrary, during the constitutional debates, participants frequently noted with approval the Constitution's general lack of time requirements in the amendment process. Moreover, the ministerial nature of the congressional duty to call a convention and Congress's role as the agent for those legislatures in this process, suggests the opposite. Time limits are for principals, not agents, to impose. Therefore, if a state legislature believes its application to be stale, that legislature may rescind it.

This argument that applications become stale traditionally has been buttressed by a 1921 Supreme Court case, *Dillon v. Gloss*,[108)] which suggested that *ratifications*, to be valid, must be issued within a reasonable time of each other. Of course a rule pertaining to ratifications does not necessarily pertain to applications, and this was certainly true of the rationale behind the *Dillon* court's statement.[109)] Moreover, subsequent events have removed the prop for that statement, even as to ratifications: The *Dillon* language was predicated upon the court's doubt that proposed amendments could survive a very long ratification period.[110)] That doubt was dispelled, however, by the universally-recognized adoption of the Twenty-Seventh Amendment based on ratifications stretching over two centuries. In any event, the courts have edged away from the “staleness” rationale of *Dillon.*[111)]

An additional factor against the “staleness” contention is that there is no

appropriate umpire—other than the issuing state legislature—to judge the issue. It is not resolvable by the courts for lack "judicially manageable standards,"[112)] and for Congress to judge would be to invite abuse by interjecting that body into a process designed to bypass it. Thus, in the final analysis, the only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or ratification) to be outdated, the legislature may rescind it, as many have done.

§ 3.9. The Congressional Role in Calling the Convention

§ 3.9.1. The Meaning of "Call"

Article V provides that "The Congress . . . on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments. . . ." This Section 3.9 and its subsections discuss what it means for Congress to "call" a convention, the content of a call, the powers Congress enjoys as incidental to calling, and when Congress must issue a call.

The courts tell us that the terms of Article V are defined by historical usage.[113)] That usage enables us to determine what it means for Congress to "call" a convention of the states.[114)]

Between 1689 and Independence in 1776, American colonies met in convention twenty times. From 1776 through 1787, the newly independent states met in convention eleven times, including general conventions[115)] in Philadelphia in 1780 and 1787. Precipitating each gathering was an invitation to meet. Some invitations were issued by the Continental Congress or by prior conventions, but most came from individual states seeking to meet with other states. For example, the Constitutional Convention was not, as commonly believed, the product of a congressional resolution, but the result of invitations extended in November 1786 by Virginia and New Jersey.[116)]

The usual word for such an invitation was "call," although sometimes the word "application" served the same purpose. In 1785, however, Massachusetts unsuccessfully asked Congress to issue a call, and it referred to its own request as an "application."[117)] As noted earlier, in framing Article V the drafters resolved issues that prior practice left unclear,[118)] and in this instance they adopted the terminology and procedure employed in 1785 by Massachusetts. Thus, the triggering petitions were to be "applications," the invitation was to be the "call," the submission of applications from two thirds of the states would render the call mandatory, and the calling entity was to be Congress.

§ 3.9.2. Contents of the Call

The courts tell us that Article V terminology is defined by historical usage.[113)] By examining calls from Founding-Era multi-state conventions, we can determine the contents of an Article V call.[119)]

Entirely typical is the 1777 call by the Continental Congress for two multi-state conventions to deal with the problem of inflation during the Revolutionary War. Congress asked that one convention take place in York Town, Pennsylvania and another occur in Charleston, South Carolina. The call for both was as follows:

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pensylvania [*sic*], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pensylvania, on the 3d Monday in March next, to consider of, and form a system of regulation adapted to those States, to be laid before the respective legislatures of each State, for their approbation:

That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown [*sic*], in South Carolina, on the first Monday in May next. . . .[120)]

This call designated the states invited and fixed the time, place, and purpose of the meeting. Some other Founding-Era calls included provisions for notifying the invitees and, if the calling agency was a state, that state's designation of its own commissioners. (Illustrative of the latter practice is the November 23, 1786 Virginia legislation that called the Constitutional Convention.)[121)] However, Founding-Era calls did not try to control the composition, rules, or conduct of the convention beyond designating time, place, and purpose. To reassure readers on this point, the text of several calls is reproduced below in Section 3.9.7.

Massachusetts made two efforts to go beyond the “time, place, and purpose” trilogy, but both were unsuccessful. The call to the 1765 Stamp Act Congress asked that state delegations be “Committees” from the *lower houses* of the various colonies. The reason was that most of the colonial upper houses were controlled, directly or indirectly, by the Crown. Several colonies failed to follow this prescription, and the convention seated each committee regardless of how selected.[122)] Massachusetts' 1783 invitation for a tax convention at Hartford sought to dictate that the convention act, “by the majority of the delegates so to be convened” rather than by a majority of states. However, two of the four states invited refused to participate, and Massachusetts was forced to rescind.[123)] Thus, by the time the Constitution was written, established custom held that a convention call could prescribe to the states and the convention no more than the “time, place, and purpose” trilogy.

One may contrast this trilogy with the “time, place, and manner” language common in Founding-Era election law, and appearing in the Constitution itself.[124)] Both phrases share the terms “time” and “place,” but the *manner* of election differs from the *purpose* of a convention. When a Founding-Era legislature determined the “manner of election,” it described the means: the rules by which electors were to make their choices.[125)] The “purpose,” on the other hand, described the goal of the process rather than the means. In multi-state convention practice, the means—the rules of decision—were left to the participants: the state legislatures and their respective representatives in convention assembled.

In 1861, Virginia called a general convention of the states to try to craft a compromise to avoid Civil War. This Washington Conference Convention was essentially a fraternal twin of an amendments convention.[126)] The operative language of the call was as follows:

Resolved, That on behalf of the commonweath [*sic*] of Virginia, an invitation is hereby extended to all such States, whether slaveholding or non-slaveholding,

as are willing to unite with Virginia in an earnest effort to *adjust the present unhappy controversies*, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slaveholding States adequate guarantees for the security of their rights, to appoint commissioners to meet on the *fourth day of February next*, in the *City of Washington*, similar commisioners [*sic*] appointed by Virginia, to consider, and if practicable, agree upon some suitable adjustment.[127)]

As the italicized language indicates: time, place, and purpose.

§ 3.9.3. Congressional Powers Incidental to the Call

Unlike the Articles of Confederation, the Constitution conveyed powers incidental to those enumerated. The incidental power doctrine is discussed above in Section 3.5. Essentially, it holds that when construing enumerated powers one should include certain subordinate powers tied to the enumerated powers by custom or necessity. The doctrine is a way of fully effectuating the intent of those who adopted an instrument.

Because incidental powers are subordinate, they cannot be as important as their principals[128)]—a point reinforced by Chief Justice John Roberts in a 2012 case.[129)] Moreover, as Chief Justice John Marshall observed, incidental authority must be consistent with the "spirit" of the Constitution.[130)] In other words, a power incident to an express grant cannot subvert the purpose of the grant.

Article V provides for conveyance of enumerated powers to Congress, to potential amendments conventions, to state legislatures, and to potential state conventions. In accordance with the courts' direction that we look to historical practice,[113)] we know that certain incidents follow these grants. Thus, state legislatures enjoy incidental authority to define the subject of their applications and to appoint and instruct their commissioners. State legislatures enjoy the incidental power of arranging for ratifying conventions. Conventions may adopt their own rules.[131)]

Historical practice tells us that setting the initial time and place of meeting and describing the subject matter is part of the prerogative to "call."[132)] This empowers Congress, serving for this purpose as an agent of the state legislatures, to count the number of applications addressing any one topic or group of topics.[133)] Congress certainly may provide a place to store applications and to keep related records, to define the convention's subjects in the way most faithful to the applications, to respond to state requests for relevant information, and to notify the appropriate state officials of the call.[134)]

On the other hand, Congress's authority incidental to the call is quite restricted. There are at least three reasons for so concluding. First, historically a call's prescriptions for a convention were limited to time, place, and purpose.[132)] Second, incidental powers may not subvert the purpose of a grant. The overriding purpose of the state application and convention procedure is to bypass Congress.[135)] If Congress could structure the convention, this would largely defeat its overriding purpose. Third, other actors in the process enjoy incidental authority as well, and Congress may not intrude upon such authority. If Congress were to dictate to state legislatures how select commissioners,

then Congress would invade the incidental authority of state legislatures. If Congress were to set rules for the convention, it would intrude on the convention's incidental authority to adopt its own rules.

§ 3.9.4. The Necessary and Proper Clause Does Not Authorize Congress to Structure the Convention.

The Necessary and Proper Clause appears in Article I, Section 8 at the end of an (incomplete) list of congressional powers. It reads:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[136)]

In 1963, Yale University law professor Charles Black wrote an article fiercely opposing the application-and-convention procedure.[137)] Without doing much research on the matter, Black argued that upon receipt of sufficient applications Congress could employ the Necessary and Proper Clause to structure the convention as it pleased.[138)] In 1967 and twice thereafter, Senator Sam Ervin (D-N.C.), who professed himself a friend to the process, introduced legislation by which Congress would have fixed the method by which states adopt applications, prescribed how long they would last, dictated the procedure for selecting delegates, apportioned those delegates among the states, and imposed rules upon the convention, including the margin of votes necessary for making decisions.[139)] From time to time, members of Congress have introduced similar bills. None has passed.[140)]

Reliance on the Necessary and Proper Clause to justify bills of this kind assumes a certain stupidity on the part of the Constitution's Framers: that is, it assumes that the Framers drafted the Necessary and Proper Clause broadly enough to enable Congress to control a process designed to circumvent itself. In fact, the Framers did no such thing. Such bills are unconstitutional for at least three reasons.

First, the Necessary and Proper Clause does not apply to Article V. By its terms, it applies only to powers listed in Article I, Section 8 (which are not pertinent to Article V) and to powers vested (1) in the “Government of the United States” and (2) in “Departments” and “Officers” of that government

As pointed out earlier, when Congress, state legislatures, and conventions act in the amendment process, they do so not as “Department[s]” of government, but as ad hoc assemblies.[141)] Indeed, Article V is only one of several provisions in the Constitution that delegates tasks to persons or entities that do not act as agents of the U.S. Government. For example, Article I, Section 2 confers authority on state governors to issue writs of election to fill vacancies in the House of Representatives. Article I, Section 4 grants to state legislatures authority to regulate congressional elections. Before the Seventeenth Amendment, Article I, Section 3 empowered state legislatures to elect U.S. Senators. Article II, Section 1, coupled with the Twelfth Amendment, empowers the electoral college to select the President. By its wording, the Necessary and Proper Clause does not extend to such independent actors.

To be sure, all of these persons and entities receive their authority from the

Constitution and therefore are said to exercise “federal functions.”[142] But exercise of a federal function does not render an independent actor part of, or an agent of, the U.S. Government.[143]

For this reason the Necessary and Proper Clause does not encompass the independent assemblies empowered by Article V, even if, like Congress, they serve as part of government when acting in other capacities.[144]

Second, even if the Necessary and Proper Clause did encompass those assemblies, the Clause would not be broad enough to enable Congress to structure the convention. The Necessary and Proper Clause does not actually grant any authority: it is a rule of interpretation designed to tell the reader that, unlike the Articles of Confederation, the Constitution conveys incidental powers to Congress.[145] Yet powers incidental to the call are quite limited.[146] Indeed, it could hardly be otherwise. The Ervin bills would have changed a state-driven process into one in which Congress intruded at the application stage and completely muscled out the state legislatures at the convention stage. No power may be incidental to an express provision that contradicts the basic purpose of its principal.[146]

Third, a line of twentieth century cases holds that government legislation cannot control the amendment process.[147]

Such considerations strongly suggest that the courts would not permit Congress to interfere in the way contemplated by the Ervin bills. However, history suggests that litigation on the subject is unlikely. When Congress designated state conventions as the ratifying mechanism for the Twenty-First Amendment, some people suggested that Congress structure the ratifying conventions. Amid widespread objection that this was outside congressional authority or at least impractical, Congress left the task to the states, which managed the chore themselves.[148] This precedent, coupled with Congress's repeated failure over several decades to adopt the Ervin bills or comparable measures, implies that the states will be left free to constitute an amendments convention as they choose.

§ 3.9.5. If Thirty-Four Applications on the Same Subject Are Received, the Call Is Mandatory.

The Constitution provides that Congress “shall call” an amendments convention on application by two-thirds of the states (currently thirty-four). The language is obviously mandatory, and several leading Founders specifically represented it as such.[149] Historical usage informs us, however, that an application or call can limit the subject matter of the proposed gathering: virtually all applications and calls, before and during the Founding Era, had done so. Applications or calls for a convention dealing with one topic have never been treated together with applications or calls for a convention on another topic. For example, in 1786 there were simultaneous calls for a commercial convention and a navigation convention, but no one thought of aggregating them.[150] This background indicates that before Congress is obliged to call a convention, there must be thirty-four applications that overlap as to subject. The kind of overlap required is examined below in Section 3.9.6.

We normally think of Congress and state legislatures as discharging legislative

functions, the President as discharging executive functions, and the courts as discharging judicial functions. As every lawyer knows, the Constitution's separation of powers is not always so neat. The President's veto is an exercise of legislative power. The Senate's review of his nominations is executive. Congressional impeachment proceedings are judicial. The powers exercised under Article V are *sui generis.*

The structure of the Constitution implies—and the courts tell us directly—that when Congress, other legislatures, and conventions operate under Article V they discharge functions different from their usual roles, and that they serve as ad hoc agencies rather than as branches or departments of their respective governments.[151)] Thus, when Congress proposes amendments or chooses a mode of ratification, it acts as an agent of the people rather than of the federal government,[152)] just as a state legislature ratifying an amendment serves as an agent of the people rather than as a branch of state government.

The Framers selected Congress to issue the call because it was a convenient central entity. The mandatory duty to call is clearly not a legislative function, but an executive one. It is not exercised on behalf of the federal government, but on behalf of the applying state legislatures. It is, moreover, ministerial in nature, and therefore should be enforceable judicially.[153)] In other words, if Congress refuses to undertake its constitutional obligation, judicial relief—such as mandamus, a declaratory judgment, or an injunction—can compel it to do so.[154)]

§ 3.9.6. Counting Applications

Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.” As Section 3.9.5 pointed out, Founding-Era evidence demonstrates that when “two thirds of the several States” apply, the duty to call arises only when they apply on the same general subjects.

To be sure, state applications are seldom identical. Congress will need to judge which applications should be aggregated. This is not inconsistent with the ministerial, mandatory nature of the congressional task, since even ministerial duties may call for exercise of discretion.[155)] But because the duty to call is mandatory and because the application and convention process is designed to bypass Congress, in this case the exercise of discretion should be subject to heightened judicial scrutiny. This conclusion is strengthened by the fact that a refusal increases congressional authority, thereby creating a conflict of interest.

So long as thirty-four applications, however worded, agree that the convention is to consider a particular subject and do not include language fundamentally inconsistent with each other, the count may be easy. Aggregation may be facilitated by a recent trend by which an applying legislature provides explicitly that its own applications should be aggregated with designated applications from other states.

In this area, history argues that flexibility is appropriate and that hyper-technical readings are not. Founding-Era resolutions calling conventions and empowering commissioners almost never matched identically—but many conventions were held.[156)]

Thus, an application calling for an amendment limiting “outlays” to expected revenue surely should be counted with an application for an amendment limiting “appropriations” to expected revenue. These, in turn should be aggregated with applications calling merely for a convention to consider a “balanced budget amendment.”

More difficult problems arise in four separate situations:

- All applications seem to address the same subject, but some are inherently inconsistent with others.
- Some applications prescribe a convention addressing Subject A while others prescribe a convention addressing both Subject A and unrelated Subject B.
- Some applications prescribe a convention addressing Subject A (e.g., “a balanced budget amendment”) while others demand one addressing Subject X, where Subject X encompasses Subject A (e.g., “fiscal restraints on the federal government”).
- Some applications prescribe a convention addressing Subject A and others call for a convention unlimited as to topic.

