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Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"

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FOUNDING-ERA CONVENTIONS AND THE MEANING OF THE
CONSTITUTION’S “CONVENTION FOR PROPOSING
AMENDMENTS”

*Robert G. Natelson**

Abstract

Under Article V of the U.S. Constitution, two thirds of state legislatures may require Congress to call a “Convention for proposing Amendments.” Because this procedure has never been used, commentators frequently debate the composition of the convention and the rules governing the application and convention process. However, the debate has proceeded almost entirely without knowledge of the many multi-colony and multi-state conventions held during the eighteenth century, of which the Constitutional Convention was only one. These conventions were governed by universally-accepted convention practices and protocols. This Article surveys those conventions and shows how their practices and protocols shaped the meaning of Article V.

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- E. *The York Town and Abortive Charleston Price Conventions of 1777*
- F. *The Springfield Convention of 1777*
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APPENDICES A & B¹

1. *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once, including several of the author’s prior publications. The sources and short form citations used are as follows:

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INTRODUCTION: DEFINING THE CONFUSION

The United States Constitution authorizes two methods by which amendments may be proposed for ratification: (1) by a two thirds majority of each house of Congress or (2) by a “Convention for proposing Amendments,” which Congress is required to call upon receiving applications from two thirds of the state legislatures.² Although state legislatures have applied repeatedly, at no time has the necessary minimum of two thirds been reached on any one topic, so Congress has never called an amendments convention.

In recent decades, commentators have expressed uncertainty about the scope of an amendments convention, the effectiveness of limits on its charge, how delegates should be selected, and who should determine

author). Robert G. Natelson, *Amending the Constitution by Convention: A More Complete View of the Founders’ Plan* (Independence Institute, Working Paper No. IP-7-2010, 2010) [hereinafter Natelson, *Founders’ Plan*], available at http://constitution.i2i.org/files/2010/12/IP_7_2010_a.pdf.

Robert G. Natelson, *Amending the Constitution by Convention: Lessons for Today from the Constitution’s First Century*, (Independence Institute, Working Paper No. IP-5-2011, 2011) [hereinafter Natelson, *First Century*], available at http://liberty.i2i.org/files/2012/03/IP_5_2011_c.pdf.

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HARRY M. WARD, *UNITE OR DIE: INTERCOLONY RELATIONS 1690-1763* (1971) (hereinafter WARD)

C.A. WESLAGER, *THE STAMP ACT CONGRESS (1776)* (hereinafter WESLAGER).

2. The relevant language is as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a *Convention for proposing Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

U.S. CONST. art. V (emphasis added).

its operative rules.³ They also have posed the question of whether it is essentially (to use James Madison's dichotomy)⁴ a "national" or a "federal" body. In other words, is it a national assembly elected by the people and presumably apportioned by population? Or is it an assembly of delegates representing the states?⁵

Many of these questions arise because of a general failure to examine sufficiently the history behind and surrounding Article V. For example, the late Professor Charles L. Black, Jr. of Yale Law School concluded that an amendments convention is a "national" rather than "federal" body.⁶ He deduced this conclusion without referring to anything the Founders had to say on the matter and while under the misimpression that the only relevant precedent was the 1787 Constitutional Convention.⁷ Other questions derive from the ahistorical error of assuming that an *amendments* convention is the same thing as a *constitutional* convention,⁸ despite clear historical differences between the two.⁹

What nearly all commentators have overlooked¹⁰ is that the Framers did not write, nor did the Ratifiers adopt, Article V on a blank slate. They wrote and ratified against the background of a long tradition of multi-colony and multi-state conventions. During the century before the

3. *E.g.*, Tribe, *supra* note 1, at 634–40. Some commentators argue that Congress should decide all or some of those questions. *See, e.g.*, Samuel J. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 879, 892 (1968).

4. THE FEDERALIST NO. 39, *supra* note 1, at 196–99 (James Madison).

5. *E.g.*, Black, *supra* note 1, at 964–65.

6. *Id.*

7. *See id.*

8. *See, e.g.*, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 738 (1993) (“[T]here can be no such thing as a ‘limited’ constitutional convention. A constitutional convention, once called, is a free agency.”).

9. In a nutshell, the difference is as follows: a constitutional convention is a body that drafts an entirely new constitution, often (although not always) outside any pre-existing constitutional structure. Natelson, *Founders’ Plan*, *supra* note 1, at 5–7. An amendments convention meets pursuant to the Constitution and is essentially a drafting committee for determining the language of amendments addressing subjects identified in the state legislative applications. *Id.*; *see also* Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution’s Other Method*, 11 PUBLIUS 113, 137 (“An Article V convention could propose one or many amendments, but it is not for the purpose of ‘an unconditional reappraisal of constitutional foundations.’ Persisting to read Article V in this way, so that it contemplates a constitutional convention that writes—not amends—a constitution, is often a rhetorical ploy to terrify sensible people.” (footnote omitted)). Confusion between the two first arose in the nineteenth century, sowed by opponents of the process. *See* Natelson, *First Century*, *supra* note 1, at 10. Today it is rampant in the legal literature and other areas of public discourse. *See, e.g.*, Tribe, *supra* note 1 (calling an amendments convention a “constitutional convention”).

10. Russell L. Caplan is an important exception. *See* CAPLAN, *supra* note 1.

drafting of Article V, there had been at least 32 such gatherings—at least 21 before Independence¹¹ and another eleven between 1776 and 1786.¹² In addition, there had been several abortive, although still instructive, convention calls. These multi-government gatherings were the direct predecessors of the convention for proposing amendments, and formed the model upon which the convention for proposing amendments was based.

Universally-accepted protocols determined multi-government convention procedures. These protocols fixed the acceptable ways of calling such conventions, selecting and instructing delegates, adopting convention rules, and conducting convention proceedings. The actors involved in the process—state legislatures and executives, the Continental and Confederation Congresses, and the delegates themselves—each had recognized prerogatives and duties, and were subject to recognized limits.¹³

These customs are of more than mere Founding-Era historical interest. They governed, for the most part, multi-state conventions held in the nineteenth century as well—notably but not exclusively, the Washington Conference Convention of 1861.¹⁴ More importantly for present purposes, they shaped the Founders' understanding of how the constitutional language would be interpreted and applied.

Moreover, the Constitution, as a legal document, must be understood in the context of the jurisprudence of the time. In that jurisprudence, custom was a key definer of the “incidents” or attributes that accompanied principal (i.e., express) legal concepts and powers.¹⁵ Thus, the customs by which the founding generation initiated and conducted interstate conventions tell us how an Article V convention should be initiated and conducted; further, they help define the powers and prerogatives of the actors in the process. But beyond that, there is considerable affirmative evidence that the Founders *specifically* understood these customs to define the language of Article V. These

¹¹ *Infra* Part II.A (listing conventions).

¹² *Infra* Part III.C-III.O (listing and discussing post-Independence convention).

¹³ *Infra* Part III.

¹⁴ The Washington Conference Convention was a gathering of 21 states called by Virginia in an effort to propose a constitutional amendment that would avoid the Civil War. *See* ROBERT GRAY GUNDERSON, *OLD GENTLEMEN'S CONVENTION* (1861). This convention followed eighteenth century convention protocol virtually to the letter. *See, e.g., id.* at 48 (describing “one state, one vote” rule). *See also* THELMA JENNINGS, *THE NASHVILLE CONVENTION: SOUTHERN MOVEMENT FOR UNITY, 1848-1850* (1980) (describing the nine-state Nashville Convention of 1850, which followed the same voting rule. *Id.* at 137-38.

¹⁵ 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 GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52, 60–68 (2010).

practices enable us to re-capture the constitutional meaning of the terms "Application," "call," and "Convention for proposing Amendments."¹⁶

Part I of this Article explains why the Founders inserted the convention method for proposing amendments into the Constitution. Part II introduces the early-American convention tradition and some of its terminology. Part III summarizes the protocols for fourteen multi-colony and multi-state conventions held between 1754 and 1787, and also discusses the procedures employed for calling several abortive conventions. Part IV collects the evidence showing that the established protocols inhere in Article V. Part IV also explains that the Constitution specifies rules for the few cases in which there were procedural variations. The discussion concludes with an explanation of how the practice surrounding the predecessor conventions impacts the rules for amendments conventions today. Two Appendices follow, the first listing alphabetically the delegates to the fourteen conventions examined in detail, and the second listing the same delegates by state.

I. WHY THE CONSTITUTION INCLUDES A PROPOSING CONVENTION AS AN ALTERNATIVE TO CONGRESSIONAL PROPOSAL

Article V grants powers¹⁷ to two principal sorts of assemblies: legislatures, both state and federal; and conventions, both state and federal. It assigns *in-state* conventions the task of ratifying or rejecting the Constitution itself¹⁸ and (when Congress so determines) the task of ratifying or rejecting proposed amendments.¹⁹ Article V assigns to a *general* convention power to propose amendments.²⁰

The initial draft of the Constitution, composed by the Committee of Detail, provided that "This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose."²¹ In other words, the states would trigger a process requiring Congress to call a convention, which in turn would draft, and possibly adopt, all amendments. Gouverneur Morris successfully proposed permitting

16. U.S. CONST. art. V.

17. The assemblies designated in Article V exercise "federal functions" derived from the Constitution. State legislatures and conventions do not exercise reserved powers pursuant to the Tenth Amendment. Natelson, *Rules*, *supra* note 1, at 703 (collecting cases).