There is no direct judicial authority interpreting the Constitution on these points, and little, if any, reliable scholarly analysis of them. We do know, however, that the Founders expected the document to be interpreted in the larger common law context, and that in interpreting the document themselves they freely resorted to analogies from both private and public law.[157)]

In this instance, the closest analogue may be the law of contracts. Nearly all the Founders were social contractarians, and they frequently referred to the Constitution as a “compact.”[158)] The application process itself is closely akin to the kind of group offer and acceptance that leads to such legal relationships as partnerships and joint ventures. Like offers, applications may be rescinded. Like offers, they become binding on the parties when the conditions for acceptance are satisfied. Contract principles provide some guidance for all four of the situations outlined above.[159)]

The first situation arises when all applications seem to address the same subject, but some are inherently inconsistent with others. For example, the thirty-three applications issued in the 1960s for a convention to partially overturn the Supreme Court's reapportionment decisions were divided between those authorizing any amendment on the subject and those authorizing *only* an amendment applying to one house of each state legislature. Similarly, many twentieth century balanced budget applications attempted to restrict the convention to verbatim text, but the text prescribed by different applications varied.[160)] A 2010 Florida application (superseded by a broader one in 2014) applied for a balanced budget amendment but required that it comply with a long list of conditions not appearing in other applications.

Both contract principles and common sense dictate that applications with fundamentally inconsistent terms should not be aggregated together: according to the classical “mirror image” rule, the offer and the acceptance must match in order to form a contract.[161)]

The second situation arises when some applications ask for a convention

addressing Subject A while others ask for a convention addressing both Subject A and unrelated Subject B. At one time I believed those applications could be aggregated as to Subject A, but that result is inconsistent with contract principles. In this case, as in the first situation, the applications seek quite different conventions. If the convention were to address only Subject A, then the expectations of one group of applicants would not be met; but if a convention were empowered to address both subjects, it would fail to meet the expectations of the other group. Put another way, the “offer” is materially different from the purported “acceptance.”[162)]

This non-aggregation conclusion is supported by correspondence between states negotiating the 1776-1777 Providence Convention. When Massachusetts called a convention to consider paper money and public credit, Connecticut (after an initial rejection) sought to accept on the basis of paper money, public credit, and military affairs. The response from Massachusetts president James Bowdoin indicated that an additional subject would be welcome, but stopped short of committing himself until he had seen Connecticut's proposal in writing.[163)]

Of course, just as an offeror is the master of his offer, a state is the master of its application. Certainly a state is free, when applying for a convention on two unrelated subjects, to specify that its application should be aggregated with others limited to either subject.

In the third situation, one set of applications contemplates a convention addressing Subject A while another set contemplates a convention addressing Subject X, which encompasses Subject A. For example, the first group may seek a balanced budget convention while the second seeks fiscal restraints on the federal government. In this case, contract principles argue for aggregation on Subject A.[164)]

Admittedly, the states applying for “fiscal restraints” might have preferred alternatives other than a balanced budget amendment. However, they employed language broad enough to comprehend a balanced budget amendment. They could have defined the subject as “fiscal restraints on the federal government, *excluding* a balanced budget amendment.” But they did not.

The conclusion of aggregability in the third situation is strengthened by a prudential factor: any state that, faced with the choice between a balanced budget amendment and no restraints at all, would prefer no restraints at all, still retains multiple remedies. It may:

- Rescind or amend its application before the thirty-four state threshold is reached;
- Join at the convention with the non-applying states in voting against a balanced budget proposal; and
- Join with non-applying states in refusing to ratify.

In the fourth situation, some applications address Subject A and others petition for an “open” or unlimited convention. In this case, the question of aggregation has no *a priori* answer.

On one side, an advocate for aggregation might contend that this fourth

scenario is really a version of the third, and that therefore a convention should be held on Subject A. An advocate for aggregation might assert that when a legislature passes an application for a convention to consider any and all topics, the legislature is chargeable with recognizing that the convention may do so. If the legislature objects to the content of other applications, it may resort to the same remedies available to a dissenting state in the third situation: rescission, amendment, action at the convention, and refusal to ratify.

An opponent of aggregation might respond that in this situation, unlike the last, there is no subject-matter nexus between the two groups of applications. Everyone understands that “fiscal restraints” may include a balanced budget amendment; indeed, at the state level a balanced budget rule is a common kind of fiscal restraint. But a legislature adopting an unlimited application may have had completely different issues on its collective mind, or it may have contemplated reform only in the context of a wider constitutional examination.

Although there is no *a priori* answer to the aggregation issue in this instance, the wording of the applications themselves may offer guidance.[165)] For example, in March, 1861, the Illinois legislature adopted an unlimited application that appears still to be valid. Its gist was that if dissatisfaction is sufficiently widespread to induce enough other states, when counted with Illinois, to apply for a convention, then for the sake of unity Illinois will meet with them.[166)] This statement evinces a willingness to convene with other states, whatever they wish to discuss.

As the date indicates, Illinois' application was a response to suggestions that the states use Article V to avoid Civil War. But the application's language is not limited to that situation and its general principle extends well beyond any one crisis. The application seems aggregable with all others.

§ 3.9.7. Appendix to Section 3.9: Historic Examples of Multi-State Convention Calls

[167)]

Congressional Call to York Town & Charleston Price Conventions (1777)[168)]

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pensylvania [*sic*], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pensylvania, on the 3d Monday in March next, to consider of, and form a system of regulation adapted to those States, to be laid before the respective legislatures of each State, for their approbation:

That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown [*sic*], in South Carolina, on the first Monday in May next. . . .[169)])

Massachusetts' Call to Springfield Convention (1777)[170)]

The General Assembly of this state, taking into their consideration the state of the bills of credit emitted by this and the neighboring governments, and finding

the measures that have already been adopted . . . have not effectually answered the purpose of supporting the credit of said bills . . . have chosen a committee to meet such committees, as may be appointed by the states of New Hampshire, Rhode Island, Connecticut and New York, on the 30th day of July next, at the town of Springfield, in the county of Hampshire, within this state, to confer together upon this interesting subject, and consider what steps can be taken effectually to support the credit of the public currencies, and prevent their being counterfeited; and to confer upon such other matters as are particularly mentioned in the resolve enclosed. . . .[171)]

Virginia's Combined Call and Authorization of Commissioners for the Constitutional Convention (1787)[172)]

Whereas the Commissioners who assembled at Annapolis on the fourteenth day of September last for the purpose of devising and reporting the means of enabling Congress to provide effectually for the Commercial Interests of the United States have represented the necessity of extending the revision of the foederal System to all it's defects and have recommended that Deputies for that purpose be appointed by the several Legislatures to meet in Convention in the City of Philadelphia on the second day of May next a provision which was preferable to a discussion of the subject in Congress . . .

Be It Therefore Enacted by the General Assembly of the Commonwealth of Virginia that seven Commissioners be appointed by joint Ballot of both Houses of Assembly who or any three of them are hereby authorized as Deputies from this Commonwealth to meet such Deputies as may be appointed and authorized by other States to assemble in Convention at Philadelphia as above recommended and to join with them in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union and in 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. And Be It Further Enacted that in case of the death of any of the said Deputies or of their declining their appointments the Executive are hereby authorized to supply such Vacancies. And 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.[173)]

Virginia's Call to Washington Conference Convention (1861)[174)]

Resolved, That on behalf of the commonweath [*sic*] of Virginia, an invitation is hereby extended to all such States, whether slaveholding or non-slaveholding, as are willing to unite with Virginia in an earnest effort to adjust the present unhappy controversies, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slaveholding States adequate guarantees for the security of their rights, to appoint commissioners to meet on the fourth day of February next, in the City of Washington, similar commisioners [*sic*] appointed by Virginia, to consider, and if practicable, agree upon some suitable adjustment.[175)]

§ 3.10. Selecting Commissioners

At the convention, each participating state is represented by a “committee” (delegation) of commissioners (delegates). When Article V was adopted, the

nearly-universal procedure was for the state legislatures to determine the method for selecting commissioners. (Exceptions were limited to instances when the selection had to be made during the legislative recess.) This practice continued for subsequent conventions as well. Article V indirectly confirms that the method of delegate selection is a prerogative of the state legislature by granting application power to state legislatures, in their capacity not as branches of state government but as Article V assemblies.

During the Founding Era, the legislature usually opted to select the commissioners itself.[176)] Among the fifty-five commissioners at the 1787 Constitutional Convention, for example, fifty-four were legislative selections. The sole exception was James McClurg of Virginia. Governor Edmund Randolph designated Dr. McClurg, a noted physician, pursuant to legislative authorization after the legislature's original choice, Patrick Henry, refused to serve.[177)]

A bicameral legislature may choose to elect commissioners by joint vote of both houses, or by seriatim votes. As the McClurg example suggests, however, the legislature may choose a different selection method. During the Founding Era, state legislatures occasionally delegated the choice to the executive or to a legislative committee. A number of states attending the 1861 Washington Conference Convention permitted the governor to nominate commissioners, subject to state senate approval, and commissioners to the 1922 Santa Fe convention all were selected by state governors pursuant to legislative authorization.

In theory, a state legislature could devolve election of commissioners upon the people, voting at large or in districts. This would be unprecedented, however, and probably unwise. The commissioner's job is primarily filled with diplomatic and drafting duties, with basic policy decisions left in the commissioning legislature. The text, history, and applicable case law strongly suggest that the commissioner is also subject to legislative rather than popular instruction. Direct election could create conflicts of interest in that regard. It is even conceivable that, based on Article V case precedent, the courts might not permit direct election.[178)]

§ 3.11. Empowering Commissioners

As their name indicates, commissioners are empowered by a document usually called a *commission*, although the term *credentials* is also used.[176)] The commission includes the name of the commissioning authority (in this case, the state legislature or its designee), the name of the commissioner, the method of selection, the assembly to which the commissioner is being sent, and language granting power to the commissioner and defining the scope of that power. When the convention opens, commissioners are expected to present their credentials, usually to a credentials committee, for review. Several forms from prior conventions are included in Part IV.[179)]

§ 3.12. Instructing and Supervising Commissioners

In prior federal conventions, state officials issuing commissions often supplemented them with additional written instructions.[180)] Unlike the commissions, these instructions customarily were secret in order to preserve

diplomatic and negotiating leverage. The instructions defined the commissioner's authority with greater precision and informed him what measures he could or could not consider, and what goals to seek. Form instructions are included in Part IV.[181)]

§ 3.13. "No Runaway" Acts and Similar Laws

Several states have adopted, or considered, measures designed to further minimize the negligible chance that a convention for proposing amendments might exceed its authority. Such measures are not enforceable to the extent they attempt to dictate the structure of the legislature's applications, how it selects its commissioners, and when they may recall them.[182)] They also are not enforceable to the extent that they attempt to control the convention's discretion within the scope of its authority.[182)] Provisions imposing civil or criminal penalties on commissioners who clearly abuse their trust probably are valid, however. Even insofar as they are technically invalid, they may serve an educational function, and if an Article V assembly (usually in this case a state legislature) voluntarily operates under them, that assembly may be deemed to have accepted them.[183)]

§ 3.14. Convention Rules

[184)]

§ 3.14.1. The Legal Environment

As discussed in Section 3.5, the courts rely heavily on historical practice when interpreting the words of Article V. This is true both of the Supreme Court[185)] and lower courts.[186)] The history relied on by the courts includes both the period up to the time the Constitution was ratified and practice subsequent to ratification.

Prominent in historical practice—both before and after the Constitution's adoption—has been the uniform and exclusive prerogative of Article V assemblies to adopt their own rules.[187)] Shortly before he ascended to the Supreme Court, Justice John Stevens, writing for a three-judge federal panel, explicitly recognized this prerogative.[188)] The prerogative further extends to the right of a convention to judge the credentials of its delegates.[189)] Occasional suggestions that Congress could impose rules on an Article V convention are not well-founded, either in history or law.[190)]

The prerogative of conventions to establish their own rules does not mean that each convention acts on a blank slate. Far from it. Many, if not most, multi-state conventions have borrowed their written rules from prior multi-state conventions and from legislative bodies. For example, the rules employed by the Washington Conference Convention of 1861 derived substantially from those governing the 1787 Constitutional Convention.[191)] The Nashville Convention of 1850 decided that when one of its own specifically adopted rules did not apply, it would consult Thomas Jefferson's manual of procedure for the United States Senate.[192)]

Convention rules are adaptations of a branch of the Anglo-American common

law referred to as *parliamentary law*.[193] As the name suggests, parliamentary law owes its origin to the practices of the British Parliament, but over the years it has been refined for use in this country by numerous legislative and judicial precedents.[194] Parliamentary law applies to both private and public bodies, including legislatures and conventions.[195] An example of a rule of parliamentary law is that convention decisions are rendered by a majority of those voting.[196]

Although an assembly is free to adopt its own rules, parliamentary law standards govern whenever a specifically adopted rule does not.[197] In the case of a convention, parliamentary law controls (1) before adoption of formal rules[198] and (2) after adoption of formal rules when none of them resolves an issue.[199]

Historically, the formal rules adopted by prior multi-state conventions have been less than comprehensive, leaving most matters to be decided by parliamentary law. Fortunately, that law is readily accessible and easy to ascertain: it is collected in *Mason's Manual of Legislative Procedure*, published by the National Conference of State Legislatures. As explained below, we recommend *Mason's Manual* as a source of guidance in absence of a formal convention rule to the contrary.

§ 3.14.2. Historical Resources

Before the Constitution was ratified, colonies and states met in convention over thirty times.[200] Since ratification, at least four additional conventions of states have met: Hartford (1814), Nashville (1850), Washington, D.C. (1861), and Santa Fe (1922).[201] The formal rules of several of these gatherings survive, and the journals or proceedings enable us to reconstruct a partial list of rules from many of the others.

The records from the following meetings are helpful[202]:

- Albany Congress (1754)
- Stamp Act Congress (1765)
- First Continental Congress (1774)
- First Providence Convention (1776-1777)
- York Town Convention (1777)
- Springfield Convention (1777)
- New Haven Convention (1778)
- First Hartford Convention (1779)
- Philadelphia Price Convention (1780)
- Boston Convention (1780)
- Second Hartford Convention (1780)
- Second Providence Convention (1781)
- Annapolis Convention (1786)
- The Constitutional Convention (1787)
- Third Hartford Convention (1814)
- Nashville Convention (1850) (also called the Southern Convention)
- Washington Conference Convention (1861) (also informally called the Washington Peace Conference)

- Santa Fe Convention (1922) (formally the Colorado River Commission)[203)]

The rules and protocols followed by these gatherings show far more commonalties than differences. For several reasons, however, the rules and protocols of the Washington Conference Convention of 1861 seem particularly apt: It was our most recent general multi-state convention,[204)] and our largest to date. It was, moreover, called for the understood purpose of proposing amendments. Thus, even though the Washington Conference Convention did not operate under Article V, it served as prototype for a duly-called convention for proposing amendments. In several places below, therefore, this section focuses on the rules of the Washington conclave.[205)]

§ 3.14.3. Formalities before Adoption of Rules

Time and Place

The congressional call specifies the initial time and place of meeting.[206)] State applications cannot control the initial time and place, although state legislatures may make recommendations on those subjects to Congress. After convening, the assembly assumes control of times and places of meeting. Thus, the convention decides when and for how long to adjourn, and to what place. For example, the Nashville Convention held its initial session in June of 1850, and then adjourned to November of the same year. The Colorado River Commission (Santa Fe Convention) conducted its twenty-seven days of sitting in four different cities: Washington, D.C., Phoenix, Denver, and Santa Fe. However, Santa Fe was the site of the last eighteen of the twenty-seven meetings and of the most important negotiations.[207)]

Commissioner Selection

A multi-state convention is a gathering of states in their sovereign capacities, and sovereigns may choose their own representatives. Accordingly, selection of state committees is *always* left to the states sending them.[208)] The strength of the rule is illustrated by the outcomes of the rare attempts to breach it: only twice has the calling entity attempted to guide the selection procedure (in 1765 and again in 1780), and on both occasions those efforts were successfully disregarded.[209)] In any event, for Congress to dictate how commissioners are selected would radically undercut the fundamental purpose of the convention procedure as a way for the states to bypass Congress.