18. U.S. CONST. art. VII.

19. *Id.* art. V.

20. *Id.*; *see infra* note ___ and accompanying text on the meaning of "general convention."

21. 2 FARRAND'S RECORDS, *supra* note 1, at 159.

Congress, as well as the states, to initiate the amendment process.²² When the document emerged from the Committee of Style, it appeared to give Congress *exclusive* power to propose amendments for state ratification.²³ George Mason then objected because he feared Congress might become abusive or refuse to adopt necessary or desirable amendments, particularly those curbing its own power.²⁴ For this reason, the draft was changed to insert the convention for proposing amendments to enable the states to propose amendments without a substantive veto by Congress.²⁵ The immediate inspiration for the application procedure seems to have been a provision in the Georgia constitution whereby a majority of counties could demand amendments on designated topics, and require the legislature to call a convention to draft the language.²⁶

It was well for the Constitution that the state application and convention procedure was added. Without it, the document may never have been ratified. This is because many believed the Constitution could lead to congressional abuse and overreaching, and that Congress would be unlikely to curb itself.²⁷ The state application and convention

22. *Id.* at 468 (Aug. 30, 1787); *see also id.* at 558 (Sept. 10, 1787) (“The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments. . . .” (quoting Alexander Hamilton)).

23. *Id.* at 578 (Aug. 30, 1787) (“The Legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution . . .”).

24. The record, paraphrasing George Mason, stated:

As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as [Mason] verily believed would be the case.

Id. at 629 (Sept. 15, 1787).

25. *See id.* at 629–30.

26. Georgia’s constitution provided that:

No alteration shall be made in this constitution without petitions from a majority of the counties . . . at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

GA. CONST. of 1777, art. LXIII. The Committee of Detail’s draft convention looked much like the Georgia provision. 2 FARRAND’S RECORDS, *supra* note 1, at 188.

27. *An Old Whig I*, PHILA. INDEP. GAZETTEER, Oct. 12, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 376–77 (“[W]e shall never find two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance”); *see also* A Plebeian, *An Address to the People of the State of New York*, Apr. 17, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 942, 944 (“The amendments contended for as necessary to be made, are of such a nature, as will tend to limit and abridge a

procedure of Article V provided the Constitution's advocates with a basis for arguing that the system was a balanced one,²⁸ and that Congress could be bypassed, if appropriate.²⁹ Illustrative are comments by the widely-read Federalist essayist Tench Coxe:

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will shew [*sic*] this to be a groundless remark. It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of" two thirds of the legislatures; and all amendments proposed by such convention, are to be *valid* when approved by the conventions or legislatures of three fourths of the states. It must therefore be evident to every candid man, that two thirds of the states can *always* procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be *unanimously* opposed

number of the powers of the government. And is it probable, that those who enjoy these powers will be so likely to surrender them after they have them in possession, as to consent to have them restricted in the act of granting them? Common sense says—they will not.”)

28. *E.g.*, 23 DOCUMENTARY HISTORY, *supra* note 1, at 2522 (Feb. 4, 1789) (reproducing remarks of Samuel Rose, that Congress could propose amendments if it did not have sufficient power and the states, acting through the convention, could propose if it had too much).

29. 3 ELLIOT'S DEBATES, *supra* note 1, at 101 (“[Patrick Henry] thinks amendments can never be obtained, because so great a number is required to concur. Had it rested solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originated with Congress. On the application of the legislatures of two thirds of the several states, a convention is to be called to propose amendments. . . .” (quoting George Nicholas at the Virginia ratifying convention)); James Iredell, at the North Carolina ratifying convention, also explained:

The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a general convention for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and, upon the ratification of three fourths of the states, will become a part of the Constitution.

4 ELLIOT'S DEBATES, *supra* note 1, at 177.

to each and all of them. Congress therefore cannot hold *any power*, which three fourths of the states shall not approve, *on experience*.³⁰

II. OVERVIEW OF PRIOR AMERICAN EXPERIENCE WITH CONVENTIONS, AND THEIR RECORDS AND TERMINOLOGY

A. *Conventions Before the Constitution*

The Founders understood a political “convention” to be an assembly, other than a legislature, designed to undertake prescribed governmental functions.³¹ The convention was a familiar and approved device: several generations of Englishmen and Americans had resorted to them. In 1660 a “convention Parliament” had recalled the Stuart line, in the person of Charles II, to the throne of England.³² A 1689 convention Parliament had adopted the English Bill of Rights, declared the throne vacant, and invited William and Mary to fill it.³³ Also in 1689, Americans resorted to at least four conventions in three different colonies as mechanisms to replace unpopular colonial governments, and in 1719 they held yet another.³⁴

During the run-up to Independence, conventions within particular colonies issued protests, operated as legislatures when the *de jure* legislature had been dissolved, and removed British officials and governed in their absence.³⁵ After Independence, conventions wrote several state constitutions.³⁶

Those state constitutions also resorted to conventions as elements of their amendment procedures. The Pennsylvania Constitution of 1776 and the Vermont Constitution of 1786 both authorized amendments

30. Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 283–84 (alteration added) (emphasis in original). Coxe made the same points in *A Pennsylvanian to the New York Convention*, PA. GAZETTE, Jun. 11, 1788, reprinted in 20 DOCUMENTARY HISTORY, *supra* note 1, at 1139, 1142. Coxe had been Pennsylvania’s delegate to the Annapolis convention.

31. Natelson, *Founders’ Plan*, *supra* note 1, at 6; *see also In re Op. of the Justices*, 167 A. 176, 179 (Sup. Jud. Ct. 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.”); CAPLAN, *supra* note 1, at 5–6 (discussing the development of the word “convention” in the seventeenth century).

32. CAPLAN, *supra* note 1, at 5; *see also* Natelson, *Founders’ Plan*, *supra* note 1, at 6.

33. CAPLAN, *supra* note 1, at 5; Natelson, *Founders’ Plan*, *supra* note 1, at 6.

34. CAPLAN, *supra* note 1, at 6–7 (discussing two conventions in Massachusetts, one in New York, one in Maryland, and one in South Carolina).

35. *See id.* at 8–10.

36. CAPLAN, *supra* note 1, at 10–13. Sometimes a joint session of the legislature met as a convention to write a constitution, as happened with the unsuccessful Massachusetts constitution of 1777. 20 MASS. RECORDS, *supra* note 1, at 315.

conventions limited as to subjects by a “council of censors.”³⁷ The Massachusetts Constitution of 1780 provided for amendment by convention.³⁸ The Georgia Constitution of 1777 required the legislature to call a convention to draft constitutional amendments whose gist had been prescribed by a majority of counties.³⁹

Conventions within individual colonies or states represented the people, towns, or counties.⁴⁰ Another sort of “convention” was a gathering of three or more American governments under protocols modeled on international diplomatic practice.⁴¹ These multi-government

37. Pennsylvania’s original constitution provided, in relevant part:

The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.

PA. CONST. of 1776, § 47; *see also* VT. CONST. of 1786, art. XL (similar language).

38. The Massachusetts constitution of 1780 stated that:

[T]he general court which shall be in the year of our Lord [1795] shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to [*sic*] amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary’s office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

MASS. CONST. of 1780, pt. II, ch. VI, art. X.

39. GA. CONST. of 1777, art. LXIII.

40. HOAR, *supra* note 1, at 2–10 (describing state constitutional conventions at the Founding); *see also* CAPLAN, *supra* note 1, at 8–16 (also discussing conventions). Thus, state conventions for ratifying the Constitution represented the people. *See, e.g.*, 3 DOCUMENTARY HISTORY, *supra* note 1, at 110 (setting forth the Delaware form of ratification); *id.* at 275–78 (setting forth the Georgia form of ratification); *id.* at 560 (setting forth the Connecticut form of ratification); *cf. In re Op. of the Justices*, 167 A. 176, 179 (Sup. Jud. Ct. Me. 1933) (noting that conventions within states directly represented the people).

41. There also were many meetings of representatives of only two colonial governments—for example, the 1684 and 1746 conferences with the Iroquois, and the 1785 meeting between Maryland and Virginia at Mount Vernon, but two-sovereign meetings seem

conventions were comprised of delegations from each participating government, including, on some occasions, Indian tribes. Before Independence, such gatherings often were called “congresses,” because “congress” was an established term for a gathering of sovereignties.⁴² After Independence, they were more often called “conventions,”⁴³ presumably to avoid confusion with the Continental and Confederation Congresses. But both before⁴⁴ and after⁴⁵ Independence the terms could be employed interchangeably.

Multi-government congresses or conventions were particularly common in the Northeast, perhaps because governments in that region had a history of working together. In 1643 the four colonies of Massachusetts, Plymouth Colony, Connecticut, and New Haven formed the United Colonies of New England. Essentially a joint standing committee of colonial legislatures, this association was not always active, but endured at least formally until 1684.⁴⁶ In 1695, the Crown created the Dominion of New England, a unified government imposed on New England, New York, and New Jersey.⁴⁷ The Dominion proved unpopular, and in 1689 colonial conventions swept it away; nevertheless, northeastern governments continued to confer together. Many of these meetings were conclaves of colonial governors, usually conferring on issues of defense against French Canada and her allied Indian tribes, rather than conventions of diplomatic delegations.⁴⁸ An

not to have been called “conventions.” IROQUOIS DIPLOMACY, *supra* note 1, at 161, 182, 201. On the pre-Independence conferences with the Iroquois, see generally *id.* at 157–208; see generally FRANKLIN, INDIAN TREATIES, *supra* note 1.