The selection method most often chosen by state legislatures has been election by the legislature itself, either in joint session or (more often) seriatim by chamber. However, legislatures may delegate the choice to the executive alone or to some combination of executive nomination and legislative approval. The latter methods were employed for many of the commissioners sent to Washington (1861) and to all of them sent to Santa Fe (1922).

Commissioner Credentialing

Each state determines how to commission its own representatives. Early in the convention, each commissioner is expected to present his or her *credentials*—that is, the commission or comparable document showing authority to act on behalf of his state or state legislature. The convention selects a committee that passes on those credentials.

Initial Voting Rules

As noted above, a convention for proposing amendments is a *convention of states*: a gathering of states in their sovereign, or semi-sovereign, capacities.[210)] To the extent the extant records address the issue, they show that conventions of states universally apply the suffrage rule of "one state, one vote." This rule follows from the international law standard that all sovereigns are equal. *The calling entity (which, in the case of an amendments convention, is Congress), may not alter this rule.*[211)]

Although at some conventions individual commissioners have been tagged as "members," multi-state conventions never have applied a "one person, one vote" rule. Perhaps this is because, technically, the "members" of the convention are not individual commissioners but state committees.[212)]

Some multi-state convention journals refer to voting "by ballot," especially for officers and committees. This phrase does not refer to voting per capita, but to a procedure by which individual choices are secret, even within state committees.[213)] Votes are still counted by state and state committees voted as units. However, most voting is not by ballot but *viva voce* (Latin for "with live voice").[214)]

The tradition at general conventions has been for state-by-state votes to be tabulated in northeast-to-southwest order.

Quorum and Majority Vote

There are two kinds of quorum rules: (1) the number of commissioners who must agree to cast a state committee's vote and (2) the number of states necessary to transact business on the floor. The former is called an *internal quorum rule.* It is determined by the commissioning authority—that is, by each state for its own committee. For example, when New York commissioned its three delegates to the Constitutional Convention, it specified that any two must be present (and agree) to cast the state's vote.

As for the quorum of states necessary on the floor and the margin required for decision, by both common law and court decision a majority of states represented is necessary for a quorum,[215)] and a majority of states voting (a quorum being present) is necessary to decide.[216)]

What Officers Should the Convention Have?

Conventions of states always decide what officers are to govern them. Prior conventions seem to have made this decision pursuant to parliamentary law, before formal rules were adopted.

At the least, every convention has a presiding officer, called the president or chairman, and a secretary, executive secretary, or clerk.[217)] Some conventions, especially larger ones, have selected other officers, such as vice president, assistant secretaries, doorkeepers, sergeants-at-arms, and messengers. One former legislator consulted on this project recommended appointment of a parliamentarian.

How Officers Are Chosen.

In prior conventions, the identity of the temporary presiding officer, pending election of a permanent chairman, seems to have been arranged in informal

pre-opening meetings. Although some have suggested that Congress designate a temporary presiding officer in its convention call, no multi-state convention call has ever done this, and an attempt to do so likely would have advisory force only.

At the 1754 Albany Congress, a representative of the Crown was present and became the presiding officer. Since Independence, permanent officers invariably have been elected by the convention itself, generally before adoption of formal rules, pursuant to parliamentary law. To the extent the historical records are complete, they show that all American multi-government conventions have elected officers by a majority vote of state committees. This was true even at the 1922 Colorado River Commission, where a federal representative, Secretary of Commerce Herbert Hoover, was present. Hoover ultimately did serve as chairman, but only after free election by his fellow commissioners, one from each participating state.[218)]

Before the 1850 Nashville Convention, a preliminary committee decided on nominees for various offices. Although this did not prevent nominations from the floor, the convention did elect the committee's nominees.

The presiding officer always has been elected from among the commissioners rather than from outside the convention. The secretary or clerk usually (but not always) has been a non-commissioner, presumably to better assure impartiality in preparation and preservation of the records. We recommend that state lawmakers consult in advance on preliminary nominations, and that a convention of states retain the custom of electing a commissioner as the presiding officer and a non-commissioner as secretary or clerk.

How Rules Are Adopted.

Some of the smaller conventions have been comprised of only a handful of commissioners—most of them veterans of government service or prior conventions—thereby obviating the need to adopt formal rules. The 1778 New Haven Convention adopted rules, but did not insert them in the journal. The 1922 Santa Fe Convention (Colorado River Commission) seems not to have adopted formal rules, but it did vote on agendas and procedures for each future meeting.[219)] In the absence of formal rules, parliamentary law, essentially as represented by *Mason's Manual*, prevails.[197)] The larger conventions all adopted formal rules and entered them on the journal, although parliamentary law served as a source of default rules.[220)]

One of our advisors suggested that an informal committee of state legislative leaders draft proposed rules in advance of the convention, and then try to induce as many state legislatures as possible to agree to them in advance. Whether or not this is done, the final decision on convention rules belongs to the convention itself.

Immediately after election of officers, the convention should choose a rules committee. By modern parliamentary law, committee staffing is the prerogative of the presiding officer.[221)] However, the convention may vote to select the committee itself,[222)] and the historical records suggest that most of the major conventions have done so. In absence of a rule to the contrary, whoever staffs the committee designates the person who chairs it.[223)]

After drafting proposed rules, the committee presents those rules to the floor

for debate, adoption, or rejection.

§ 3.14.4. Recommended Rules Not Pertaining to Debate or Decorum

Source of Default Rules

A “default rule” is a rule that applies in absence of an explicit rule to the contrary. For example, in American parliamentary practice, the default rule for making decisions is a majority of those voting. The federal Constitution, or that of a state, or the adopted rules of a public body, can alter a default rule.

It is impractical for a temporary gathering such as a convention of states to adopt rules to address every conceivable situation, and the historical record shows that conventions of states have not attempted to do so. Instead, like legislatures, they adopt discrete rules addressed to particular situations and rely on a common source to supply the gaps.[224)] By way of illustration, the default rules for the 1787 Constitutional Convention appear to have been adapted from the procedures of the Confederation Congress. The 1850 Nashville Convention formally acceded to Thomas Jefferson's *Manual of Parliamentary Practice,* which Jefferson drafted for the U.S. Senate when he served as Vice President, and therefore as President of the Senate.

We believe the convention should adopt as a source of default rules *Mason's Manual of Legislative Procedure.* There are several reasons for this.

First, *Mason's Manual* is very comprehensive. Using it as a source of default rules would make it unnecessary for the convention to struggle with such questions as which motions are in order and when, or the vote margin required for reconsideration.

Second, *Mason's Manual* is usable and practical. Not only is it time-tested, but unlike the rules and prior default sources used by earlier conventions, it has been kept up-to-date and consistent with modern technology.

Third, *Mason's Manual* relies on parliamentary common law, and is annotated heavily with legislative and judicial precedents, so the sources and reasoning behind a particular rule are easily discoverable.

Fourth, it enjoys wide currency among state legislatures: Seventy of the ninety-nine American state legislative chambers[225)] have adopted it, and there is trend in its direction.[226)] Therefore, *Mason's Manual*, or adopted rules based on *Mason's Manual*, are likely to be familiar to a majority of commissioners—most of whom will be chosen by state legislatures and will have had state legislative experience. *Mason's Manual* also will be familiar to any legislative officers or committees assigned to oversee their respective convention delegations.

Finally, among those lawmakers we consulted for this project, we found none who was hostile to *Mason's Manual,* and several who were very enthusiastic.

True, *Mason's Manual* was written for state legislatures rather than for conventions. As a practical matter, however, the principle implication of this fact is that certain portions of the manual, such as the portion addressing “Relations with the Executive” can be safely disregarded.[227)]

Adoption of *Mason's Manual* would make it unnecessary to craft rules for every occasion. Nevertheless, we believe some explicit rules are called for, as explained below.

Voting by State

All multi-state conventions whose journals disclose a voting rule have proceeded on the basis of “one state, one vote.” This has been both the default rule and the standard prevailing when conventions adopt explicit standards of suffrage.[228)]

To understand the reasons for state-by-state voting, it is important to remember that a convention for proposing amendments is not a general legislature, like Congress or a state legislature. Nor is it an instrumentality of any one state. It is, rather, part of a process designed *explicitly* to enable the semi-sovereign states, acting as a group through their legislatures,[229)] to offer ratifiable proposals. James Madison pointed out that the Constitution has both “national” (popular) and “federal” (state-based) features.[230)] The amendments convention, like the U.S. Senate, is a clear example of the latter.

Moreover, the fundamental reason for the convention procedure was to provide the states a way to bypass Congress.[231)] The only entity, other than the convention, that might prescribe an unprecedented voting rule would be Congress.[232)] But allowing Congress to design the convention's voting system would undercut the convention's fundamental purpose in a way that the judiciary generally does not sanction. There is no evidence that the one state, one vote rule has been impacted in any way by the “one person, one vote” requirement the modern Supreme Court imposes on general legislative bodies directly representing the people.

Although the application and convention process was not intended to be perfectly democratic, it does accommodate the need for popular consent. The requirement that two-thirds of states, rather than a simple majority, apply for a convention raises the probability of popular consent. The three-quarters ratification requirement virtually assures that any amendment will be approved by a majority (and more likely a supermajority) of the American people.[233)]

There have been occasional attempts in multi-state conventions to challenge or alter the one state, one vote rule, invariably without success. For example, a motion to alter state voting power to reflect population differences was considered at the Nashville Convention. It was recognized that this motion would require assent by a majority of states. The motion was defeated when a majority of states refused to adopt it.[234)]

Majority Voting

Approval of motions and proposals by a majority of those voting (in this case, a majority of states) is the prevailing rule under parliamentary law and prior convention practice. The convention may, if a majority of state committees wishes, alter the rule. The Santa Fe Convention (Colorado River Commission) decided on a unanimity requirement among states for most purposes. The reason, apparently, was that the group was negotiating an interstate compact, the compact would not be binding on any state that rejected it, and the compact might be useless unless all states consented.

The unanimity requirement at the Santa Fe meetings worked tolerably well, but there were only eight commissioners, and dissenters occasionally voted “yes” so as not to obstruct the progress of the negotiations. Even at Santa Fe, late in the proceedings the unanimity rule was changed temporarily to majority

consent for most purposes.

A unanimous voting rule clearly would not be appropriate at a general convention, with far more states involved. We recommend that amendments conventions decide substantive and procedural questions by a majority of states voting, a quorum being present.

Quorum

Traditionally, a quorum is a majority of eligible voters (states),[235)] and this rule seems to have been followed for most multi-state conventions. For example, the 1787 Constitutional Convention adopted a quorum of seven—that is, a majority of state committees—with decisions to be made by a majority of a quorum. On the other hand, the Washington Conference Convention adopted a quorum of only seven states when twenty-one were present. In absence of unforeseen circumstances, we do not recommend departing from the majority rule. However, any future convention of states should provide, as prior multi-state conventions have, that if a quorum is not present, those states that are represented should have power to adjourn from day to day.

Prayers and Oaths

Some conventions have been introduced with prayers, generally before the daily session. For example, the rules of the Hartford Convention of 1814 prescribed that "[t]he meetings of this Convention shall be opened each morning, by prayer, which it is requested may be performed, alternately, by the Chaplains of the Legislature of Connecticut, residing in the city of Hartford." Even the modern Congress has decided that prayer can have an uplifting effect on the proceedings.

On the other hand, the most successful American multi-state convention in history—the one that drafted the Constitution—made no provision for institutionalized prayer.

We have a preference for an initial prayer, led in turn by representatives of a wide range of faiths and denominations. However, prayer is not an objective that should be pursued if it proves divisive, since, of course, individual commissioners and committees can make their own arrangements if they wish.

The Albany Congress administered an oath to its secretary, presumably to record the proceedings honestly. Oaths of fidelity are routinely administered to American public officers, and we see no reason why a convention should not do so as well.

Kinds of Committees

A convention may decide to create any committees relevant to its mission. Typically, conventions create committees to review credentials, committees to draft language, and committees to negotiate differences. If the gathering is called under the Convention of States application, it will have to address a range of subjects, including term limits, fiscal responsibility, and amendments narrowing or clarifying the jurisdiction of the federal government. In that case, the convention may opt to create a committee to develop amendment language addressing each subject.

Committee Staffing

Under modern parliamentary common law, the presiding officer staffs

committees, as did the president of the 1814 Hartford Convention. An assembly may, however, provide for election instead. A rule of the 1787 Constitutional Convention specified:

That Committees shall be appointed by ballot; and that the members who have the greatest number of ballots, although not a majority of the votes present, be the Committee. When two or more Members have an equal number of votes, the Member standing first on the list in the order of taking down the ballots shall be preferred.

Note that under this rule election was by a plurality rather than a majority.

There seems to be no reason to go through the trouble of electing members to all committees, but election may be appropriate for major areas of responsibility, such as rules and intra-convention negotiation.

Secrecy

Those conventions addressing the issue appear to have applied a rule of secrecy. A principle purpose was to allow commissioners to think aloud, debate freely, and change their minds without losing face. For example, the rules of the First Continental Congress provided that “the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honour, to keep the proceedings secret, untill [*sic*] the majority shall direct them to be made public.” The 1861 Washington Conference Convention prescribed that “[t]he yeas and nays of the members shall not be given or published—only the decision by States.”

Similarly, the rules of both the Constitutional and Washington Conference Conventions specified that “no copy be taken of any entry on the journal during the sitting of the House without leave of the House,” and that “members only be permitted to inspect the journal.” The rules of the Constitution Convention admonished that “nothing spoken in the House be printed, or otherwise published or communicated without leave.”

Our advisors were unanimous in believing that such secrecy would not be publicly acceptable today. *Mason's Manual*, accordingly, includes no such rules. Advocates of secrecy may be comforted by the realization that, although secrecy has some procedural advantages, disclosure offers some offsetting advantages (in addition to public acceptance). Among these advantages is the greater ability of legislative authorities to ensure that their commissioners remain within their instructions and remain connected with political realities.

Obviously, openness does not justify chaos:the convention will have to adopt rules assuring that its proceedings are not disrupted by outsiders. But this is no more than any modern legislative body must do.[236)]

Minutes

All conventions direct the secretary, either personally or through a convention-authorized assistant, to record the minutes necessary for entry in the official journal. A 1787 Constitutional Convention rule specified that “Immediately after the President shall have taken the Chair, and the members their seats, the minutes of the preceding day shall be read by the Secretary.”[237)]

Number of Commissioners on the Floor

Informal discussions among state legislative leaders prior to a convention may

lead to agreed limits on the size of any one state's committee. Based on a study of the historical record, we believe that a cap of five commissioners per state would be appropriate. Ultimately, the size of a state's committee is a matter for that state's legislature to determine.

It is possible that non-cooperative states may, if they do not boycott the convention,[238)] opt to send oversized delegations. They may do so as a measure of protest, as a populist gesture, or as a way of skewing debate in their favor. An historical illustration is the decision of Tennessee to send 100 commissioners to the Nashville Convention, when all the remaining states collectively sent only seventy-five. The presence of oversized committees does not change the one state, one vote rule (which, in fact, survived a challenge at Nashville), but the situation could present problems of crowding and fairness.

One way of forestalling this problem without impairing the prerogative of a state to govern its own committee is to adopt a convention rule limiting the number of commissioners from any one state who may participate in any given debate or appear on the floor at one time. One of our advisors suggested a limit on the amount of floor time that may be used on any day by any state committee.

§ 3.14.5. Rules of Debate and Decorum

Several of the major multi-state conventions have adopted rules of debate and decorum specific to their needs. Notable among these are the standards applied at the Washington Conference Convention of 1861, which were based largely, although not entirely, on the rules of debate and decorum in the more famous conclave in Philadelphia in 1787.[239)] For reasons mentioned earlier, the Washington Convention rules are worth examining in some detail.[240)] Listed below are the principle rules together with commentary that may be helpful in adapting them to modern needs.[241)]

Order of Business

The Washington Convention prescribed that (1) “[i]mmediately after the President shall have taken the chair, and the members their seats, the minutes of the preceding day shall be read by the Secretary” and that (2) “[o]rders of the day shall be read next after the minutes, and either discussed or postponed, before any other business shall be introduced.”[242)]

Commentary: *Mason's Manual* sets forth a somewhat different order.[243)] If we disregard the items on *Mason's* list relevant to a legislature but not to a convention, we are left with the following: (1) call to order, (2) roll call, (3) invocation, (4) reading and approval of the journal of the previous day, (5) reports of standing committees, (6) reports of special or select committees, (7) special orders, (8) unfinished business, (9) introduction and first reading of proposals, (10) consideration of daily calendar, (11) announcement of committee meetings, and (12) adjournment.