42. See, e.g., THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (defining “congress” in part as “an appointed meeting for settlement of affairs between different nations”).

43. See *supra* notes ___ and accompanying text.

44. See, e.g., 2 N.Y. RECORDS, *supra* note 1, at 545 (reproducing Massachusetts commission to Albany Congress, referring to it as “a General convention of Commissioners for their Respective Governments”); 1 J. CONT. CONG., *supra* note 1, at 17 (reproducing the Connecticut credentials for the First Continental Congress, which empower Connecticut’s delegates to attend the “congress, or convention of commissioners, or committees of the several Colonies”); DANIEL LEONARD, MASSACHUSETTENSIS 106 (Boston, 1775) (referring to the Albany Congress as a “congress or convention of committees from the several colonies”).

45. Rush, *Notes*, *supra* note 1, at 129 (Dec. 25, 1776) (referring to the Providence Convention as “a Congress composed of Deputies from the 4 New Eng^d [*sic*] States”); Letter from Daniel St. Thomas Jenifer to Thomas Sim Lee (Sept. 26, 1780), in 5 LETTERS, *supra* note 1, at 391–92 (calling the 1780 Boston Convention a “Congress or Convention”); Gov. James Bowdoin, Speech before Council Chamber (May 31, 1785), reprinted in 1784–85 MASS. RECORDS, *supra* note 1, at 706, 710 (referring to a proposed general convention as a “Convention or Congress” of “special delegates from the States”).

46. NEWBOLD, *supra* note 1, at 24–25.

47. NEWBOLD, *supra* note 1, at 26.

48. See generally, WARD, *supra* note 1, at 52–65 (summarizing war conferences and conventions).

example from outside the Northeast was the meeting of five governors held at Alexandria, Virginia in 1755.⁴⁹ Many others, however, were full-dress conventions among commissioners appointed from three or more colonies. These meetings were usually, but not always, held under the sanction of royal authorities.

To be specific: Three colonies met at Boston in 1689 to discuss defense issues.⁵⁰ The following year, the acting New York lieutenant governor called, without royal sanction, a defense convention of most of the continental colonies to meet in New York City. The meeting was held on May 1, 1690, with New York, Massachusetts Bay, Connecticut, and Plymouth colonies in attendance.⁵¹ A similar gathering occurred in 1693 in New York, this time under Crown auspices.⁵² Other defense conventions were held in New York City in 1704,⁵³ Boston in 1711,⁵⁴ Albany in 1744 and 1745,⁵⁵ and New York City in 1747.⁵⁶ The New England colonies held yet another in 1757.⁵⁷

In addition to defense conventions, there were conventions serving as diplomatic meetings among colonies and sovereign Indian tribes, particularly the Iroquois. There were at least ten such conclaves between 1677 and 1768 involving three or more colonies. Those ten included gatherings in 1677, 1689, 1694, and 1722 at Albany, New York; in 1744 at Lancaster, Pennsylvania; in 1745, 1746, 1751, and 1754 at Albany; and in 1768 at Fort Stanwix (Rome), New York.⁵⁸

The assembly at Lancaster became one of the more noted. Participants included Pennsylvania, Maryland, Virginia, and several Indian tribes. The proceedings lasted from June 22 to July 4, 1744, and produced the Treaty of Lancaster.⁵⁹ Even more important, however, was

⁴⁹ *Id.* at 58.

⁵⁰ *Id.* at 52.

⁵¹ *Id.* at 52-53. The brief proceedings are in 2 N.Y. HISTORY, *supra* note 1, at 134-35

⁵² WARD, *supra* note 1, at 53-54.

⁵³ *Id.* at 54.

⁵⁴ *Id.* at 56.

⁵⁵ *Id.* at 56.

⁵⁶ *Id.* at 56-57.

⁵⁷ *Id.* at 62.

⁵⁸ IROQUOIS DIPLOMACY, *supra* note 1, at 160, 161, 173, 181 (listing two), 182, 185, 187, 190 & 197. WARD, *supra* note 1, adds the conventions held in 1689, 1694, and 1746. *Id.* at 131, 133 & 139. NEWBOLD, *supra*, note 1, at 28, seems to be counting Indian conferences at which only one colony attended. He specifically names as multi-state gatherings only the 1744 Lancaster, Pennsylvania convention (Indians plus Pennsylvania, Maryland, and Virginia); a 1748 (possibly an error for 1746) Albany meeting (Indians plus Massachusetts and New York); and a 1751 gathering, also in Albany (Indians plus Massachusetts, Connecticut, New York, and South Carolina). *Id.* Cf. SHANNON, *supra*, note 1, at 132 & 133 (adding the 1745 Albany conference between the Indians and Pennsylvania, Massachusetts, Connecticut, and New York), and stating accurately that four colonies attended the 1751 meeting in Albany).

⁵⁹ WARD, *supra* note 1, at 137-38. Maryland and Virginia signed treaties with the Indians

the seven-colony Albany Congress of 1754, whose proceedings are discussed in Part IV.A.

The most famous inter-colonial conventions were the Stamp Act Congress of 1765 and the First Continental Congress of 1774, discussed in Parts IV.B and IV.C. As for the *Second* Continental Congress (1775-81), participants might initially have thought of it as a convention, but it is not so classified here because it really served as a continuing legislature.

After the colonies had declared themselves independent states, they continued to gather in conventions. All of these meetings were called to address specific issues of common concern. Northeastern states convened twice in Providence, Rhode Island—in December, 1776 and January, 1777, and again in 1781. Other conventions of northeastern states met in Springfield, Massachusetts (1777); New Haven, Connecticut (1778); Hartford, Connecticut (1779 and 1780); and Boston, Massachusetts (1780).⁶⁰ Conventions that included states outside the Northeast included those at York Town, Pennsylvania (1777), Philadelphia, Pennsylvania (1780 and, of course, 1787), and Annapolis, Maryland (1786).⁶¹ There also were abortive calls for multi-state conventions in Fredericksburg, Virginia, Charleston, South Carolina, and elsewhere.⁶²

Thus, the Constitutional Convention of 1787—far from being the unique event it is often assumed to be—was but one in a long line of similar gatherings.

B. *Historical Records*

Each convention produced official records referred to as its *journal*, *minutes*, or *proceedings*. These records vary widely in length and completeness. For example, the journals of the First Continental Congress and of the Constitutional Convention consume hundreds of pages, but the proceedings of the 1781 Providence Convention cover less than a page and a half. Fortunately, a fair amount of other historical material supplements the journals. This material includes legislative records, other official documents, and personal correspondence. The journals and other sources tend to show consistency in convention protocol and procedures.

The Albany Congress, the Stamp Act Congress, the First Continental Congress, and the Constitutional Convention have been subjects of

at this conference, with Pennsylvania serving as a broker. The lieutenant governor of Pennsylvania also served as a representative of the colony of Delaware. See FRANKLIN, INDIAN TREATIES, *supra* note 1, at 41.

60. See Natelson, *First Century*, *supra* note 1, at 1-2.

61. See *id.*

62. *Infra* Part III.K-L.

detailed historical study. The other multi-state conventions have been largely neglected.

C. *Convention Terminology*

Convention practice included certain standard terminology, some of which appears in Article V. The convention *call* was the initial invitation to meet. Most calls were issued by individual states or colonies. Some were issued by the Continental Congress or by previous conventions.

The usual role of a multi-state convention was as a problem-solving task force, so the call necessarily specified the issue or issues to be addressed. However, the call never attempted to dictate a particular outcome or to limit the convention to answering a prescribed question affirmatively or negatively. The call also specified the initial time and place of meeting and whether the convention resolutions would bind the participating states or serve merely as recommendations or proposals. The call did not determine how the colonies or states were to select their delegates, nor did it establish convention rules or choose convention officers. An invited government was always free to ignore a call.

A *general* convention was one to which all or most colonies or states were invited, even if limited to a single subject.⁶³ A *partial* convention was one restricted to a certain region, such as New England or the Middle States. The terms "general" or "partial" referred only to geographic area; they had nothing to do with the scope of the subject matter specified by the call. Thus, a convention for proposing amendments is a general convention, even if limited to a single subject.⁶⁴ Failure to understand why a convention for proposing amendments is referred to as a general convention has led some writers to conclude that it must be unlimited as to topic.⁶⁵

63. *E.g.*, *A Freeman*, NEWPORT HERALD, Apr. 3, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 220–21 (referring to the Constitutional Convention as "the General Convention of the States"). The Philadelphia Price Convention of 1780 was referred to as a general convention because all but the three southernmost states were invited. PA. JOURNALS, *supra* note 1, at 396–97 (Nov. 15, 1779).