Focus of the Convention

Another rule of the Washington Convention provided as follows: “Every member, rising to speak, shall address the President; and while he shall be speaking none shall pass between them, or hold discourse with another, or read a book, pamphlet, or paper, printed or manuscript; and of two members

rising to speak at the same time, the President shall name him who shall first be heard."[244)]

Commentary: Addressing the presiding officer is in accord with modern practice.[245)] The presiding officer's obligation to select the person rising earlier, and to choose between those rising at the same time, also is consistent.[246)] The proscription on reading extraneous matter may seem alien in a time of universal multi-tasking, particularly with tablet computers and smartphones; but there is something to be said for requiring commissioners to direct their attention to the debate. If, however, written motions are to be disseminated instantly, commissioners should have receiving devices available. If computers are used for that purpose, then preventing commissioners from reading unrelated matter on them may be impractical.

Frequency and Length of Speaking

"A member shall not speak oftener than twice, without special leave upon the same question; and not a second time before every other who had been silent shall have been heard, if he choose to speak upon the subject."[247)]

Commentary: The two-time rule had been used in the First Continental Congress of 1774 and in other fora, and its success argues for emulation. *Mason's Manual* provides that a person may speak only once on a question at the same stage of procedure on a given day, and sometimes even on different days.[248)]

We found no multi-state convention that limited the amount of time a commissioner could speak on the floor. An effort to impose time limits at the Washington Conference Convention was unsuccessful. Because a modern convention for proposing amendments will represent more states than any prior multi-state gathering—and therefore probably contain more commissioners—we recommend imposition of time limits.

Motions

The Washington Convention rules specified as follows: "A motion made and seconded, shall be repeated; and if written, as it shall be when any member shall so require, read aloud by the Secretary before it shall be debated; and may be withdrawn at any time before the vote upon it shall have been declared." The rules further stated that "[w]hen a debate shall arise upon a question, no motion, other than to amend the question, to commit it, or to postpone the debate, shall be received."[249)]

Commentary: Today's technology makes it more practical to require that all but the simplest, most standardized motions be written; and they can be disseminated instantly by electronic means.[250)] *Mason's Manual* does not require seconds; thus in the absence of a seconder, the movant alone may withdraw.[251)] As for the precedence of motions, the treatment in *Mason's Manual* should suffice.[252)]

Simplifying Complex Questions

The applicable Washington rule was as follows: "A question which is complicated, shall, at the request of any member, be divided and put separately upon the propositions of which it is compounded."[249)]

Commentary: This rule is probably best retained, as more appropriate for a convention than the single-subject-related tests for bills set forth in *Mason's Manual*.[253)] To avoid confusion, the term “member” should be replaced by “commissioner.”

Calls to Order

The Washington rules stated that “[a] member may be called to order by another member, as well as by the President, and may be allowed to explain his conduct or expressions supposed to be reprehensible. ~~And all questions of order shall be decided by the President, without appeal or debate~~.”[249)]

Commentary: Not even the great prestige of former President John Tyler, the Washington Convention's presiding officer, enabled the stricken non-appealability language to survive a motion to amend. The convention decided that any ruling from the chair could be appealed, although without debate. We also recommend that appeals be permitted to prevent undue influence from the chair.[254)] This is particularly important because any person with sufficient reputation to be elected presiding officer is likely to have, or to have had, ties (and perhaps sympathies) with the same federal government the convention has gathered to reform.

The word “member” in this rule should be changed to “commissioner.” *Mason's Manual* does not refer to a participant being called to order by any other participant, although the presiding officer may call anyone to order.[255)]

Motions to Adjourn

“Upon a question to adjourn for the day, which may be made at any time, if it be seconded, the question shall be put without debate.”[249)]

Commentary: In *Mason's Manual*, adjournment for the day is called a “recess,” and a motion to recess is not debatable.[256)] A permanent adjournment is called an adjournment *sine die* (Latin for “without day,” meaning “without a day for reconvening”). A convention may adjourn *sine die* at any time, whether or not its work is complete.[257)]

Decorum on Adjournments for the Day

“When the Convention shall adjourn, every member shall stand in his place until the President pass him.”[258)]

Commentary: This rule derived from the 1787 convention, and was a tribute to the enormous prestige of its president, General Washington. The 1861 convention retained the rule, probably as a tribute to John Tyler. Whether a modern convention adopts it may depend on the personal prestige of its presiding officer.

Absences

“That no member be absent from the Convention, so as to interrupt the representation of the State, without leave.”[259)]

Commentary: This is in accord with the modern practice of compelling attendance at the “call of the house.”[260)]

Sitting of Committees and Assuring Proper Notice of Proposals

The Washington Convention prescribed that “Committees do not sit while the Convention shall be, or ought to be sitting, without leave of the Convention.”[249)]

Commentary: This rule also is duplicated in modern practice.[261)] It assures that all commissioners have full notice of pending measures and time to consider them. For similar reasons, the rules of the First Continental Congress prescribed that “no question shall be determined the day, on which it is agitated and debated, if anyone of the Colonies desire the determination to be postponed to another day.”[262)] This prompted one of our advisors to recommend a requirement of at least a day's lapse between committee approval of a measure and action by the full house. *Mason's Manual* states, “It is the usual procedure not to consider bills reported by committees when the report is received by the house, but to order the bill to second reading.”[263)] Because this reference seems inapplicable to conventions (which do not consider bills nor customarily provide for “readings”) a day's delay between committee report and house vote may serve the purpose better.

Part IV: Forms

§ 4.1. Citizens for Self-Governance Form Application

Application for a Convention of the States

under Article V of the U.S. Constitution

Whereas, the Founders of our Constitution empowered State Legislators to be guardians of liberty against future abuses of power by the federal government, and

Whereas, the federal government has created a crushing national debt through improper and imprudent spending, and

Whereas, the federal government has invaded the legitimate roles of the states through the manipulative process of federal mandates, most of which are unfunded to a great extent, and

Whereas, the federal government has ceased to live under a proper interpretation of the Constitution of the United States, and

Whereas, it is the solemn duty of the States to protect the liberty of our people —particularly for the generations to come, to propose Amendments to the Constitution of the United States through a Convention of the States under Article V to place clear restraints on these and related abuses of power,

Be it therefore resolved by the legislature of the State of _____:

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.

Section 2. The Secretary of State is hereby directed to transmit copies of this

application to the President and Secretary of the United States Senate and to the Speaker and Clerk of the United States House of Representatives, and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislative houses in the several States, requesting their cooperation.

Section 3. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject.

§ 4.2. Sample Form Electing Commissioners

Resolution Electing Commissioners to Convention

to Propose Amendments Restraining the

Abuse of Power by the Federal Government

Whereas, the legislature of the State of ____ has applied to Congress under Article V of the United States Constitution for a convention for proposing amendments to the Constitution 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

Whereas, the legislature has decided to select its commissioners to the convention, if such is held:

Be it resolved by a joint session of the Senate and the House of Representatives of the State of _____,

That (commissioner 1), (commissioner 2), (commissioner 3), (commissioner 4), and (commissioner 5) are hereby elected commissioners from this state to such convention, with power to confer with commissioners from other states on the sole and exclusive subject of whether the convention shall propose amendments to the United States Constitution 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, if so, what the terms of such amendments shall be; and further, by the decision of a majority of the commissioners from this state, to cast this state's vote in such convention.

Be it further resolved that, unless extended by the legislature of the State of ____, voting in joint session of the Senate and House of Representatives, the authority of such commissioners shall expire at the earlier of (1) December 31, 20__ or (2) upon any addition to the convention agenda or convention floor consideration of potential amendments or other constitutional changes other than amendments as aforesaid.

§ 4.3. Sample Commissions

Commissions are the documents appointing commissioners to represent the state legislature at a convention for proposing amendments. Below is an example of a commission issued by the State of New Jersey to five commissioners to the 1787 Constitutional Convention. One of the listed individuals, John Neilson, did not serve:

The State Of New Jersey.

To the Honorable David Brearly, William Churchill Houston, William Patterson and John Neilson Esquires. Greeting.

The Council and Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you the said David Brearley, William Churchill Houston, William Patterson and John Neilson Esquires, or any three of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, at the City of Philadelphia in the Commonwealth of Pensylvania [*sic*], on the second Monday in May next for the purpose of taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.

In testimony whereof the Great Seal of the State is hereunto affixed. Witness William Livingston Esquire, Governor, Captain General and Commander in Chief in and over the State of New Jersey and Territories thereunto belonging Chancellor and Ordinary in the same, at Trenton the Twenty third day of November in the Year of our Lord One thousand seven hundred and Eighty six and of our Sovereignty and Independence the Eleventh.

Wil: Livingston.

By His Excellency's Command

Bowes Reed Secy.

Some modern changes:

- The state legislature rather than the state itself is arguably the represented party at a convention for proposing amendments. This suggests that the presiding officers of each house of the state legislature ought to issue the commission.
- The commission should be tailored to the purpose of the convention, and of course modern language should be employed. The following is a possible modification:

The State Of New Jersey.

To John Jones. Greeting.

The Senate and General Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you, Jane Doe, and Prudence Watley, or any two of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, in convention at the City of Denver in the State of Colorado, on May 17, 20 ___, pursuant to Article V of the Constitution of the United States, for the sole purpose of considering whether to propose, and if so, to draft, amendments to the United States Constitution 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.

In testimony whereof the Great Seal of the State is hereunto affixed.

Witness: Frankly F. Fineagle, President of the Senate, and Georgia G. Gripper,

Speaker of the Assembly, at Trenton, on the ___ day of November, 20___.

_____

Speaker President of the Senate

§ 4.4. Sample Instructions

Instructions for previous multi-state conventions were usually secret, and are difficult to recover. Some of them apparently were rambling documents, providing general guidance rather than specific rules.

The following instructions were issued by the Massachusetts legislature in 1779 as instructions for the 1780 Philadelphia Price Convention, a meeting designed to cope with continental inflation. As one can see, the commissioners were Samuel Osgood and Elbridge Gerry. The latter served as a commissioner to the Constitutional Convention as well, and ultimately as governor of Massachusetts and Vice President of the United States. The instructions are found in volume 21 of the Acts and Resolves of the Province of Massachusetts Bay. They do not reveal much confidence in the viability of wage and price controls.

VOTE INSTRUCTING ELBRIDGE GERRY AND SAMUEL OSGOOD, ESQUIRES, COMMISSIONERS TO THE CONVENTION AT PHILADELPHIA IN JANUARY NEXT TO CONSIDER THE LIMITING OF PRICES OF PRODUCE AND MERCHANDIZE.

To the Hon. Elbridge Gerry, Esq., and Samuel Osgood, Esq.

GENTLEMEN,

The General Assembly having appointed you Commissioners to represent this State at the Convention to be held at Philadelphia, on the 1st Wednesday of January next; you are hereby authorized and impowered to meet at the time and place before mentioned such Commissioners as may be appointed by other United States, and to confer and consult with them upon the expediency of limiting the prices of articles of produce and merchandize.

In your deliberations upon this important subject, you will duly consider on the one side the advantages that it has been suggested will accrue from such a measure among others, that it will tend to give stability to our currency, prevent that inequality and injustice in private dealings, as well as in furnishing the public supplies from the several States, which have arisen from the fluctating [*sic*] state of prices, and that it will render it practicable for Congress and the several States to make the proper estimates for their future expences, and to fix adequate salaries upon those who are in the public service; these are important objects, and ought to be attended to. On the other side, you will duly advert to the many objections that have been made to such a plan, and the many difficulties that will attend the execution of it; for in case such a measure should be attempted and fail in the execution, you must be sensible it will be attended with many pernicious consequences, it will greatly weaken the bonds of government, as well as throw us into the greatest embarrassment, and will have a fatal tendency further to depreciate our currency. Among many other objections and difficulties that might be mentioned, and which will naturally occur to your minds in the discussion of this subject, it may be well to consider whether it has not been found that a limitation of prices, instead of appreciating or giving stability to our money has not rendered it in a manner useless, has not shut up our granaries, discouraged husbandry and commerce,

and starved our Sea-Ports, in short, whether it has not created such a stagnation of business and such a witholding of articles as has obliged the people to give up the measure or submit to starving: Whether from these repeated trials and failures, that confidence, (which is so absolutely necessary in case of a limitation) is not so far lost between the States and the members of each State that this alone must prevent the execution of such a measure, as each person will be waiting to see his neighbours compliance, in the mean time witholding [*sic*]every supply from his friend and his country; whether it has not thrown the honest and conscientious part of the community into the hands of Sharpers, Monopolizers and Extortioners, and while it has operated as a restraint upon the former to their great loss and damage, it has not afforded an opportunity to the latter, whose only principle is that of Gain, by their cunning and deceit to aggrandize and enrich themselves, to the no small detriment of their Country.

You will also consider whether it is possible to carry an act for this purpose into execution in the method prescribed by Congress, when upon trial, it will be found, that by the method they propose the prices of labour and produce will be reduced more than two-thirds, while the articles of foreign produce will be reduced but a trifle, if any thing at all; can it be supposed the people in general will submit to it? For however reasonable it may appear to men of candour and discernment, and those who will thoroughly examine into the causes of it, yet the bulk of the people will apprehend they are imposed upon, and it will be extreamly [*sic*] difficult, if possible, to convince them to the contrary: You will further consider whether if such a limitation should take place, and could be effectually carried into execution, it would not be the means of disappointing Congress of such supplies of money as they depend upon from the late recommendations for taxation, and thereby oblige them to that measure which they are so very solicitous to avoid, viz. the making further emissions to defray the public expences; for is it to be supposed that the people in general would submit to such a large reduction of the prices of their produce, and at the same time submit to such large taxes as the requisitions from Congress now demand? We trust you will give these objections, as well as every thing else that may be offered pro and con upon this interesting matter in convention, their due weight, and after all, we leave it with you to act according to your best judgment and discretion, and in case you should, after mature and thorough consideration judge the measure to be expedient and practicable, and find that it is highly probable it will be adopted by all the rest of the United States, you will then proceed upon the business and make report of your proceedings to this Court, that they may take such order thereupon, as they shall then judge will best promote the public weal.

§ 4.5. "No Runaway" Acts

Commentators have proposed state enactment of legislation designed to dispel fears that a convention for proposing amendments could exceed the scope of its authority. In 2011, Michael Stern and this author prepared a draft model law for state legislatures to consider. The model law is set forth below, along with its annotations. The term “delegate” has been changed to the more precise “commissioner” throughout.

This model law is designed both for Article V and other interstate conventions. Any portions not applicable to Article V (because outside the legislative

authority of the state) may be adhered to voluntarily by the state legislature when exercising its Article V functions.

Following the model law are two similar enactments of the Indiana legislature.

§ 4.5.1. Uniform Interstate Convention Act

Uniform Interstate Convention Act

(Annotations in Footnotes)

Section 1. .Definitions

(a) “Application” means an application for a convention for proposing amendments relied upon by Congress in calling such a convention.

(b) “Commission” means the document or documents whereby the state, state legislature, or duly authorized officer of the state empowers a commissioner to an interstate convention and fixes the scope of his or her authority.[264)]

(c) “Committee” means a delegation of persons commissioned to an interstate convention.[264)]

(d) “Convention for proposing amendments”[265)] means an interstate convention consisting of committees commissioned by the legislatures of the several states and called by Congress on the application of at least two thirds of such legislatures under the authority of Article V of the United States Constitution.

(e) “Instructions” means directions given to commissioners by the commissioning authority or by that authority's agent designated for that purpose. Instructions are given contemporaneously with or subsequent to a commission, and may be amended before or during an interstate convention.[266)]

(f) “Interstate convention” means a diplomatic meeting,[267)] however denominated, of delegations (“committees”) from three or more states or state legislatures[268)] to consult upon and propose or adopt measures pertaining to one or more issues previously prescribed by applications, by the convention call, or by the commissioning authority.[269)]

Section 2. Statements of understanding.