64. *E.g.*, 4 ELLIOT'S DEBATES, *supra* note 1, at 177 ("The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a *general convention* for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by *such general convention*, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and, upon the ratification of three fourths of the states, will become a part of the Constitution." (quoting James Iredell, at the North Carolina ratifying convention)) Iredell, a leading lawyer and judge, later served as associate justice on the United States Supreme Court.

⁶⁵ *E.g.*, Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82

A *plenipotentiary* convention was one whose topic was unlimited. The credentials issued to delegates to the First Continental Congress were so broad, that it was arguably plenipotentiary.⁶⁶ The powers of the other multi-government conventions ranged from the very broad (the Springfield Convention of 1777,⁶⁷ the 1787 Constitutional Convention)⁶⁸ to the very narrow (e.g., the Providence Convention of 1781).⁶⁹

A *committee* was a colonial or state delegation—that is, the body into which the diplomacy of the colony or state had been *committed*. Thus, an interstate convention, while often referred to by a variant of the phrase “convention of the states,”⁷⁰ also could be called a “convention of committees”⁷¹ or a “convention of committees of the several states.”⁷²

Each participating colony or state empowered its representatives by documents called *commissions*, sometimes referred to also as *credentials*.⁷³ Although a representative could be referred to informally as a “delegate,” the formal title was *commissioner*.⁷⁴ Each commission specified the topic of the meeting and the scope of authority granted.⁷⁵ *Instructions* might supplement the commission.⁷⁶ Unlike commissions,

YALE L.J. 189, 202 (1972).

66. *Infra* Part III.C.

67. *Infra* Part III.F.

68. On the broad scope of the powers of most delegates at the Constitutional Convention, see *infra* Part III.N–O.

69. *Infra* Part III.L.

70. *E.g.*, A *Freeman*, NEWPORT HERALD, Apr. 3, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 220; 19 J. CONT. CONG. 235 (Mar. 6, 1781) (referring to the second Hartford convention as a “convention of sundry states”).

71. *E.g.*, 11 J. CONT. CONG., *supra* note 1, at 843 (Aug. 27, 1778) (referring to the Springfield gathering); 15 *id.* at 1254 (Nov. 10, 1779) (referring to the first Hartford convention the same way); *id.* at 1272 (Nov. 15, 1779) (same); 17 *id.* at 790 (Aug. 29, 1780) (referring to the 1780 Boston Convention); 18 *id.* at 931–32 (Oct. 16, 1780) (same); *id.* at 1141 (Dec. 12, 1780) (referring to the second Hartford convention the same way).

72. *E.g.*, 9 *id.* at 1043 (Dec. 20, 1777) (referring to the prospective New Haven convention).

⁷³ See generally *infra* Part III (discussing proceedings at various conventions).

74. Hence, such a convention sometimes was called a “convention of commissioners.” See, e.g., 15 *id.* at 1287 (Nov. 18, 1779) (so labeling the first Hartford convention); PA. JOURNALS, *supra* note 1, at 398 (Nov. 18, 1779) (also so labeling the first Hartford Convention).

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

76. *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 574 (reproducing Rhode Island’s instructions to its delegates at the 1780 Philadelphia Price Convention); 21 MASS. RECORDS, *supra* note 1, at 307–08 (reproducing instructions to delegates at the 1780 Philadelphia Price Convention); 1786–1787 *id.* at 320 (reproducing instructions to delegates to the Annapolis Convention); *id.* at 447–49 (reproducing instructions to delegates to the Constitutional Convention).

instructions were not usually reproduced in the convention journal, and might be secret.⁷⁷ A delegate's commission or instructions could restrict his authority to a scope narrower than the scope of the call. For example, the commissions issued by New York, Massachusetts, and Delaware to their delegates to the Constitutional Convention limited their authority to a scope narrower than the call.⁷⁸

Like other agents, commissioners were expected to remain within the limits of their authority, and *ultra vires* acts were not legally binding.⁷⁹ However, also like other agents, commissioners could make non-binding recommendations to their principals. To put this in modern terms: A convention for proposing amendments could recommend that Congress or the states consider amendments outside the subject-matter assigned to them, but those recommendations would be legally void—that is, they would not be ratifiable “proposals.”

Each state determined how to appoint its commissioners, but in practice the legislature usually selected them, with chambers in bicameral legislatures acting either by joint vote or *seriatim*.⁸⁰ If the legislature was not in session or had authorized the executive to fill vacancies, then selection was by the executive—normally the governor and his executive council, but in wartime often by the state's committee of safety.⁸¹ Each colony or state paid its own delegates.⁸²

77. As the Massachusetts instructions set forth *supra* note ___ undoubtedly were, since they quarreled with the purposes of the convention.

78. See *infra* text accompanying notes ____.

79. THE FEDERALIST NO. 78, *supra* note 1, at 403 (Alexander Hamilton) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”); see THOMAS BRADBURY CHANDLER, WHAT THINK YE OF THE CONGRESS NOW? 7 (New York, J. Rivington 1775) (stating that a principal is bound by an agent's actions within the scope of the commission, but not by actions that exceed the scope of the commission). For a summary of eighteenth-century fiduciary law, see generally Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 251–69 (2007).

⁸⁰ See, .e.g., Part III.F (discussing selection of delegates to the 1777 Springfield convention).

^{81.} See generally Part III; cf. U.S. CONST. art. I, § 3, cl. 2 (“[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments. . . .”); *id.* art. IV, § 4 (“[May protect the states from domestic violence] on Application of the Legislature, or of the Executive (when the Legislature cannot be convened). . . .”).

82. E.g., 3 CONN. RECORDS, *supra* note 1, at 270–71 (showing payment of delegates to the two Hartford Conventions); 20 MASS. RECORDS, *supra* note 1, at 175 (showing payment to commissioners to first Hartford Convention); *id.* at 233 (showing payment to New Haven commissioners); *id.* at 296 (showing payment to commissioners to first Hartford Convention); *id.* at 308 (payment for Philadelphia Price Convention); *id.* at 387 (same); 1786–1787 *id.* at 304 (showing allowance to commissioners to Annapolis Convention); *id.* at 519 (showing allowance to commissioners to Constitutional Convention); 15 PA. RECORDS, *supra* note 1, at 135 (Minutes

As observed earlier, the official proceedings of the convention, drafted by the convention secretary or clerk, constituted its *journal*, *minutes*, or *proceedings*.

III. SUMMARY OF CONVENTIONS PRIOR TO THE CONSTITUTION

This Part III summarizes the central procedures and characteristics of the three inter-colonial conventions for which records are most complete and all of the interstate conventions for which I have found records. This is not intended to be an exhaustive history of these meetings. It focuses principally on the protocols and usages employed in calling, conducting, and considering the recommendations of inter-governmental conventions.

A. *The Albany Congress of 1754*

Of the multi-colonial conventions in Albany during the eighteenth century, the gathering between June 19 and July 11, 1754 is by far the best documented. It also has been the subject of several scholarly studies.⁸³

Twenty-five delegates from seven colonies participated in the 1754 Albany Congress. The number of colonies actually was eight if one counts Delaware, which had its own legislature but an executive held in common with Pennsylvania. Georgia had not been invited; the other colonies had been invited but did not attend. Appendixes A and B list the commissioners and the colonies they represented for the Albany Congress and for the other (non-abortive) conventions discussed in this Article.

In a few ways the Albany Congress varied from most subsequent multi-government gatherings. Because it was called primarily to conduct diplomacy with the Six Nations of the Iroquois, it included delegates from the Six Nations as well as commissioners from the colonies.⁸⁴ Although the immediate call came from James DeLancy, the

of the Supreme Executive Council of Pennsylvania, showing payment to Tench Coxe for service in Annapolis); *id.* at 546 (showing payment to widow of William Henry for service at the Philadelphia Price Convention); 8 R.I. RECORDS, *supra* note 1, at 301 (showing payments to delegates to the first Providence and Springfield Conventions); *id.* at 369 (showing payment to New Haven commissioner); 9 *id.* at 293 (showing payment to commissioner to first Hartford Convention).

^{83.} See generally, e.g., NEWBOLD, *supra* note 1; SHANNON, *supra* note 1; see also Beverly McAnear, Notes and Documents, *Personal Accounts of the Albany Congress of 1754*, 39 MISS. VALLEY HIST. REV. 727 (1953); John R. Alden, *The Albany Congress and the Creation of the Indian Superintendencies*, 27 MISS. VALLEY HIST. REV. 193 (1940). The minutes of the Albany Congress appear in 6 N.Y. RECORDS, *supra* note 1, at 853–92.

^{84.} See 6 N.Y. RECORDS, *supra* note 1, at 866.

royal lieutenant governor of New York,⁸⁵ DeLancey was acting as a proxy for the British Lords of Trade.⁸⁶ Thus, the Albany Congress was different from future conventions in that the British government was represented. Moreover, as the representative of the Crown,⁸⁷ DeLancey was expected to preside; beginning in 1774, multi-colonial and multi-state conventions invariably elected their own presiding officers. Otherwise, the practices followed before and during the Albany Congress were consistent with those of later gatherings.

First, like the call of most subsequent conventions, the call for the Albany Congress was limited rather than plenipotentiary.⁸⁸ The specified topic was improving relations with the Iroquois and signing an inter-colonial treaty with them.⁸⁹

Second, each participating colony sent "commissioners" empowered by "commissions" or "credentials." An exception was New York, where the lieutenant governor and members of the executive council comprised that state's committee. Those delegates needed no commissions because their offices granted them sufficient authority.⁹⁰

Third, the colonies themselves decided how to select their delegates. New York, as noted, sent its executive council. In Pennsylvania the lieutenant governor chose the commissioners with the consent of the colony's proprietors.⁹¹ In Maryland, the governor made the selection.⁹² In the other four colonies, the legislature elected the commissioners.⁹³ In subsequent conventions, the legislative election method became dominant.

Fourth, each colony decided how many delegates to send. New Hampshire credentialed four commissioners, Massachusetts five, Rhode Island two, Connecticut three, New York five, Pennsylvania four, and Maryland two.⁹⁴ By far the best-known today of the delegates was Benjamin Franklin, although two others are well known to students of

85. DeLancey undertook the task because the royal governor, Sir Danvers Osborne, had committed suicide. NEWBOLD, *supra* note 1, at 23.

86. The Lords of Trade letter appears at N.Y. RECORDS, *supra* note 1, at 854–56.

87. SHANNON, *supra* note 1, at 130 ("James DeLancey ironically became the king's mouthpiece at the Albany Congress.").

88. See NEWBOLD, *supra* note 1, at 47–48.

89. 6 N.Y. RECORDS, *supra* note 1, at 856 (quoting letter from Lords of Trade to New York governor).

90. SHANNON, *supra* note 1, at 147.

91. 2 N.Y. HISTORY, *supra* note 1, at 549–50.

92. *Id.* at 551.

93. The Massachusetts commission recites selection by the General Court (legislature). 2 N.Y. RECORDS, *supra* note 1, at 545. The New Hampshire commission is not entirely clear, but implies selection of two delegates from each legislative chamber. *Id.* at 546–47. The Connecticut credentials recite selection by the general assembly, *id.* at 547–48, as do those of Rhode Island, *id.* at 548–49.

94. See Newbold, *supra* note 1, at 45.

the period: Thomas Hutchinson of Massachusetts was to become the royal governor of his colony and perhaps the continent's most prominent Tory. Rhode Island's Stephen Hopkins would become a leading Founder and signer of the Declaration of Independence.⁹⁵

Fifth, despite the different size of colonial committees, the weight of each colony seems to have been equal. The Albany Congress established a precedent followed by all subsequent conventions: "to avoid all disputes about the precedence of the Colonies," they always were ordered in the minutes from north to south.⁹⁶

Sixth, the Albany Congress kept an official record of its proceedings, which it denominated the *minutes*.⁹⁷

Seventh, the gathering elected a non-delegate, Peter Wraxall, as secretary (in later conventions sometimes entitled "clerk"), and he was put on oath.⁹⁸

Finally, the group established its own committees, and elected members to staff them.⁹⁹

Most of the time at the Albany Congress was consumed by negotiations with the Iroquois. At the urging of Franklin, however, the gathering also recommended to the colonies and to Parliament a "Plan of Union" uniting most of British North America under a single Grand Council and President-General. The vote for the Plan at the Albany Congress was unanimous, but the scheme became highly controversial. Many saw the it as beyond the scope of the Congress's call, even though the language of most of the commissions was broad enough to authorize the recommendation.¹⁰⁰ Some colonies refused to consider it, and those that did consider it, rejected it.¹⁰¹ This reception assured that the Plan was never introduced in Parliament.¹⁰²

95. *See id.* at 42–43.

96. 6 N.Y. RECORDS, *supra* note 1, at 859.

97. *Id.* at 853–59.

98. *Id.* at 859.

99. *Id.* at 860.

100. The Commissions are located at 2 N.Y. HISTORY, *supra* note 1, at 545–53, at 47. Newbold claims that only the Massachusetts commissioners had such authority, but he reads the other commissions far too narrowly. NEWBOLD, *supra* note 1, at 47. Historian Timothy J. Shannon, SHANNON, *supra* note 1, at 176, is more accurate, but is incorrect when he states that Maryland commissioners were forbidden to discuss a union: they were barred merely from committing to one. 2 N.Y. HISTORY, *supra* note 1, at 552. The Plan of Union was a recommendation only. In his subsequent pamphlet advocating the plan, Rhode Island commissioner Stephen Hopkins defensively included language from the credentials of four colonies states that seemed to authorize the Plan, but omitted the Pennsylvania credentials, which were more restrictive. STEPHEN HOPKINS, A TRUE REPRESENTATION OF THE PLAN FORMED AT ALBANY, FOR UNITING ALL THE BRITISH NORTHERN COLONIES, IN ORDER TO THEIR COMMON SAFETY AND DEFENSE 1–3 (Newport, 1755).

101. NEWBOLD, *supra*, note 1, at 169–70.

102. *Id.* at 173.

B. *The Stamp Act Congress of 1765.*

The Stamp Act Congress was held at the instigation of the colonists; it was not sponsored by the Crown. The gathering is fairly well documented, largely due to C.A. Weslager's diligent research, and his 1976 book based on that research.¹⁰³

This convention (as in other cases, the word was used interchangeably with "congress")¹⁰⁴ was called by the lower house of the Massachusetts legislature "to Consult together [sic] on the present Circumstances of the Colonies and the Difficulties to which they are and must be reduced by the operation of the late Acts of Parliament [sic]," particularly the Stamp Act.¹⁰⁵ The call was, therefore, quite broad but not plenipotentiary. It asked that the invited colonies send "such Committees as the other Houses of Representatives, or Burgesses in the Several Colonies on this Continent may think fit to Appoint. . ."¹⁰⁶ The call specified the date of meeting (October 1, 1765) and the place (New York City). The invitation was not extended to the British colonies in Canada or in the Caribbean.

Nine of the 13 invited colonies sent committees: New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, and South Carolina. The number of commissioners on each committee ranged from two to five. There were 27 in all. Despite the call's suggestion that the lower house of each colony elect commissioners, the colonies used their judgment in the matter. Several colonies whose legislatures had been prorogued or dissolved chose delegates by other means. In New York, the legislature previously had designed five New York City lawmakers as a committee of correspondence; after informal consultation with their colleagues, that committee decided to act as the delegation.¹⁰⁷ In Delaware, out-of-session lawmakers chose the commissioners.¹⁰⁸ The convention seated delegates even if their selection was not in accord with the mode suggested by the call.

¹⁰³ WESLAGER, *supra* note 1

¹⁰⁴ On the interchangeability of the two terms to describe meetings of governments, see *supra* notes ___ and accompanying text. Thus, the word "convention" frequently was applied to the Stamp Act Congress. *See, e.g.*, WESLAGER, *supra* note 1, at 62 (referring to the meeting as a convention) & *id.* at 89 (quoting Thomas Whately as referring to it as a convention); 116 (citing attack on the meeting as an "illegal convention").

¹⁰⁵ The call is reproduced *id.* at 181-82.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 80-81.

¹⁰⁸ Such was the case in Delaware. *Id.* at 93-95 and South Carolina, *id.* at 148..

The commissioners included Oliver Partridge of Massachusetts, who had served at the 1754 gathering in Albany, and a number of other members destined to become “old convention hands.”¹⁰⁹ Eliphat Dyer of Connecticut, for example, served in four subsequent Founding Era conventions.¹¹⁰ The roster also included three men who performed distinguished service at the 1787 Constitutional Convention: John Dickinson of Pennsylvania (who represented Delaware in Philadelphia), William Samuel Johnson of Connecticut, and John Rutledge of South Carolina.¹¹¹ The gathering was late getting started, but finally convened on October 7.

The protocols and procedures followed in organizing and operating the Stamp Act Congress foreshadowed those of all subsequent gatherings of the type. As we have seen, the call was a sparse document, limited to date, place and subject. Although unlike most subsequent convention calls, it suggested how delegates might be appointed, the colonies did not find this suggestion binding and the convention seated each colony’s delegates however selected.¹¹² Each colony paid its own committee,¹¹³ and issued credentials and instructions.¹¹⁴ Some of these authorized their delegates only to consult,¹¹⁵ while the rest empowered them to join in any proposed course of action.

The convention adopted its own rules and chose its own committees.¹¹⁶ It selected a commissioner, Timothy Ruggles of Massachusetts, as President,¹¹⁷ and a non-commissioner, John Cotton, as Secretary.¹¹⁸ It elected those two gentlemen by ballot, but then reverted to the rule of one colony/one vote.¹¹⁹ It also kept a journal.¹²⁰ The convention adjourned on October 25 after issuing four documents: A declaration of the rights of the colonists, an address to the king, a

¹⁰⁹ For a list of all commissioners, see *id.* at 255.

¹¹⁰ Appendix A.

¹¹¹ *Id.*; WESLAGER, *supra* note 1, at 255.

¹¹² WESLAGER, *supra* note 1, at 198 (reproducing portion of journal reporting seating of irregularly-selected delegates).

¹¹³ See, e.g., *id.* at 62 (Massachusetts), 69 (Connecticut), 73 (Maryland), 85 (Pennsylvania).

¹¹⁴ The credentials are reproduced *id.* at 183-97; for an example of instructions, see *id.* at 88 (Rhode Island).

¹¹⁵ These included Connecticut, *id.* at 69 and South Carolina. *Id.* at 148.