(a) In the years since the Declaration of Independence, and both before and after ratification[270)] of the United States Constitution, the states and state legislatures have from time to time met in interstate conventions (however denominated) to consult upon and propose or adopt measures to address prescribed problems.[271)] This continued a pre-Independence practice of American colonies meeting in inter-colonial conventions and congresses.[272)]

(b) The United States Constitution recognizes the authority of states and state legislatures to commission commissioners to interstate conventions, subject to the limitations set forth in the Constitution. It does so implicitly in Article I, Section 10 (recognizing to interstate compacts, subject to congressional approval), explicitly though Article V (authorizing conventions for proposing amendments), and by reserving this previously-existing state power to the

states through the Tenth Amendment.

(c) Although the authority to meet in convention is generally a power reserved to the states by the Constitution, in the case of a convention for proposing amendments the power is granted to the several state legislatures through the Article V of the Constitution.[273)]

(d) Leading American Founders, among them James Madison, recognized the authority of states to coordinate their efforts in ways that necessarily or properly included interstate conventions.[274)]

Section 3. Purposes. The purposes of this Act are

(a) to clarify the scope of authority of commissioners and committees representing this state [commonwealth] or the legislature of this state [commonwealth] at interstate conventions;

(b) to provide for enforcing limits on such authority;

(c) to provide methods of selecting and replacing commissioners to conventions; and

(d) to prescribe an oath to be taken by interstate convention commissioners.

Section 4. Number, selection, and removal of commissioners.

(a) Commissioners to a convention for proposing amendments shall be selected by a majority vote of a joint session of the legislature [or, in Nebraska “by a majority vote of the legislature].[275)] Unless a different number is prescribed by the same [joint] session, the number of commissioners in this state's committee shall be three [five].[276)]

(b) Commissioners to a convention for proposing amendments may be recalled and removed at any time and for any reason by a majority vote of a [joint] session of the legislature, and, if the legislature is not in session, may be suspended pending such a vote by a [joint] legislative committee duly authorized by the legislature for that purpose.

(b) The number and methods of selection and removal of commissioners to other conventions shall be as prescribed by law.[277)]

Section 5. Vacancies.

(a) Vacancies in committees representing the state legislature at a convention for proposing amendments shall be filled by the [joint] legislative committee duly authorized for that purpose until such time as a vote by [a joint session of] the legislature shall select a permanent replacement.

(b) Vacancies in committees of commissioners at other interstate conventions shall be filled as prescribed by law or, in absence of governing law, by the authority commissioning the commissioners.

Section 6. Limitations on commissioners' powers.

(a) No delegate shall exceed the scope of authority granted by his or her commission or violate his or her instructions.

(b) In the case of a convention for proposing amendments, the scope of

authority granted by any commission and instructions shall not be deemed to exceed the narrowest of

(i) the scope of the congressional call,

(ii) the scope of the narrowest application among those cited by Congress as mandating the convention call, or

(iii) the actual terms of the commission and instructions.[278)]

Section 7. Oath.

(a) Prior to or contemporaneously with receiving his or her commission, each commissioner shall take the following oath: “I do solemnly swear (or affirm) that I accept and will act according to the limits of authority specified in my commission, by any present or subsequent instructions, and by the Uniform Interstate Convention Act. I understand that violating this oath may subject me to penalties provided by law.”

(b) No person shall serve as a commissioner prior to taking the oath specified in subsection (a).

Section 8. Offense of exceeding scope of authority at an interstate convention.

(a) A person commits the offense of exceeding the scope of authority at an interstate convention if, while serving as a delegate at an interstate convention, he or she votes for, votes to consider, or otherwise promotes any action of the convention not within the scope defined in Section 6; provided, however, that a delegate may vote for or otherwise support a measure clearly identified as a non-binding recommendation rather than as a formal proposal.[279)]

(b) A person committing the offense of exceeding the scope of authority at an interstate convention shall be subject to the same punishments applicable to a person convicted of perjury.[280)]

§ 4.5.2. Indiana Acts Limiting Commissioners

Below are two laws recently passed by the Indiana legislature that are designed to limit the authority of commissioners to an Article V convention. Unlike the above model application, these laws apply only to Article V conventions, not all multi-state conventions.

Full text of Indiana's Legislation

First Regular Session 118th General Assembly (2013)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the

introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 224

AN ACT to amend the Indiana Code concerning the general assembly.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 2-8 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]:

ARTICLE 8. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES

Chapter 1. General Provisions

Sec. 1. This article applies whenever an Article V convention is called.

Chapter 2. Definitions

Sec. 1. The definitions in this chapter apply throughout this article.

Sec. 2. “Alternate delegate” refers to anindividual appointed as an alternate delegate as provided by law.

Sec. 3. “Article V convention” refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.

Sec. 4. “Delegate” refers to an individual appointed as provided by law to represent Indiana at an Article V convention.

Sec. 5. “House of representatives” refers to the house of representatives of the general assembly.

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Sec. 6. “Paired delegate” refers to the delegate with whom an

alternate delegate is paired as provided by law. Sec. 7. “Senate” refers to the senate of the general assembly. Chapter 3. Duties of Delegates and Alternate Delegates Sec. 1. (a) At the time delegates and alternate delegates are appointed, the general assembly shall adopt a joint resolution to provide instructions to the delegates and alternate delegates regarding the following:

(1) The rules of procedure.

(2) Any other matter relating to the Article V convention that the

general assembly considers necessary.

(b) The general assembly may amend the instructions at any

time by joint resolution. Sec. 2. An alternate delegate:

(1) shall act in the place of the alternate delegate's paired delegate when the alternate delegate's paired delegate is absent from the Article V convention; and

(2) replaces the alternate delegate's paired delegate if the alternate delegate's paired delegate vacates the office.

Sec. 3. A vote cast by a delegate or an alternate delegate at an Article V convention that is outside the scope of:

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention; is void. Sec. 4. (a) A delegate or alternate delegate who votes or attempts to vote outside the scope of:

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention; forfeits the delegate's appointment by virtue of that vote or attempt to vote.

(b) The paired alternate delegate of a delegate who forfeits appointment under subsection (a) becomes the delegate at the time

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the forfeiture of the appointment occurs.

Sec. 5. The application of the general assembly to call an Article V convention for proposing amendments to the Constitution of the United States ceases to be a continuing application and shall be treated as having no effect if all of the delegates and alternate delegates vote or attempt to vote outside the scope of:

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

Sec. 6. A delegate or alternate delegate who knowingly or intentionally votes or attempts to vote outside the scope of:

(1) the instructions established by a joint resolution adopted under section 1 of this chapter; or

(2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention; commits a Class D felony.

Chapter 4. Article V Convention Delegate Advisory Group

Sec. 1. As used in this chapter, “advisory group” refers to the

Article V convention delegate advisory group established by section 2 of this chapter. Sec. 2. The Article V convention delegate advisory group is established. Sec. 3. The advisory group consists of the following members:

(1) The chief justice of the supreme court.

(2) The chief judge of the court of appeals.

(3) The judge of the tax court. Sec. 4. The chief justice of the supreme court is the chair of the advisory group.

Sec. 5. The advisory group shall meet at the call of the chair.

Sec. 6. The advisory group shall establish the policies and procedures that the advisory group determines necessary to carry out this chapter.

Sec. 7. (a) Upon request of a delegate or alternate delegate, the advisory group shall advise the delegate or alternate delegate whether there is reason to believe that an action or an attempt to

take an action by a delegate or alternate delegate would:

(1) violate the instructions established by a joint resolution adopted under IC 2-8-3-1; or

(2) exceed the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

(b) The advisory group may render an advisory determination under this section in any summary manner considered appropriate by the advisory group.

(c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for

a determination.

(d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner possible to the delegate or alternative delegate who requested the advisory determination.

(e) If the advisory group renders an advisory determination under this section, the advisory group may also take an action permitted under section 8 of this chapter.

Sec. 8. (a) On its own motion or upon request of the speaker of the house of representatives, the president pro tempore of the senate, or the attorney general, the advisory group shall advise the attorney general whether there is reason to believe that a vote or an attempt to vote by a delegate or alternate delegate has:

(1) violated the instructions established by a joint resolution adopted under IC 2-8-3-1; or

(2) exceeded the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.

(b) The advisory group shall issue the advisory determination under this section by one (1) of the following summary procedures:

(1) Without notice or an evidentiary proceeding.

(2) After a hearing conducted by the advisory group.

(c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for an advisory determination.

(d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner

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possible to the attorney general.

Sec. 9. Immediately, upon receipt of an advisory determination under section 8 of this chapter that finds that a vote or attempt to vote by a delegate or alternate delegate is a violation described in section 8(a)(1) of this chapter or in excess of the authority of the delegate or alternate delegate, as describedinsection8(a)(2) of this chapter, the attorney general shall inform the delegates, alternate delegates, the speaker of the house of representatives,the president pro tempore of the senate, and the Article V convention that:

(1) the vote or attempt to vote did not comply with Indiana law, is

void, and has no effect; and

(2) the credentials of the delegate or alternate delegate who is the subject of the determination are revoked.

SECTION 2. IC 4-6-2-1.1, AS AMENDED BY P.L.126-2012, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1.1. The attorney general has concurrent jurisdiction with the prosecuting attorney in the prosecution of the following:

(1) Actions in which a person is accused of committing, while a member of an unlawful assembly as defined in IC 35-45-1-1, a homicide (IC 35-42-1).

(2) Actions in which a person is accused of assisting a criminal (IC 35-44.1-2-5), if the person alleged to have been assisted is a person described in subdivision (1).

(3) Actions in which a sheriff is accused of any offense that involves a failure to protect the life of a prisoner in the sheriff's custody.

(4) Actions in which a violation of IC 2-8-3-6 (concerning constitutional convention delegates) has occurred.

SECTION 3. IC 35-32-2-7 IS ADDED TO THE INDIANA CODE AS**NEW**SECTIONTOREADASFOLLOWS[EFFECTIVEJULY 1, 2013]: **Sec. 7. A person may be tried for a violation of IC 2-8-3-6 in:**

(1) Marion County; or

(2) the county where the person resides.

SECTION 4. IC 35-51-2-1, AS ADDED BY P.L.70-2011, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1. The following statutes define crimes in IC 2:

IC 2-4-1-4 (Concerning legislative investigations).

IC 2-7-6-2 (Concerning lobbying).

IC 2-7-6-3 (Concerning lobbying).

IC 2-7-6-4 (Concerning lobbying).

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IC 2-8-3-6 (Concerning constitutional convention delegates).

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_____ President of the Senate

_____ President Pro Tempore

_____ Speaker of the House of Representatives

_____ Governor of the State of Indiana

Date: _____ Time: _____

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First Regular Session 118th General Assembly (2013)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 225

AN ACT to amend the Indiana Code concerning the general assembly.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 2-8.2 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]:

ARTICLE 8.2. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES

Chapter 1. General Provisions

Sec. 1. This article applies whenever an Article V convention is called.

Chapter 2. Definitions

Sec. 1. The definitions in this chapter apply throughout this article.

Sec. 2. “Alternate delegate” refers to anindividual appointed as an

alternate delegate as provided by law.

Sec. 3. “Article V convention” refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.

Sec. 4. “Chamber” refers to either the house of representatives or the senate.

Sec. 5. “Delegate” refers to anindividual appointed as provided by law to represent Indiana at an Article V convention.

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Sec. 6. “House of representatives” refers to the house of representatives of the general assembly.

Sec. 7. “Paired delegate” refers to the delegate with whom an alternate delegate is paired as provided by law.

Sec. 8. “Senate” refers to the senate of the general assembly.

Chapter 3. Qualifications and Appointment of Delegates and Alternate Delegates

Sec. 1. (a) An individual must satisfy the following to be appointed as a delegate to an Article V convention:

(1) The individual must reside in Indiana.

(2) The individual must be a registered voter in Indiana.

(3) The individual must be at least eighteen (18) years of age.

(4) The individual is not registered or required to be registered as a lobbyist under IC 2-2.1, IC 4-2-7, IC 4-2-8, 2

U.S.C. 1603, or rules or regulations adopted under any of these laws.

(b) An individual may not be appointed as a delegate if the individual holds a federal office.

Sec. 2. An individual appointed as an alternate delegate must have the same qualifications as an individual appointed as a delegate under section 1 of this chapter.

Sec. 3. (a) Whenever an Article V convention is called, the general assembly shall appoint:

(1) the number of delegates allocated to represent Indiana; and

(2) an equal number of alternate delegates; under rules adopted jointly by the house of representatives and the senate.Unless established otherwise by the rules and procedures of an Article V convention, it shall be assumed that Indiana has two

(2) delegates and two (2) alternate delegates designated to represent Indiana.

(b) If the general assembly is not in session during the time during which delegates to an Article V convention must be appointed, the governor shall call the general assembly intospecial session under Article 4, Section 9 of the Constitution of the State of Indiana for the purpose of appointing delegates and alternate delegates. Sec. 4. (a) To be appointed a delegate or an alternate delegate, an individual must receive, in each chamber, the vote of a majority of all the members elected to that chamber.

(b) At the time of appointment, each alternate delegate must be paired with a delegate as provided in a joint resolution adopted by

the general assembly.

Sec. 5. The general assembly may recall any delegate or alternate delegate and replace that delegate or alternate delegate with an individual appointed under this article at any time.

Sec. 6. The general assembly shall appoint or recall delegates or alternate delegates by joint resolution.

Sec. 7. (a) A delegate or an alternate delegate is:

(1) entitled to receive the same mileage and travel allowances paid to individuals who serve as legislative members of interim study committees established by the legislative council; and

(2) not entitled to receive a salary or a per diem instead of salary for serving as a delegate or alternate delegate.

(b) For purposes of Article 2,Section9 of the Constitution of the State of Indiana,the positionof delegate or alternate delegate is not a lucrative office.

(c) All funds necessary to pay expenses under subsection (a) shall be paid from appropriations to the legislative council and the legislative services agency.

Sec. 8. Each delegate and alternate delegate shall, after appointment and before the delegate or alternate delegate may exercise any function as delegate or alternate delegate, execute an oath in writing that the delegate or alternate delegate will:

(1) support the Constitution of the United States and the Constitution of the State of Indiana;

(2) faithfully abide by and execute any instructions to delegates and alternate delegates adopted by the general assembly and as may be amended by the general assembly at any time; and

(3) otherwise faithfully discharge the duties of delegate or alternate delegate.

Sec. 9. (a) A delegate's or alternate delegate's executed oath shall be

filed with the secretary of state.

(b) After a delegate's or alternate delegate's oath is filed with the secretary of state, the governor shall issue a commission to the delegate or alternate delegate as provided in IC 4-3-1-5(2).

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_____
President of the Senate

_____
President Pro Tempore

_____
Speaker of the House of Representatives

_____
Governor of the State of Indiana

Date: _____ Time: _____

SEA 225 — Concur+

Part V: Full-Text Source Materials

§ 5.1. Robert Natelson, Founding-Era Conventions

Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments" Robert G. Natelson This article was published originally at 65 FLA. L. REV. 615 (2013) and is reprinted here by permission of Professor Robert Natelson and the Florida Law Review.

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§ 5.2. Robert Natelson, Rules Governing the Process

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§ 5.3. Michael Rappaport, The Constitutionality of a Limited Convention

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§ 5.4. Michael Stern, Toward a Safeguarded Article V Convention

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End Notes

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[1] # See infra § 3.5.

[2] # Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013), reprinted infra § 5.1.

[3] # Dodge v. Woolsey, 59 U.S. 331 (1855) (noting that the electorate has no direct role in the amending process); Smith v. Union Bank, 30 U.S. 518 (1831) (referring to a convention for proposing amendments as a "convention of the states"); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that the President has no role in the amending process, and relying on the procedures used in proposing the first ten amendments).

[4] # See infra § 3.1.