¹¹⁶ *Id.* at 124 (discussing election of committee to inspect minutes and proceedings).

¹¹⁷ *Id.* at 122.

¹¹⁸ *Id.* at 123.

¹¹⁹ *Id.* at 124-25 (discussing the one colony/one vote decision).

¹²⁰ The journal is reproduced *id.* at 181-218.

memorial to the House of Lords, and a petition to the House of Commons.¹²¹

C. *The Continental Congress of 1774*

The call for a continental congress or convention came from the New York Committee of Correspondence in a circular letter authored by John Jay.¹²² The gathering was a general rather than a partial convention, since all the colonies were invited.¹²³

The Congress met in Philadelphia on September 5, 1774 and adjourned on October 26 of the same year. Fifty-six commissioners from twelve of the thirteen continental colonies south of Canada attended; Georgia was absent. (See Appendices A and B.) The journal of the proceedings is extensive, and of course the history of the Congress has inspired a massive amount of retelling. The task here is not to recite that history, but to identify key protocols and procedures.

In most colonies, commissioners were chosen by the *de facto* legislative authority. In Rhode Island, the *de jure* legislature also governed *de facto*, so it named that colony's commissioners. In other colonies, royal officials and upper-house councilors had become recalcitrant, so commissioners were selected either by the lower house (as in Massachusetts or Pennsylvania) or by colonial conventions acting as legislatures (New Jersey, Delaware, Maryland, Virginia, and North Carolina). In Connecticut, the lower house empowered the committee of correspondence to appoint the commissioners. In New York, voters elected them directly in local meetings.¹²⁴

In its scope, the First Continental Congress was perhaps the most nearly plenipotentiary of multi-colonial and multi-state conventions. Colony-issued credentials granted very broad authority to consult and recommend solutions to the crisis with Great Britain. The narrowest credentials, those issued by Rhode Island, empowered that colony's delegates

to meet and join with the commissioners or delegates from

¹²¹ These documents are reproduced in the journal.

¹²² The text of the letter is reproduced at http://avalon.law.yale.edu/18th_century/letter_ny_comm_1774.asp (last accessed Mar. 12, 2013). For an account, see Edward D. Collins, *Committees of Correspondence of the American Revolution* 262 (1901)

¹²³ The New York invitation stated that the gathering should be a "congress of deputies from the colonies in general." See http://avalon.law.yale.edu/18th_century/letter_ny_comm_1774.asp (last accessed Mar. 12, 2013).

¹²⁴ The credentials of delegates from attending states other than North Carolina are reproduced at 1 J. CONT. CONG., *supra* note 1, at 15–24. Those for North Carolina are reproduced at *id.* at 30.

the other colonies, *in consulting* upon proper measures to obtain a repeal of the several acts of the British parliament, for levying taxes upon his Majesty's subjects in America, without their consent, and particularly an act lately passed for blocking up the port of Boston, and upon proper measures to establish the rights and liberties of the Colonies, upon a just and solid foundation, agreeable to the instructions given you by the general Assembly.¹²⁵

The other credentials were wider still, for they not only authorized almost unlimited discussion, but also conveyed authority to bind their respective colonies to collective decisions. For example, the Delaware commissions empowered delegates “to consult and advise [i.e., deliberate] with the deputies from the other colonies, and to *determine upon* all such prudent and lawful measures, as may be judged most expedient for the Colonies immediately and unitedly to adopt. . . .”¹²⁶ Pennsylvania bestowed authority “to form *and adopt* a plan for the purposes of obtaining redress of American grievances,”¹²⁷ and New Jersey used the general formula, “to represent the Colony of New Jersey in the said general congress.”¹²⁸ Thus, Rhode Island had in mind a *proposing* convention, but the other colonies sought one that actually could *decide* matters. When a commissioner had authority to bind his government, international lawyers said he had power to *pledge the faith* of his government.¹²⁹ Variants on “pledge the faith” appear in the proceedings of several later multi-state conventions.¹³⁰

Ultimately, however, the First Continental Congress made no decisions legally binding on the colonies. It merely issued a series of recommendations and petitions, memorials and other communications. Thus, it remained within the scope of power authorized by the narrowest credentials.

As the Stamp Act Congress had done,¹³¹ the First Continental Congress elected all its own officers and staffed all its own committees. At the first session, the gathering elected Peyton Randolph, a delegate from Virginia, as president, and Charles Thompson, a non-delegate, as

125. *Id.* at 17 (emphasis added).

126. *Id.* at 22 (emphasis added).

127. *Id.* at 20 (emphasis added).

128. *Id.*

129. *Cf.* EMER DE VATTEL, THE LAW OF NATIONS bk. 2, §§ 163, 220, 329.4 (Liberty Fund ed., 2008) (1758) (discussing the faith of treaties); *id.* bk. 2, §225 (discussing the pledge of faith in an oath); *id.* bk. 2, § 234 (discussing tacit pledges of faith), bk. 3, § 238 (discussing the pledge of faith in truces and suspensions of arms); *see also infra* note ___ and accompanying text.

130. *Infra* notes ___ and accompanying text.

¹³¹ *Supra* Part III.B.

secretary.¹³² The following day, the convention set about adopting rules. The first of these was the principle of suffrage:

Resolved, That in determining questions in this Congress, each Colony or Province shall have one Vote.—The Congress not being possess'd of, or at present able to procure proper materials for ascertaining the importance of each Colony.¹³³ [The session then adopted the following additional rules.]

Resolved, That no person shall speak more than twice on the same point, without the leave of the Congress.

Resolved, That no question shall be determined the day, on which it is agitated and debated, if any one of the Colonies desire the determination to be postponed to another day.

Resolved, 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.

Resolved, unan: That a Committee be appointed to State the rights of the Colonies in general, the several instances in which these rights are violated or infringed, and the means most proper to be pursued for obtaining a restoration of them.

.....

Resolved, That the Rev.^d Mr. Duché be desired to open the Congress tomorrow morning with prayers, at the Carpenter's Hall, at 9 o'Clock.¹³⁴

These rules were adopted by the Second Continental Congress as well.¹³⁵

Before adjournment, the Congress issued a conditional call for a second congress to meet on May 10, 1775, "unless the redress of grievances, which we have desired, be obtained before that time."¹³⁶ The body then dissolved itself.¹³⁷

132. 1 J. CONT. CONG., *supra* note 1, at 14.

133. *Id.* at 25.

134. *Id.* at 26.

135. 2 *id.* at 55.

136. 1 *id.* at 102.

137. *Id.* at 114.

D. *The Providence Convention of 1776–1777*

The first multi-government-convention after Independence was that held from December 25, 1776 to January 2, 1777 in Providence, Rhode Island.

On November 16, 1776, the Massachusetts House of Representatives passed, and the council approved, a resolution that served both as the call and as the appointment of delegates. It specified as subjects paper currency and public credit. The convention was to confer on those subjects and make proposals to the legislatures sending them, as well as to Congress.¹³⁸ The power of the Massachusetts delegation to communicate proposals to other states and to Congress was conditional on agreement by the committees of the other states. The resolution appointed Tristram Dalton and Azor Orne as “a Committee to meet Committees from the General Assemblies of the States of Connecticut, New-Hampshire and Rhode-Island, at Providence in Rhode-Island the tenth day of December next. . . .”¹³⁹

On November 21, the Rhode Island general assembly accepted the call and appointed its own committee.¹⁴⁰ Just four days later, Connecticut rejected the call. In a letter to Massachusetts Council president James Bowdoin, Connecticut Governor Jonathan Trumbull explained that “[I] am desired by the Assembly of this State to advise” that such a convention might “give umbrage to the other States” because Congress previously had “taken the subject into consideration.” Trumbull added that Connecticut already had laws dealing with

138. The Massachusetts resolution stated:

Resolved, That the Honourable *Tristram Dalton* and *Aaron Orne*, Esquires, with such as the honourable Board shall join, be a Committee to meet Committees from the General Assemblies of the States of *Connecticut*, *New-Hampshire*, and *Rhode-Island*, at *Providence*, in *Rhode-Island*, the tenth day of *December* next, provided said Assemblies think proper to appoint such Committees, then and there to hold a conference respecting further emissions of Paper Currency on the credit of any of said States; also on measures necessary for supporting the credit of the publick [*sic*] Currencies thereof: And the said Committee (if the Committees of the other States so met agree thereto) be empowered to communicate to the other *United States of America* the intention of their Convention, and urge that some measures be taken by them to the same purpose, and to give like information to the honourable the Continental Congress, and propose to them whether the regulation of the Currencies is not an object of necessary attention, and to report as soon as may be.

And it is *Ordered*, That the Secretary immediately transmit authenticated copies of the Resolve to the General Assemblies of the several States aforementioned.

3 AMERICAN ARCHIVES, *supra* note 1, at 772.

139. 19 MASS. RECORDS, *supra* note 1, at 661.

140. 8 R.I. RECORDS, *supra* note 1, at 48–49.

currency and credit issues.¹⁴¹

Initially, the Massachusetts Council voted to proceed with the convention "the foregoing letter notwithstanding,"¹⁴² but the House was opposed. With the ultimate concurrence of the Council, the legislature wrote to New Hampshire and Rhode Island informing them the gathering was canceled.¹⁴³ President Bowdoin expressed the belief, however, that "this matter will be taken up again."¹⁴⁴

Bowdoin turned out to be right. On December 6 (the same day the Massachusetts legislature decided not to pursue the convention) Rhode Island's Governor Nicholas Cooke, surveying the military situation, wrote to Bowden that Rhode Island would "readily concur in proper measures with the Assemblies of the States of *Massachusetts-Bay* and *Connecticut*."¹⁴⁵ Just three days after that, Trumbull sent a missive to Massachusetts bemoaning the sad state of the American cause. He added:

When we had an intimation from you a few weeks past for Commissioners from the *New-England* States to meet at *Providence*, to confer on the affair of our currency, it was then thought, for prudential reasons given you in answer then, to decline; but I beg leave to suggest whether, in the present aspect of affairs, our main army drove to the southward, the communication being greatly interrupted and in danger of being totally obstructed between the Southern and *New-England* Colonies, whether it will not be best, as soon as the enemy are retired into winter quarters, for the *New-England* States to meet by their Commissioners to consult on the great affairs of our safety, and of counteracting the enemy in their future operations. . . . We hope we shall soon hear from you on this subject.¹⁴⁶

With the Massachusetts House then in recess, the council, through Bowdoin, responded warmly. Bowdoin assured Trumbull that

141. Letter from Jonathan Trumbull to James Bowdoin (Nov. 25, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 845. Trumbull further explained the decision in a letter to Governor Cooke of Rhode Island. Letter from Governor Trumbull to Governour Cooke (Dec. 4, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1077.

142. 3 AMERICAN ARCHIVES, *supra* note 1, at 845–46 (Dec. 6, 1776).

143. *Id.* at 846.

144. James Bowdoin to President Weare (President of the Council of New Hampshire), Dec. 6, 1776, reprinted in 3 AMERICAN ARCHIVES, *supra* note 1, at 1104–05.

145. Letter from Governor Cooke to James Bowdoin (Dec. 6, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1104.

146. Letter from Governor Trumbull to Mass. Council (Dec. 9, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1142–43.

Massachusetts was still willing to participate, and that the authority of the Bay State delegates would be expanded to include military affairs:

The regulation of the price of things, (the mode you have adopted,) was thought of, and might have been the best, but many objections arose, which at that time prevented it. However, as we have renewed our application to you to join with the other States of *New-England* in the appointing a Committee to consider this and other matters, we hope you will approve the measure, and that great good will result from it. By our proposal their commission is to be so extensive as to include the important business you mention of consulting on the great affairs of our safety, and counteracting the enemy in their future operations. But if this is not expressed in terms sufficiently explicit, you can agree to our proposal with such additions as you think proper, and there is no doubt we shall concur with you.¹⁴⁷

After that communication, all the invited states acted quickly. On December 18, for example, Massachusetts delegate Tristram Dalton acknowledged receiving his orders,¹⁴⁸ and on the same day the Connecticut legislature appointed its delegates and defined their authority.¹⁴⁹ The committees had gathered in Providence by Christmas Day.

Thirteen delegates represented the four states: four from Connecticut and three each from Rhode Island, New Hampshire, and Massachusetts (which had added Thomas Cushing to its committee).¹⁵⁰ All had been appointed by their respective legislatures, except for the Rhode Island commissioners. The British had occupied much of that state, so the legislature had deputized a council of war to exercise its powers. The council of war appointed its commissioners, two of whom were members of the council itself.¹⁵¹

The states had granted their delegates authority that, while not unlimited, was quite broad. As promised, Massachusetts had expanded the power conferred on its committee to include military as well as

147. Letter from Massachusetts Council to Governor Trumbull (Dec. 13, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1209–10.

148. Letter from Tristram Dalton to John Avery (Dec. 18, 1776), in 3 AMERICAN ARCHIVES, *supra* note 1, at 1287.

149. 3 AMERICAN ARCHIVES, *supra* note 1, at 1389.

150. For the delegates, see Appendices A and B. One delegate, a man from New Hampshire, rejoiced in the name of Supply Clap. Apparently he was a competent fellow. See Letter from John Langdon to Josiah Bartlett (June 3, 1776), in BARTLETT PAPERS, *supra* note 1, at 67, 68 n.2.

151. 1 CONN. RECORDS, *supra* note 1, at 585, 588.

economic measures, with the proviso that they avoid subjects “repugnant to or interfering with the powers and authorities of the Continental Congress.”¹⁵² Connecticut granted authority to address public credit and “every measure . . . necessary for the common defense.”¹⁵³ The authority of the Rhode Island committee was similar.¹⁵⁴ Only New Hampshire issued narrower credentials, which encompassed military matters but did not mention currency or public credit.¹⁵⁵

However, a key reason for the decision to address currency and public credit was the need to keep armies in the field. Accordingly, the New Hampshire delegates finally concluded that commissions were broad enough to include them. As Josiah Bartlett, one of those delegates explained:

I am fully sensible of the difficulties attending the setting prices to any thing, much more to every thing, but unless something was done so as the soldier might be ascertained of what he could purchase for his forty shillings, no more would enlist, nor could we with reason expect it: what will be the effect of establishing prices I know not, however it must be tried¹⁵⁶

The call had been for a convention that would make proposals only, without authority to “pledge the faith” of the participating governments. This limitation, reflected in a letter from the Rhode Island’s Stephen Hopkins, the first president of the convention, to the Massachusetts council,¹⁵⁷ also appeared in the credentials and in the proceedings: The latter repeatedly referred to convention resolutions as “representations” or “applications” (in a precatory sense).¹⁵⁸

The convention elected its own officers, initially choosing Hopkins as president.¹⁵⁹ When Hopkins left midway through the proceedings, the convention replaced him with William Bradford, also from Rhode

152. *Id.* at 585, 586.

153. *Id.* at 587.

154. *Id.* at 588.

¹⁵⁵ *Id.* at 587.

156. Letter from Josiah Bartlett to William Whipple (Jan. 15, 1777), in BARTLETT PAPERS, *supra* note 1, at 143–44; *see also* 1 CONN. RECORDS, *supra* note 1, at 585, 592 (a convention resolution expressing the view that “exorbitant [*sic*] price[s] of every necessary and convention article of life . . . disheartens and disaffects the soldiers.”).

157. Letter from Stephen Hopkins to James Bowdoin, 3 AMERICAN ARCHIVES, *supra* note 1, at 1423 (stating in part, “we . . . are of opinion” and “We submit this representation, and desire you would give orders”).

158. 1 CONN. RECORDS, *supra* note 1, at 585, 589.

159. *Id.* at 589.

Island.¹⁶⁰ As clerk, the delegates selected Rowse J. Helme, a non-delegate.¹⁶¹

The Providence Convention of 1776–1777 issued a wide range of recommendations, covering prices, auctions, and an embargo of luxury goods.¹⁶² Its final proposal—a “Day of Fasting, Public Humiliation, and Prayer”¹⁶³—would in those religious times and in religious New England certainly, be seen as within the delegates’ respective powers. On January 2, 1777, the group adjourned *sine die*.¹⁶⁴ The convention’s recommendations were taken seriously, and later in the year, Massachusetts and Connecticut both sent troops to Rhode Island in accordance with them.¹⁶⁵

E. *The York Town and Abortive Charleston Price Conventions of 1777*

When the Continental Congress received letters from Connecticut and Massachusetts describing the Providence recommendations, Congress scheduled the matter for discussion.¹⁶⁶ That discussion spread over several days in late January and the first half of February, 1777.¹⁶⁷ Some congressional delegates questioned whether the meeting of the New England states had been proper, in view of the power vested in Congress. Those delegates were in the minority, however; contemporaneous reports relate that Congress in general was quite pleased with the recommendations, particularly those pertaining to prices.¹⁶⁸

160. *Id.* at 592.

161. *Id.* at 589.

162. *See id.* at 589–99. For the embargo recommendation, see *id.* at 597.

163. *Id.* at 598–99.

164. *Id.* at 589.

165. *Id.* at 161; 19 MASS. RECORDS, *supra* note 1, at 732–33.

166. 7 J. CONT. CONG., *supra* note 1, at 65–66 (referring to receipt of the letters and scheduling of discussion on Jan. 28, 1777).

167. 7 J. CONT. CONG., *supra* note 1, at 79, 80–81 (Jan. 31, 1777); *id.* at 85, 87–88 (Feb. 4, 1777); *id.* at 88, 93–94 (Feb. 5, 1777); *id.* at 94, 97 (Feb. 6, 1777); *id.* at 108, 111–12 (Feb. 12, 1777); *id.* at 112, 118 (Feb. 13, 1777); *id.* at 118, 121–22 (Feb. 14, 1777); *id.* at 123, 124–25 (Feb. 15, 1777).