[5] # Applications are collected at The Article V Library, http://article5library.org/ (last visited Apr. 2, 2014), and one may undertake subject searches there. Another site collecting applications, Friends of the Article V Convention, http://www.foavc.org/ (last visited Apr. 2, 2014), is less reliable and must be used cautiously.

[6] # State Article V Applications—By Subject, The Article V Library, http://article5library.org/apptable_by_subject.php (screen by "Direct election of Senators") (last visited Apr. 2, 2014).

[7] # Id. (screen by "Limit Presidential Tenure").

[8] # This campaign died out partly as a result of the passing of its leader, Senator Everett Dirksen (R-IL) and partly because liberal opponents widely disseminated fears that an Article V convention was a "con-con" that might "run away." Although similar claims arose late in the nineteenth century, this seems to have been the first application campaign in which those claims had a significant political impact. The applications differed in wording sufficiently that it might have been impossible to aggregate all thirty-three. See id. The same cannot be said of the applications for direct election of Senators. Id. (screen by "Direct election of Senators").

[9] # Thirty-two of the necessary thirty-four states were at one time on record for a balanced budget convention. See id. (screen by "Balanced budget").

[10] # See infra Part II.

[11] # See, e.g., Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 Yale L.J. 957 (1963); ———, Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189 (1972); William F. Swindler, The Current Challenge to Federalism: The Confederating Proposals, 52 Geo. L.J. 1 (1963–1964). Professor Swindler argued expressly that only Congress should be allowed to initiate amendments and that state efforts to do so should be ignored, despite the language of the Constitution! Id. at 23, 33. He justified this, in part, by saying that then-pending state-based initiatives were "alarmingly regressive." Id. at 38.

[12] # See The Greenhouse in the Sky?, Chemistry World, http://www.rsc.org/chemistryworld/Issues/2006/April/Greenhousesky.asp (last visited Apr. 2, 2014) (contrasting prior science-fiction speculation with the actual surface of Venus).

[13] # E.g., Phyllis Schlafly, Is Article V in Our Future?, Town Hall Mag., Aug. 27, 2013, available at http://townhall.com/columnists/phyllisschlafly/2013/08/27/is-article-v-in-our-future-n1673875/page/full . ("Now imagine Democratic and Republican

conventions meeting in the same hall and trying to agree on constitutional changes.”).

14) #Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615, 629 (2013), reprinted infra § 5.1. For examples of this misunderstanding, see Charles L. Black, Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189, 198 (1972) (describing an unlimited convention as a “general” one), and Walter E. Dellinger, The Recurring Question of the “Limited” Constitutional Convention, 88 Yale L.J. 1623, 1632 n.47 (1978–1979) (assuming that because Madison referred to a “general” convention he meant an unlimited one).

15) # John M. Harmon, Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution, 3 Op. O.L.C. 390 (1979).

16) # Thus, in Bruce M. Van Sickle & Lynn M. Boughey, A Lawful and Peaceful Revolution, Article V and Congress’ Present Duty to Call a Convention for Proposing Amendments, 14 Hamline L. Rev. 1, 28–29 (1990–1991), the authors argued that because Article V used of the word “amendments” (in the plural), it necessarily prevented limiting a convention to a single subject. This conclusion flies in the face of history.

17) # On this history, see generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615 (2013) [hereinafter Natelson, Conventions], reprinted infra § 5.1.

18) # Natelson, Conventions, at 624; Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 706 (2011) [hereinafter Natelson, Rules], reprinted infra § 5.2; cf. Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (“The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes.”).

19) #See 8 House of Commons Journal 16–18 (1802), available at http://www.british-history.ac.uk/search/series/commons-jrnl.

20) # See Russell L. Caplan, Constitutional Brinkmanship: Amending the Constitution by National Convention 6–40 (1988) [hereinafter Constitutional Brinksmanship].

21) # Natelson, Conventions, at 620; Natelson, Rules, at 707–08.

22) # These are discussed generally in Natelson, Conventions.

23) # On terminology, see Natelson, Conventions, at 629–32. For an example of the term “application” being used as a synonym for “call,” see id. at 642 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention). For additional terminology, see Natelson, Rules, at 698–99, 708.

24) # Natelson, Conventions, at 667.

25) # Constitutional Brinksmanship, at 95–96 (1988).

26) # Natelson, Conventions, at 680–85.

27) # E.g., Smith v. Union Bank, 30 U.S. 518, 528 (1831).

28) # Natelson, Conventions, at 684–85 (reproducing language of early state applications and a responsive resolution).

29) # Amendments to the Constitution Proposed by the Hartford Convention: 1814, Yale Law School, http://avalon.law.yale.edu/19th_century/hartconv.asp

(last visited Apr. 4, 2014). The journal is also available in A Short Account of the Hartford Convention (Theodore Lyman ed., 1823).

30) # See Thelma Jennings, The Nashville Convention: Southern Movement for Unity, 1848–1850 (1980). This gathering, called by the State of Mississippi, also was known as the Southern Convention.

31) # The official name of the gathering was the Washington Conference Convention, but it is also commonly referred to as the “Washington Peace Conference.” It was called by Virginia, and attended by twenty-one states after several already had seceded. Former President John Tyler served as convention president. The proceedings are collected in A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States (L.E. Chittenden ed., 1861). For a modern treatment, see Robert Gray Gunderson, Old Gentlemen’s Convention: The Washington Peace Conference of 1861 (1961). (The name of the book comes from a derogatory comment by abolitionist Horace Greeley.

32) # The Hartford journal does not reveal how votes were tabulated (by commissioner or by state), but otherwise its proceedings are consistent.

33) # U.S. Const. arts. V, VII.

34) # U.S. Const., art. VII.

35) # On the latter, see Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws (Everett Somerville Brown ed., 1938). For a shorter treatment, see Everett Somerville Brown, The Ratification of the Twenty-First Amendment, 29 Am. Pol. Sci. Rev. 1005 (1935).

36) # The division between proposal and decision was elucidated by the seventeenth century political author James Harrington in his Commonwealth of Oceana—a work hugely popular among the Founders. Harrington compared it to the common domestic situation in which one girl cuts a cake while the other gets to choose which piece is hers. He therefore referred to it as “dividing” and “choosing.”

37) # Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615, 656 (2013), reprinted infra § 5.1.

38) # Id. at 621–22.

39) # After most of the states already had accepted the invitation to participate, Congress passed a weak resolution expressing the “opinion” that the convention be limited to amending the Articles. All but two states disregarded this “opinion,” but many writers have confused it with the convention call. Id., at 674–79.

40) # 3 The Records of the Federal Convention of 1787, at 559–86 (Max Farrand ed., 1939).

41) # Some writers have depicted a convention for proposing amendments, as least potentially, as a popularly-elected gathering directly representing the people. However, the Supreme Court refers to it not as a “convention of the people” but as a “convention of the states,” Smith v. Union Bank, 30 U.S. 518, 528 (1831). The Court’s characterization is confirmed by a large body of uncontradicted Founding-Era evidence. This evidence includes, inter alia, contemporaneous convention practice and discussions of the procedure during the Constitutional Convention and during the ratification debates.

Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 715–32 (2011), reprinted infra § 5.2. See generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013), reprinted infra § 5.1. In addition, the Founding Generation often referred to an amendments convention as a "convention of the states." This usage appears in contemporaneous legislative resolutions on the subject. See, for example: The first application for an Article V convention. 1 Annals of Congress 28–29 (1789) (Joseph Gales ed., 1834) (reproducing Virginia application of Nov. 14, 1788, calling an amendments convention "a convention of the states"). The Pennsylvania legislature's resolution disapproving that application. Minutes of the Thirteenth General Assembly of the Commonwealth of Pennsylvania in Their Second Session 124–25 (Mar. 5, 1789) (calling an amendments convention "a convention of the states"). A letter from the Virginia legislature to the Governor of New York successfully urging New York to adopt its own application. Journal of the House of Assembly of the State of New-York 25 (Dec. 27, 1788) (calling an amendments convention "a Convention of the States"). A Rhode Island legislative resolution on the same subject. 10 Records of the State of Rhode Island 309–10 (John Russell Bartlett ed., 1865) (General Assembly resolution of Oct. 27, 1788) (calling an amendments convention a "general convention of the states").

42) # 2 The Records of the Federal Convention of 1787, at 159 (Max Farrand ed., 1939).

43) # Id. at 578.

44) # Id. at 649.

45) # On the framing process, see Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 621–24 (2013), reprinted infra § 5.1; Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 699–702 (2011), reprinted infra § 5.2; Michael Stern, Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention, 78 Tenn. L. Rev. 765, 767–70 (2011), reprinted infra § 5.4; see also Idaho v. Freeman, 529 F. Supp. 1107, 1132 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982) ("[T]he drafters of the Constitution found it appropriate to grant the same power to propose amendments to both the local [state] and national governments . . . .").

46) # 23 The Documentary History of the Ratification of the Constitution 2520–22 (Merrill Jensen, John P. Kaminsky, & Gaspare J. Saladino eds., 2009).

47) # Letter from James Madison to George Turberville (Nov. 2, 1788), reprinted in 5 The Writings of James Madison 297, 299 (Gaillard Hunt ed., 1904); Cf. Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis, 28 Const. Comment. 53, 92–93 (2012), reprinted infra § 5.3.

48) # Some writers cite stray Supreme Court dicta or concurrences suggesting that congressional control over the amendment process is unreviewable. White v. Hart, 80 U.S. 649 (1871); Coleman v. Miller, 307 U.S. 438, 456 (1939) (Black, J., concurring). Black's Coleman concurrence has had a disproportionate effect on public perceptions, considering (1) the patent

implausibility of its core claim (it asserted, in the teeth of the constitutional language, that Congress has absolute control of the amendment process), see Idaho v. Freeman, 529 F. Supp. 1107, 1135–36 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982), (2) that it was not the opinion of the Court, (3) that it has never been followed and (4) that the courts have universally repudiated it!

49) # Opinion of the Justices, 172 S.E. 474 (N.C. 1933) (stating that whether an amendment is ratified ultimately is determined by the Supreme Court); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.); Freeman, 529 F. Supp. 1107. See also the Article V cases cited throughout this book. See supra Part II.

50) # Freeman, 529 F. Supp. at 1126.

51) # United States v. Sprague, 282 U.S. 716 (1931). The language in Sprague was arguably, broader—that all of Article V precluded interpretation—but other parts of Article V were not at issue. See Coleman, 307 U.S. 438 (referring to the "familiar principle, what was there said must be read in the light of the point decided"). As the footnotes in this work demonstrate, the courts, including the Supreme Court, have freely interpreted the less-obvious portions of the Article.

52) # Hawke v. Smith ("Hawke I"), 253 U.S. 221 (1920).

53) # Leser v. Garnett, 258 U.S. 130 (1922) (relying on history to affirm validity of the procedure adopted for the Fifteenth, and therefore the Nineteenth, Amendment); Hollingsworth v. Virginia, 3 U.S. 381 (1798) (following practice pertaining to first ten amendments); Dyer, 390 F. Supp. at 1306–07 (applying historical evidence in determining how conventions determine voting rules); United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954) (citing history of judicial reliance on the Fourteenth Amendment as evidence that it had been validly adopted); Barlotti v. Lyons, 189 P. 282 (Cal. 1920) (citing Founding-Era evidence in defining the Article V word "legislature"); Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (determining the mode of election for a state ratifying convention by consulting historical practice).

54) # Dillon v. Gloss, 256 U.S. 368, 373 (1921) (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification).

55) # Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 704–06 (2011), reprinted infra § 5.2. The Founding-Era law of principals and incidents and its implication for constitutional interpretation are discussed in Robert G. Natelson, The Legal Origins of the Necessary and Proper Clause, in The Origins of the Necessary and Proper Clause 52, 60–68 (2010). The basic concepts outlined there were adopted by Chief Justice Roberts in his discussion of the Clause in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

56) # Dillon, 256 U.S. at 373 (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933) (holding that Article V gives state legislatures power to provide for ratifying conventions); State ex rel. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933) (stating that the calling of a convention is an incidental duty of the state legislature when Congress chooses that mode of ratification).

[57] # Myers, 186 N.E. 918 (stating that the calling of a convention is an duty of the state legislature when Congress chooses that mode of ratification because it is "necessary and incidental" to ratification); see also Sevier, 62 S.W.2d 895 (holding that Article V gives state legislatures power to provide for ratifying conventions).

[58] # Natelson, Rules, at 703–04.

[59] # Hawke v. Smith ("Hawke I"), 253 U.S. 221 (1920); see also Hawke v. Smith ("Hawke II"), 253 U.S. 231 (1920).

[60] # Prior v. Norland, 188 P. 729 (Colo. 1920).

[61] # United States v. Sprague, 282 U.S. 716, 733 (1931) (holding the Tenth Amendment irrelevant because, "The fifth article does not purport to delegate any governmental power to the United States . . . . On the contrary . . . the article is a grant of authority by the people to Congress, and not to the United States."); United States v. Thibault, 47 F.2d 169 (2d Cir. 1931) (holding that Tenth Amendment is not relevant in the ratification process); Dyer v. Blair, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.); Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977).

[62] # Coleman v. Miller, 307 U.S. 438 (1939).

[63] # Leser v. Garnett, 258 U.S. 130, 137 (1922) (Brandeis, J.); State ex rel. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933).

[64] # Hawke I, 253 U.S. 221; Hollingsworth v. Virginia, 3 U.S. 381 (1798); Prior, 188 P. 729; see also Hawke II, 253 U.S. 231; Dillon v. Gloss, 256 U.S. 368, 374 (1921) (stating that people assent to amendments through representative assemblies); Sevier, 62 S.W.2d 895.

[65] # For a slightly different formulation, see Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 702–03 (2011), reprinted infra § 5.2.

[66] # Dyer, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules); Opinion of the Justices, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members).

[67] # See infra § 3.9.3.

[68] # Hawke I, 253 U.S. 221; Opinion of the Justices, 107 A. 673; Prior, 188 P. 729; Decher v. Sec'y of State, 177 N.W. 288 (Mich. 1920); see also Hawke II, 253 U.S. 231; Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982); Dyer, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules).

[69] # Hollingsworth, 3 U.S. 381; Opinion of the Justices, 107 A. 673.

[70] # Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 710–12 (2011), reprinted infra § 5.2; Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977); see also Opinion of the Justices, 673 A.2d 693 (Me. 1996) (stating that a governor has no delegated power under Article V).

[71] # Hawke I, 253 U.S. 221; Prior v. Norland, 188 P. 729 (Colo. 1920); see also Hawke II, 253 U.S. 231; Sevier, 62 S.W.2d 895. This is so, although references to the state legislature in other parts of the Constitution may include the referendum power. Smiley v. Holm, 285 U.S. 355 (1932) (stating that the constitutional meaning of "legislature" depends on the function, and

that it can refer to a lawmaking, ratifying, electing, or consenting body; of course, it may also mean an applying body); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) (construing the Times, Places and Manner Clause); State ex rel. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984) (dicta).

72) # Hawke I, 253 U.S. 221; see also Hawke II, 253 U.S. 231; State ex rel. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933).

73) # Opinion of the Justices, 167 A. 176 (Me. 1933

74) # Gralike v. Cooke, 191 F.3d 911 (8th Cir. 1999), aff'd on other grounds, 531 U.S. 510 (2001); Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999); Barker v. Hazetine, 3 F. Supp. 2d 1088 (D.S.D. 1998); League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996); Bramberg v. Jones, 978 P.2d 1240 (1999); AFL-CIO v. Eu, 36 Cal. 3d 687 (1984); Morrissey v. State, 951 P.2d 911 (Colo. 1998); Waltermire, 691 P.2d 826 (dicta); In re Initiative Petition 364, 930 P.2d 186 (Okla. 1996). But see Opinion of the Justices, 148 So. 107 (Ala. 1933) (a state law may require convention delegates to vote in accordance with the results of a referendum). As the cases cited here demonstrate, this holding has been repudiated everywhere.

75) # Opinion of the Justices, 167 A. at 180.

76) # Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996); see also Gralike, 191 F.3d 911; Miller, 169 F.3d 1119; Barker, 3 F. Supp. 2d 1088; Gwadosky, 966 F. Supp. 52; Bramberg, 978 P.2d 1240; Morrissey, 951 P.2d 911; Opinion of the Justices, 673 A.2d 693 (Me. 1996); Waltermire, 691 P.2d 826 (dicta); In re Initiative Petition 364, 930 P.2d 186.

77) # Leser v. Garnett, 258 U.S. 130, 137 (1922); see also Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973) (holding that under Leser a state constitution may not impair a state legislature in its ratification function).

78) # Miller, 169 F.3d 1119.

79) # Kimble v. Swackhamer, 439 U.S. 1385 (1978) (Rehnquist, J.) (upholding advisory referendum); Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997).

80) # Everett Somerville Brown, The Ratification of the Twenty-First Amendment, 29 Am. Pol. Sci. Rev. 1005, 1017 (1935).

81) # State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933).

82) # Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (holding a state legislative voting rule not binding on, but impliedly accepted by, the legislature operating under Article V).

83) # For an example of the term "application" being used as a synonym for "call," see Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 642 (2013), reprinted infra § 5.1 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention).

84) # The Federalist No. 85 (Alexander Hamilton).

85) # Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 709–10 (2011) [hereinafter Natelson, Rules], reprinted infra § 5.2.

86) # See supra § 3.6.

87) # See supra § 3.7.

88) # Dyer, 390 F. Supp. 1291.

[89] # Ohio ex rel. Erkenbrecher v. Cox, 257 F. 334 (S.D. Ohio 1919) (dicta); cf. Rhode Island v. Palmer ("The Prohibition Cases"), 253 U.S. 350 (1920) (the requirement that "two thirds" of each house of Congress propose amendments means two-thirds of the members present, assuming a quorum).

[90] # See supra § 3.7; see also Natelson, Rules, at 710–12.

[91] # United States ex rel. Widenmann v. Colby, 265 F. 998 (D.C. Cir. 1920), aff'd, 253 U.S. 350 (1921); Cox, 257 F. 334 (no requirement for validity of a ratification other than mentioned in Constitution).

[92] # Leser v. Garnett, 258 U.S. 130 (1922) (holding that official notice by state legislatures that they had ratified bound the U.S. Secretary of State, whose certification was binding on the courts); Field v. Clar, 143 U.S. 649, 669–73 (1892) (holding that evidence that bill was signed by the Speaker of the House and President of the Senate and enrolled was conclusive that it was duly passed); Idaho v. Freeman, 529 F. Supp. 1107, 1150 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982); Colby, 265 F. 998; Cox, 257 F. 334.

[93] # Cf. Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977) (holding that a single-subject application is valid, although not dealing with the issue as to whether the limitation is enforceable).

[94] # See, e.g., Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis, 28 Const. Comment. 53 (2012) [hereinafter Rappaport, Limited Convention], reprinted infra § 5.3.; Michael Stern, Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention, 78 Tenn. L. Rev. 765 (2011) [hereinafter Stern, Reopening], reprinted infra § 5.4.

[95] # See generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013) [hereinafter Natelson, Conventions], reprinted infra **§ 5.1.**

[96] # Robert G. Natelson, Proposing Constitutional Amendments by Convention: **Rules Governing the Process**, 78 Tenn. L. Rev. 693, 723–31 (2011) [hereinafter Natelson, Rules], reprinted infra **§ 5.2; Rappaport, Limited Convention**, at 83–89; Stern, Reopening, at 771.

[97] # This application is substantially reproduced in **Natelson, Rules**, at 739, along with its unlimited New York counterpart.

[98] # **Natelson, Rules**, at 731–32.

[99] #See infra **§ 3.9.6.**

[100] #See generally Natelson, Conventions. On the Constitutional Convention, see id. at 674; Natelson, Rules, at 719–23.

[101] #Robert G. Natelson, Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers 17–18 (Am. Legislative Exch. Council, 2d ed. 2013), available at http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf; see also **Rappaport, Limited Convention**, at 81–82; **Stern, Reopening**, at 781–87.

[102] #Infra § 5.1.

[103] #Conditional applications and calls were recognized during the Founding Era. See, e.g., Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65

Fla. L. Rev. 615, 639, 661–62 (2013), reprinted infra § 5.1; cf. Idaho v. Freeman, 529 F. Supp. 1107, 1154 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982) (declining to rule on the issue while criticizing the claim that conditions are void or void an application).

104) #Coleman v. Miller, 307 U.S. 438 (1939) (stating that congressional decisions against rescission will be respected); Opinion of the Justices, 107 A. 673 (Me. 1919). But see Freeman, 529 F. Supp. at 1141 (noting that Congress has not come to a definitive conclusion on rescission of ratifications).

105) #Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 712 (2011), reprinted infra § 5.2; Freeman, 529 F. Supp. 1107 (holding that ratifications can be rescinded until the three-fourths minimum is reached).

106) #E.g., Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 666 (2013), reprinted infra § 5.1.

107) #This section is based largely on Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 712–14 (2011), reprinted infra § 5.2, but also includes new information.

108) #256 U.S. 368 (1921).

109) #The "staleness" discussion in Dillon was based partly on presumed congressional power to set ratification time limits as an incident of its power to choose one of two "Mode[s] of Ratification." However, congressional authority to call a convention for proposing amendments is narrower than its authority over ratification: The latter is partly discretionary, the former is purely ministerial.

110) #Dillon, 256 U.S. at 375.

111) #Dillon upheld the limit in the Eighteenth Amendment as incidental to the power to fix the mode of ratification, but the text of the amendment indicates that the limit was part of the original proposal itself. See United States v. Thibault, 47 F.2d 169, 169 (2d Cir. 1931) (reproducing the amendment's text). Since Dillon, the courts have corrected the basis on which the congressionally imposed seven-year ratification limit was justified. Thus, in Coleman v. Miller, 307 U.S. 438, 454 (1939) the Court stated that "We have held that the Congress in proposing an amendment may fix a reasonable time for ratification." See also United States v. Gugel, 119 F. Supp. 897, 900 (E.D. Ky. 1954) (stating that time for ratification is not important "unless a period of limitation is fixed by the Congress in the act submitting the amendment to the states"—that is, in the proposal). In Idaho v. Freeman, 529 F. Supp. 1107, 1153 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982), the court reported the original Dillon rationale, but noted that the time period in the proposed amendment before it was part of the congressional proposal itself.

112) #Coleman, 307 U.S. 438 (holding that there are no judicial standards for determining what time is reasonable); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

113) #See supra § 3.5.

114) #For the characterization, by the founding generation and by the Supreme

Court, of an Article V convention as a “convention of the states,” see supra §§ 3.1, 3.2.4.

115) #See supra § 3.1 (distinguishing between partial and general conventions). This survey of historical practice draws on Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615 (2013) [hereinafter Natelson, Conventions], reprinted infra § 5.1.

116) #See Natelson, Conventions, at 674–80, for a general discussion of the origins and procedure of the Constitutional Convention.

117) #See id. at 666–67.

118) #Id. at 689–90.

119) #Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615 (2013) [hereinafter Natelson, Conventions], reprinted infra § 5.1, contains more than a dozen Founding-Era calls.

120) #Id. at 645.

121) #See infra § 3.9.7 (reproducing the Virginia call).

122) #C.A. Weslager, The Stamp Act Congress (1976). The call itself is reproduced on pages 181–82. The New York commissioners were selected by the legislature’s committee of correspondence, id. at 81, and the Delaware commissioners by a rump of former legislators. Id. at 93–99. One might read the call of Connecticut for the 1780 Boston convention as seeking to prescribe how some of the other states appointed their commissioners. However, that language probably represents merely an understanding of which state legislatures were in session and which ones were in recess. In any event, the result was the same as it was for the Stamp Act Congress: states appointed commissioners as they pleased, and all were seated. The call for the 1780 Boston Convention is found in Proceedings of a Convention of Delegates from Several of the New-England States, Held at Boston, August 3–9, 1780, at 53–55 (Franklin B. Hough ed., 1867), and discussed in Natelson, Conventions, at 659–60.

123) #Natelson, Conventions, at 666.

124) #U.S. Const. art. I, § 4, cl. 4 (“Times, Places and Manner of holding Elections”).

125) #Robert G. Natelson, The Original Scope of the Congressional Power to Regulate Elections, 13 U. Pa. J. Const. L. 1 (2010).

126) #See infra § 3.14.2 for an explanation of the relative importance of the Washington Conference Convention.

127) #A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States 9 (L.E. Chittenden ed., 1861) (emphasis added).

128) # See supra § 3.5.

129) #Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591–92 (2012).

130) #McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (stating that means must “consist with the letter and spirit of the constitution”).

131) #See supra § 3.5; infra § 3.14.

132) #See supra § 3.9.2.

133) #See infra § 3.9.6 (discussing how Congress counts applications).

134) #In Dillon v. Gloss, 256 U.S. 368 (1921), the Supreme Court seemed to take a more expansive view of Congress's incidental powers under Article V by upholding its time limit for ratification in the Eighteenth Amendment as incidental to the power to fix the mode of ratification. However, the text of the amendment indicates that the limit was part of the original proposal itself. See United States v. Thibault, 47 F.2d 169, 169 (2d Cir. 1931) (reproducing the amendment's text). Since Dillon, the courts have corrected the basis on which the congressionally imposed seven-year ratification limit was justified. Thus, in Coleman v. Miller, 307 U.S. 438, 454 (1939) the Court stated that "We have held that the Congress in proposing an amendment may fix a reasonable time for ratification." (Emphasis added); see also United States v. Gugel, 119 F. Supp. 897, 900 (E.D. Ky. 1954) (stating that the time of ratification is not important "unless a period of limitation is fixed by the Congress in the act submitting the amendment to the states"—that is, in the proposal). In Idaho v. Freeman, 529 F. Supp. 1107, 1153 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982), the court reported the original Dillon rationale, but noted that the time period in the proposed amendment was part of the congressional proposal itself. In any event, the scope of powers incidental to selecting the mode of ratification does not determine the scope of powers incidental to calling a convention, particularly since the purpose of the convention is to bypass Congress.

135) # See supra § 3.3.

136) #U.S. Const. art. I, § 8, cl. 18.

137) #Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 Yale L.J. 957 (1963).

138) #Professor Black may have been encouraged by the Supreme Court's use of the Clause in expanding the Commerce Power. However, the Court generally has not applied the Clause that way in other contexts.

139) #Sam J. Ervin, Jr., Proposed Legislation to Implement the Convention Method of Amending the Constitution, 66 Mich. L. Rev. 875 (1967).

140) #See Thomas H. Neale, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress (Cong. Research Serv., Mar. 7, 2014) (discussing these efforts).

141) #See supra §§ 3.6, 3.7.

142) # See section 3.6; see also Ray v. Blair, 343 U.S. 214 (1952).

143) # Ray, supra, 343 U.S. at 224-25 ("The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution.")

144) # The non-applicability of the Necessary and Proper Clause help explains why the Times, Places and Manner Clause (also called the Elections Clause) includes a specific term permitting Congress to act in the area. U.S. Const., art. I, § 4, cl. 1. Another grant of power to Congress to act in an independent capacity—that is, outside its normal role as the legislature of the U.S. Government—is U.S. Const., amend. XII (providing for the Senate and House of Representatives to serve as witnesses to the count of electoral votes in presidential elections).

145) #See generally Robert G. Natelson, The Framing and Adoption of the

Necessary and Proper Clause, in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, The Origins of the Necessary and Proper Clause 84, 97–101 (2010) (discussing the adoption and meaning of the Clause); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (quoting James Madison for the proposition that "the Clause is 'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.'") (alteration in original).

146) #See supra § 3.9.3.

147) #See supra note 70; see also Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

148) #Everett Somerville Brown, The Ratification of the Twenty-First Amendment, 29 Am. Pol. Sci. Rev. 1005 (1935).

149) #Quotations are collected in Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 734–35 & nn.275–80 (2011), reprinted infra § 5.2.

150) #The Navigation Convention was to be a meeting of Pennsylvania, Delaware, and Maryland to discuss a canal and improvements in the waterways leading to Philadelphia and Baltimore. It never met. The Annapolis Commercial Convention met in 1786, and issued a sort of application recommending to the governments of the states represented at the convention that they call the Constitutional Convention. On the Navigation Convention, see Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 668–70 (2013), reprinted infra § 5.1.

151) #See supra § 3.6.

152) # United States v. Sprague, 282 U.S. 716, 733 (1931).

153) #Ministerial duties and constitutional rules, even on Congress, are enforceable by the courts. Cf. Powell v. McCormick, 395 U.S. 486 (1969) (issuing a declaratory judgment for reinstatement of a member of Congress denied his seat); Roberts v. United States, 176 U.S. 222 (1900) (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

154) #Absolute refusal by both Congress and the courts to issue, or require issue, of the mandated call would, of course, be unconstitutional behavior, and presumably would require an extra-constitutional response. For example, the states might call a plenipotentiary convention outside Article V. Extra-constitutional responses are not within the scope of this treatise.

155) #Roberts, 176 U.S. 222 (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

156) #See generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013), reprinted infra § 5.1.

157) #For example, during the ratification process, James Iredell, a leading North Carolina attorney and subsequently associate justice of the Supreme Court, likened the Constitution's scheme of enumerated powers to a "great power of attorney," 4 The Debates in the Several State Conventions of the Adoption of the Federal Constitution 148–49, (Jonathan Elliot ed., 2d ed. 1827) [hereinafter Elliot's Debates], while Edmund Pendleton explained the Constitution's delegation of powers by referring to (a) conveyance of a term

of years, (b) conveyance of a fee tail or life estate, (c) conveyance of a fee simple, and (d) agency. Letter from Edmund Pendleton to Richard Henry Lee (Jun. 14, 1788), reprinted in 10 Documentary History of the Ratification of the Constitution 1625–26 (Merrill Jensen et al. eds., 1976).

158) #The examples are many. See, e.g., 3 Elliot's Debates, at 384, 445, 591 (quoting Patrick Henry, an anti-federalist, at the Virginia ratifying convention); id. at 467 (quoting Edmund Randolph, a federalist, at the same convention).

159) #The contract analogy occurred to me in part because I did extensive work in contracts while in law practice and occasionally taught the subject as a law professor. More importantly, in writing this I have had the advantage of guidance by Scott Burnham, the Frederick N. & Barbara T. Curley Professor of Law at Gonzaga University, who is one of the nation's premier scholars on the law of contracts.

160) #Aside from aggregation issues, such applications may not be valid. See supra § 3.8.4.

161) # See Restatement (Second) of Contracts § 58 (1981).

162) #If, however, the wording of an "A plus B" application was such that the addition of B was a mere inquiry or suggestion, then presumably it could be aggregated with those applications addressing only Subject A. Cf. id. § 39.

163) #Natelson, Conventions, at 640–42.

164) #As Professor Burnham points out: in the absence of qualifying language "if the offeror said, for example, 'I offer you any of my household furniture,' and the offeree responded, 'I'll buy the couch,' there is no doubt a contract was formed with respect to the couch."

165) #Professor Burnham notes, "As a matter of interpretation, we must again determine what the offeror [i.e., an applying state legislature] intended. The offeror could be saying in effect, 'I am open to discuss any topic,' leaving the offeree to choose the topic; alternatively, the offeror could be saying in effect, 'I am open to discuss only all topics,' barring the offeree from narrowing the chosen topics."

166) #The application provides in part: WHEREAS, although the people of the State of Illinois do not desire any change in our Federal constitution, yet as several of our sister States have indicated that they deem it necessary that some amendment should be made thereto; and whereas, in and by the fifth article of the constitution of the United States, provision is made for proposing amendments to that instrument, either by congress or by a convention; and whereas a desire has been expressed, in various parts of the United States, for a convention to propose amendments to the constitution; therefore, Be it resolved by the General Assembly of the State of Illinois, That if an application shall be made to Congress, by any of the States deeming themselves aggrieved, to call a convention, in accordance with the constitutional provision aforesaid, to propose amendments to the constitution of the United States, that the Legislature of the State of Illinois will and does hereby concur in making such application. 1861 Ill. Laws 495.

167) # Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 668–70 (2013) [hereinafter Natelson, Conventions], reprinted infra § 5.1, includes details from the calls for numerous other conventions as well.

168) # For more information on the abortive York Town and Charleston Price

Conventions, see Natelson, Conventions, at 644–47.

169) # 7 Journals of the Continental Congress 1774–1789, at 124 (Worthington Chauncey Ford et al. eds., 1907

170) # For more information on the Springfield Convention of 1787, see Natelson, Conventions, at 647–49.

171) # 1 The Public Records of the State of Connecticut 599 (Charles J. Hoodly ed., 1894) (reproducing Massachusetts resolution).

172) # Virginia issued the call for the Constitutional Convention on November 23, 1786 in response to the recommendation of the Annapolis Convention. For more information about the call for the Constitutional Convention, see Natelson, Conventions, at 674–80. To view the credentials issued by the states to their delegates for the Constitutional Convention, see 3 The Records of the Federal Convention of 1787, at 559–86 (Max Farrand ed., 1939) [hereinafter Farrand's Records].

173) # 3 Farrand's Records 559–63.

174) #For more information on the Washington Conference Convention, see supra note 29 and accompanying text, and infra § 3.14.2–.5.

175) # A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States 9 (L.E. Chittenden ed., 1861).

176) #See generally Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 668–70 (2013), reprinted infra § 5.1.

177) #3 The Records of the Federal Convention of 1787, at 562–63 (Max Farrand ed., 1939).

178) #Dodge v. Woolsey, 59 U.S. 331, 348 (1855) (stating that the people "have excluded themselves from any direct or immediate agency in making amendments").

179) #Infra § 4.3.

180) #E.g., Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 631, 636, 638, 658, 663, 679, 687 (2013), reprinted infra § 5.1.

181) #Infra § 4.4.

182) #See supra § 3.7.

183) #Dyer v. Blair, 390 F. Supp. 1291 [N.D. Ill. 1975] [Stevens, J.] [holding that Article V legislature impliedly adopted provisions of state constitution].

184) #The author would like to thank the seasoned lawmakers and other experts who contributed insights into the convention rules process. In the treatment that follows, these people sometimes are referred to as our "advisors."

185) #United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Hawke v. Smith, 253 U.S. 221 (1920); see also Hollingsworth v. Virginia, 3 U.S. 381 (1798) (following procedure in adopting first ten amendments.

186) #See supra § 3.5; see also Paul Mason, Mason's Manual of Legislative Procedure § 39-6 (Nat'l Conference of State Legislatures, 2010 ed.) [hereinafter Mason's Manual] ("The best evidence of what are the established usages and customs is the rules as last in effect.").

187) #Accord Mason's Manual §§ 2-1, 10-4, 13-7.

188) #Dyer, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules); see also Mason's Manual § 71-1.

189) #Opinion of the Justices, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members); accord Mason's Manual § 560.

190) #This is an assumption made in Thomas H. Neile, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress 39 (Cong. Research Serv., Mar. 7, 2014) [hereinafter CRS Report], a paper that shows insufficient understanding of history, recent research, or applicable law. For example, it relies on only two of the more than forty reported Article V judicial decisions.

191) #A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States 19 (L.E. Chittenden ed., 1861).

192) #Resolutions, Address, and Journal of Proceedings of the Southern Convention 26 (Harvey M. Watterson ed., 1850). Jefferson's Manual is now a source for procedure in the U.S. House of Representatives as well. See Thomas Jefferson, Jefferson's Manual, H.R. Doc. No. 111-156 (2011), available at http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112.pdf.

193) #Mason's Manual § 44-1.

194) #Id. §§ 35, 38.

195) #Cf. id. §§ 41, 47.

196) #Id. §§ 50-1, 51-6, 510-1, 510-4; see also State of Rhode Island v. Palmer, 253 U.S. 350 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.). Alarmists sometimes demand to know in advance of a convention what the majority necessary for decision will be. A common question is, "Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment?" See Robert G. Natelson, Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers 33–34 (Am. Legislative Exch. Council, 2d ed. 2013), available at http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf (reproducing text of alarmists' questions and providing answers). This question, of course, reveals ignorance of parliamentary common law. Somewhat more surprisingly, a recent Congressional Research Service paper reveals a similar ignorance. See CRS Report, at 39 (suggesting that a convention majority of two-thirds would be appropriate).

197) #Mason's Manual §§ 32-4, 37.

198) #Id. § 39.6.

199) #Id. § 37.1.

200) #See supra § 3.1.

201) #The Santa Fe convention, which negotiated the Colorado River Compact, actually gathered at different times in four different locations, convening at various times in Washington, D.C., Phoenix, and Denver. Most of the meetings, however, including the final and climatic meetings, were held in Santa Fe. I was unable to find a single, unified, online source of the convention proceedings. I accordingly collected them and posted them at Minutes and Records of the Colorado River Commission (1922), available at http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf. There may have been other twentieth century conventions that met to negotiate

interstate compacts, although nearly all twentieth century compacts were negotiated more informally.# One might argue that the four-state Delaware River Basin Advisory Committee, which negotiated the Delaware River Basin Compact in 1959–1960, should be categorized as an additional interstate convention. Because this proposition is contestable, that gathering is not included here. See Robert G. Natelson, A Modern Quasi-Convention of States, Independence Inst. (Mar. 1, 2014), http://constitution.i2i.org/2014/03/01/thea-modern-quasi-convention-of-states/.

202) #Since this is not a law journal article, it avoids extensive citation from these sources. Summaries of all but the last four can be found in Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615 (2013), reprinted infra § 5.1. In the text above, I have listed these meetings under their usual or (where available) official names. Many of them had other names, including informal ones. For example, the Boston Convention sometimes was referred to as the "Boston Committee"; and although the first three are now remembered as "congresses," people also applied the word "convention" to them. The term "congress" to describe a multi-state convention fell into disuse after establishment of a permanent U.S. legislature called "Congress."

203) #Although called a "commission," this gathering was a true regional convention of states. It should not be confused with those bodies called "commissions" that operate after and pursuant to compacts. The latter represent another form of multi-state cooperation, but their permanent character disqualifies them from being called conventions.

204) #A "general convention" is one to which all states, or at least states from all regions, are invited, irrespective of whether all participate. It is to be distinguished from a regional, or partial, convention. See supra § 3.1. The term "general convention" does not designate an assembly where the subject matter is unlimited, as some have assumed.

205) #Infra § 3.14.4–.5.

206) #See supra § 3.9.

207) #For a unified, online collection of the proceedings, see Minutes and Records of the Colorado River Commission (1922) [hereinafter Colorado Commission Records], available at http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf.

208) #See supra § 3.10.

209) #When the Massachusetts legislature called the 1765 Stamp Act Congress, it asked that other colonies select commissioners through only the lower houses of their legislatures. This was because at the time only the lower chambers were directly elected, while the upper chambers were controlled indirectly by the British Crown. Nevertheless, several colonies chose commissioners in ways other than that recommended, and those commissioners were duly seated. Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 635–37 (2013), reprinted infra § 5.1. In 1780, the Massachusetts legislature called a convention of five northeastern states. Apparently because some state legislatures were in recess, it asked that commissioners be appointed by those states' official "councils of war."

Several states opted to select commissioners by other means, and they also were duly seated. Id. at 659–60.

210) #Supra § 3.2.4.

211) #In 1783 the Massachusetts legislature attempted to break this custom by calling a five-state "one delegate, one vote" convention. The call had to be rescinded when two of the four other states invited refused to attend. Natelson, Conventions, at 666.

212) #Cf. Paul Mason, Mason's Manual of Legislative Procedure § 52 (Nat'l Conference of State Legislatures, 2010 ed.) [hereinafter Mason's Manual] (providing for equality of the "members" of an assembly).

213) #1 The Records of the Federal Convention of 1787, at 2 (Max Farrand ed., 1939) ("The Members then proceeded to ballot on behalf of their respective States—and, the ballots being taken, it appeared that the said George Washington was unanimously elected."); see also id. at 4: ("Mr. Wilson moved that a Secretary be appointed, and nominated Mr. Temple Franklin. Col. Hamilton nominated Major Jackson. On the ballot Majr. Jackson had 5 votes & Mr. Franklin 2 votes."); id. at 29 (showing only eight slash marks representing votes). Obviously, since there were several dozen commissioners present, this low vote tally had to reflect the states.

214) #Mason's Manual §§ 306-2, 536.

215) #Id. §§ 49-1, 502-1; see also id. § 501-1 ("The total membership of a body is to be taken as the basis for computing a quorum, but when there is a vacancy, unless a special provision is applicable, a quorum will consist of the majority of the members remaining qualified."); accord id. § 502-2. Section 501-2 provides that "The authority that creates a body has the power to fix its quorum." In the case of an amendments convention, however, that authority is the convention, not Congress, which calls it, nor the state legislatures, who apply for it and authorize and create its delegations. The Constitution does not prescribe a quorum, leaving it to the convention.

216) #Rhode Island v. Palmer, 253 U.S. 350 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.). On majorities as a rule of decision, see Mason's Manual §§ 50-1, 51-6, 510-1, 510-4.

217) #Mason's Manual § 584 refers to the secretary, executive secretary or clerk in a legislature as the "chief legislative officer."

218) #Because of Hoover's relief work in World War I and his reputation as an international engineer, his personal prestige at the time was enormous.

219) #For a unified, online source of this convention's proceedings, see Colorado Commission Records.

220) #Default rules are discussed below in Section 3.14.4.

221) #Mason's Manual § 600-1.

222) #Id. § 600-2.

223) #Id. § 608.

224) #Paul Mason, Mason's Manual of Legislative Procedure § 30-1 (Nat'l Conference of State Legislatures, 2010 ed.) [hereinafter Mason's Manual] ("Most legislative bodies adopt a manual of legislative procedure as the authority to apply in all cases not covered by constitutional provisions, legislative rules, or statutes."); see also id. § 30-2 (stating that resort to manuals by "deliberative assemblies" is permissible).

225) #See Using Mason's Manual of Legislative Procedure, Nat'l Conference of

State Legislatures, http://www.ncsl.org/research/about-state-legislatures/masons-manual-for-legislative-bodies.aspx (last visited Mar. 27, 2014).

226) #Id.

227) #The two most prominent rivals to Mason's Manual also were designed for bodies other than conventions: Robert's Rules of Order, and Jefferson's Manual.

228) #For example, the rules of the 1861 Washington Conference Convention provided, "Mode of Voting. All votes shall be taken by States, and each State to give one vote. The yeas and nays of the members shall not be given or published—only the decision by States."

229) #See supra § 3.2.4.

230) #The Federalist No. 39 (James Madison).

231) #See supra § 3.3.

232) #Some have argued that Congress has this power under the Necessary and Proper Clause, but this is inaccurate. See supra § 3.9.4.

233) #Robert G. Natelson, Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers 22 (Am. Legislative Exch. Council, 2d ed. 2013).

234) #Resolutions, Address, and Journal of Proceedings of the Southern Convention 27 (Harvey M. Watterson ed., 1850). Similarly an effort in 1783 by the Massachusetts legislature to call a one delegate, one vote convention failed because states refused to participate. Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 Fla. L. Rev. 615, 666 (2013), reprinted infra § 5.1.

235) #Mason's Manual § 500-2.

236) #Mason's Manual § 705-3 (providing that a legislative body has absolute control of its chambers).

237) # 1 Farrand's Records, at 8.

238) #For example, Rhode Island objected to the 1787 Constitutional Convention, and refused to send commissioners. No multi-state convention has included committees from every single state.

239) #A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States 19 (L.E. Chittenden ed., 1861) [hereinafter Washington Conference Report].

240) #Supra § 3.14.2.

241) #All the rules of that convention are not treated here—only those on debate and decorum.

242) #Washington Conference Report, at 23, 24.

243) #Paul Mason, Mason's Manual of Legislative Procedure § 710 (Nat'l Conference of State Legislatures, 2010 ed.) [hereinafter Mason's Manual].

244) #Washington Conference Report, at 23.

245) #Mason's Manual §§ 91-2, 110-1.

246) #Id. § 91-3(a), (b).

247) #Washington Conference Report, at 23–24.

248) #Mason's Manual § 102.

249)#Washington Conference Report, at 24.

250)#Cf. Mason's Manual § 144-2 (stating that "A motion is usually presented orally, but if particularly long or involved, the presiding officer may require that it be presented . . . in writing.").

251)#Id. §§ 62, 157-1.

252)#Id. § 441 ("Form of Presenting Main Motions"); id. § 442 ("Precedence of Main Motions").

253)#Mason's Manual §§ 311-2, 313-1, 313-2.

254)#Cf. Mason's Manual §§ 230-1, 246-4 (permitting appeals).

255)#Id. § 122.

256)#Mason's Manual §§ 215, 216-3.

257)#Id. § 204-1. The Founding Generation specifically recognized that a convention for proposing amendments may adjourn without proposing any amendments. Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 743–44 n.342 (2011), reprinted infra § 5.2., at (quoting James Madison and an anti-federalist writer).

258)# Washington Conference Report, at 24.

259)# Id.

260)#Mason's Manual § 190.

261)#Mason's Manual § 628-1.

262)#1 Journals of the Continental Congress 1774–1789, at 26 (1904).

263)#Mason's Manual § 670-5.

264)#This term is taken from previous interstate convention practice.

265)#This is the official name given in Article V of the Constitution.

266)#This also follows previous convention practice.

267)#Interstate conventions were modeled on meetings of international diplomats. See Russell Caplan, Constitutional Brinksmanship: Amending the Constitution by National Convention 95–96 (1988).

268)#The smallest interstate convention ever held was the Boston Convention (1780) a meeting of three states. The 1785 two-state Maryland-Virginia negotiation at Mt. Vernon pertaining to the Potomac River apparently was not considered a convention.

269)#The scope of this Uniform Law includes conventions for proposing amendments but is not limited to them. This is partly to clarify through standardization and partly to reassure people that delegates to conventions and conferences outside Article V (such as the Conference of the States proposed in the 1990) are subject to instructions from "back home."

270)#For example, the interstate convention known as the "Washington Peace Conference" was held in 1861. See Robert G. Natelson, Learning from Experience: How the States Used Article V Applications in America's First Century (Nov. 4, 2010), available at http://goldwaterinstitute.org/article/learning-experience-how-states-used-article-v-applications-americas-first-century-part-2.

271)#During the Founding Era, at least 11 interstate conventions met as follows: Date Name/Place Scope/Topic 1776–1777 Providence, RI Price stabilization/defense 1777 Yorktown, PA Price stabilization 1777 Charleston, SC Price stabilization 1777 Springfield, MA General economic issues 1778

New Haven, CN Price stabilization 1779 Hartford, CN Currency & trade issues 1780 Philadelphia, PA Price stabilization 1780 Boston, MA War measures 1780 Hartford, CN Army supply 1781 Providence, RI Army supply for current year 1786 Annapolis, MD **Interstate commerce 1787 Philadelphia, PA Propose new federal political system * Not certain to have met.** Insufficient representation to conduct business; made a recommendation only.

272) #For example the Albany Congress (1754) and the First Continental Congress (1774) (also called a “convention”).

273) #On the last clause, see United States v. Sprague, 282 U.S. 716, 733 (1931), Hawke v. Smith, 253 U.S. 221 (1920), and Dyer v. Blair, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) (Stevens, J.) (“[T]he delegation [from Article V] is not to the states but rather to the designated ratifying bodies . . . .”).

274) #See, e.g., The Federalist No. 46 (James Madison).

275) #Nebraska’s legislature is unicameral. Bracketed language hereinafter should be deleted in Nebraska.

276) #The legislature should choose an odd number so the state committee will not be deadlocked in state-by-state voting. State committees at the 1787 Constitutional Convention ranged from two commissioners (New Hampshire) to eight (Pennsylvania).

277) #This is left flexible so it may vary according the nature and importance of the convention.

278) #This is kept narrow so that the commissioners do not exceed the scope of the convention as agreed to by all applying states. It is unfair to impose a broader call upon a state that agreed in its application only to a narrower call.

279) #Issuing non-binding recommendations—clearly denominated as such—is a universally-recognized prerogative of American conventions, adopted, for example, by seven of the state conventions that ratified the Constitution and by the Annapolis Convention of 1786.

280) #The perjury benchmark is selected because of the oath. States may apply other benchmarks, and where there are degrees of a crime, must select a degree.