168. 7 J. CONT. CONG., *supra* note 1, at 88 (committee of the whole report, Feb. 4, 1777); *id.* at 118, 121–22 n.4 (Feb. 14, 1777); *id.* at 123, 124–25 (Feb. 15, 1777); *see also* Letter of the Massachusetts Delegates to the President of the Massachusetts Council (Jan. 31, 1777), 196 MASSACHUSETTS ARCHIVES 183, *reprinted in* 2 LETTERS, *supra* note 1, at 228–29 (“[A] similar Mode for giving Stability to the Currency will probably be recommended to the Southern and middle Departments of the Continent.”); Letter from Samuel Adams to James Warren (Feb. 1, 1777), *in* 2 LETTERS, *supra* note 1, at 233 (stating that the Providence resolutions “are much applauded as being wise and salutary”); Letter from John Adams to Abigail Adams (Feb. 7, 1777), *reprinted in* 2 LETTERS, *supra* note 1, at 237 (“The attempt of New England to regulate prices is extremely popular in Congress, who will recommend an imitation of it to the other

On February 15, Congress formally approved the military and economic recommendations of the Providence Convention, "except that part which recommends the striking bills bearing interest."¹⁶⁹ Congress resolved further:

That the plan for regulating the price of labour, of manufactures and of internal produce within those states, and of goods imported from foreign parts, except military stores, be referred to the consideration of the other [U]nited States: and that it be recommended to them, to adopt such measures, as they shall think most expedient to remedy the evils occasioned by the present fluctuating and exorbitant prices of the articles aforesaid[.]¹⁷⁰

Congress then proceeded to call two additional conventions, both of the "proposing" or recommendatory kind:

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, Pennsylvania [*sic*], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pennsylvania, 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[.]¹⁷¹

The Charleston convention apparently was never held.¹⁷² One likely reason was the objection by North Carolina that Virginia, the economic powerhouse of the region, had been grouped with the middle rather than

States."); Letter from Abraham Clark to the Speaker of the New Jersey Assembly (Feb. 8, 1777), in 2 LETTERS, *supra* note 1, at 242 (reporting that congressional approbation is expected); Rush, *Notes*, *supra* note 1, at 131–39.

169. 7 J. CONT. CONG., *supra* note 1, at 124 (Feb. 15, 1777).

170. *Id.*

171. *Id.* at 124–25 (Feb. 15, 1777).

172. CAPLAN, *supra* note 1, at 17. South Carolina legislative records from the time are lost, and Georgia records are spotty, but my investigation and those of two experienced state archivists makes this conclusion probable.

the southern states.¹⁷³ However, eighteen commissioners from New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia had convened in York Town by March 26.¹⁷⁴ The committees from each state ranged in size from two commissioners to five.¹⁷⁵ The convention minutes do not reproduce their credentials. I have been able to find only the authority of the Virginia delegates, which was much the same as called for by Congress. After reciting the fact of the call, the Virginia executive council (acting presumably during a legislative recess) authorized its delegates to discuss “regulating the prices of Commodities within those States respectively, and of Goods imported in the same.”¹⁷⁶

The York Town Price Convention elected Lewis Burwell, a Virginia commissioner, as chairman, and Thomas Annor, a non-commissioner, as clerk.¹⁷⁷ Like other gatherings of the type, the convention appointed committees,¹⁷⁸ particularly a ways-and-means committee, to recommend a scheme of price controls for the consideration of the entire assembly.¹⁷⁹

The York Town minutes reveal that the delegates fully understood that their role was only to propose to state legislatures, not to decide.¹⁸⁰ Yet they could not agree on a proposal. When the ways-and-means committee issued its report, the states split evenly on a motion to reject it.¹⁸¹ A motion to amend the plan was voted down five states to one.¹⁸²

173. 2 LETTERS, *supra* note 1, at 253–54, 257–58; 7 J. CONT. CONG. 121–22 n.4 (reporting objections of Thomas Burke, delegate from North Carolina, to placing Virginia in convention of middle states).

174. The York Town minutes have been hard to locate; even archivists in Pennsylvania and in York were unaware that such a convention ever met. They can be found, however, in N.J. SELECTIONS, *supra* note 1, at 34–45 (1848).

175. *Id.* at 35.

176. The authorization of Virginia read as follows:

This Board, taking under their Consideration the Resolutions of Congress, bearing date the 15th of [F]ebruary last, respecting the appointment of Commissioners from this State, to meet Commissioners of several other States at York Town in Pennsylvania [sic] for regulating the prices of Commodities within those States respectively, and of Goods imported in the same, do appoint Lewis Burwell, and Thomas Adams esquires, commissioners for the purposes aforesaid on Behalf of this State.

1 JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA 359 (H, R, McIlwain ed., 1931) (Mar. 4, 1777).

177. N.J. SELECTIONS, *supra* note 1, at 35–36.

178. *Id.* at 36, 38.

179. *Id.* at 36–37.

180. *See id.* at 40–42 (reproducing a proposed resolution to recommend various measures to state legislatures).

181. On April 1, 1777, the record stated as follows:

The deadlock appears to have been brought on, at least in part, because many delegates did not believe price controls to be wise or effective public policy.¹⁸³ Accordingly, the convention voted on April 3 to send copies of its proceedings to Congress and to the legislatures of the participating states—and thereupon to dissolve.¹⁸⁴

F. *The Springfield Convention of 1777*

On June 27, 1777, the Massachusetts legislature called for a convention of “Committees from the General Assemblies” of the New England states and New York.¹⁸⁵ The legislature disseminated the call in a circular letter sent to the other four states.¹⁸⁶ The designated location was Springfield, Massachusetts.¹⁸⁷ The subject matter was expansive, encompassing paper money, laws to prevent monopoly and economic oppression, interstate trade barriers, and “such other matters as particularly [c]oncern the immediate [w]elfare” of the participating states.¹⁸⁸ But it was limited by the stipulation that the convention confine itself to matters “not repugnant to or interfering with the powers and authorities of the Continental Congress.”¹⁸⁹

Like the York Town and Providence gatherings, this was to be only a proposal convention. The call asked that the delegates “consider” measures and “report the result of their conference to the General Courts [legislatures] of their respective States.”¹⁹⁰ The convention’s

A motion was made and seconded, that the report be rejected, and the question being put it was received in the negative, in the manner following : viz

:
 For the affirmative, Pennsylvania, Delaware, Maryland.
 For the negative, New York, New Jersey, Virginia.

Id. at 43.

182. *Id.* at 44.

183. *Id.* at 45.

184. *Id.* at 45. The exhaustion of the delegates of the situation is captured by the presiding officer’s certification line on the resolution to adjourn: “LEWIS BURWELL, Chairman. Signed Thursday evening, By candle-light, April 3, 1777.” *Id.*

185. 1 CONN. RECORDS, *supra* note 1, at 601.

186. *E.g.*, Letter from Jeremiah Powell to Nicholas Cooke, Governor of Rhode Island (July 2, 1777), in 8 R.I. RECORDS, *supra* note 1, at 280 (containing call).

187. 20 MASS. RECORDS, *supra* note 1, at 49–50; *see also* 1 CONN. RECORDS, *supra* note 1, at 601 (reproducing Massachusetts resolution); *id.* at 602 (reproducing New York resolution reciting Massachusetts call).

188. 20 MASS. RECORDS, *supra* note 1, at 49–50.

189. 1 CONN. RECORDS, *supra* note 1, at 599; 8 R.I. RECORDS, *supra* note 1, at 276 (reciting and accepting the call); *id.* at 278 (appointing committee).

190. *See* 1 CONN. RECORDS, *supra* note 1, at 599.

resolutions are consistent with that limitation.¹⁹¹

On July 30, eleven commissioners from all five states had appeared.¹⁹² They included, among others, New York's John Sloss Hobart, who had attended at York Town, and several Providence veterans: Titus Hosmer of Connecticut, Thomas Cushing of Massachusetts, Josiah Bartlett of New Hampshire, and William Bradford and Stephen Hopkins of Rhode Island.¹⁹³ Their credentials mostly tracked the language of the call or, in the case of New York, referred to the call when defining the scope of authority.¹⁹⁴ State officials were learning that uniformity is important when credentialing.

The mode of selection varied by state. A joint session of the legislature had elected New Hampshire's and Rhode Island's committees.¹⁹⁵ In Massachusetts the legislature had chosen its committee by the two chambers voting seriatim.¹⁹⁶ In New York, the council of safety selected the delegates, and in Connecticut the governor and council of safety.¹⁹⁷

As the Providence Convention had done, the Springfield gathering elected Stephen Hopkins as President. It chose William Pynchon, Sr., a non-commissioner, as clerk.¹⁹⁸

It is a shame that more historical work has not been done on the Springfield Convention,¹⁹⁹ for it turned out to be an important and productive assembly. It met only from July 30 through August 5, but produced a series of significant recommendations on a range of economic and military subjects.²⁰⁰ The day after adjournment, President Hopkins submitted the convention proposals to "the Honorable Congress, that such measures may be taken for that end as they in their great wisdom shall think proper."²⁰¹ These recommendations formed the basis for extensive congressional debate and further

191. *E.g.*, *id.* at 603 (resolving "[t]hat it be earnestly recommended" and, again, "[t]hat it be recommended"); *id.* at 604 (resolving "[t]hat it be recommended"); *id.* at 605 (resolving, "as the opinion of this Committee").

192. *Id.* at 600.

193. *Id.*

194. *Id.* at 600–02. The Connecticut commissions initially omitted the exception in favor of the power of Congress, but then seemed to limit its delegates' authority to the items in the call. *Id.* at 601–02.

195. *See id.* at 600, 602.

196. *See id.* at 601.

197. *Id.* at 601, 602.

198. *Id.* at 605.

199. For example, Scott, *supra* note 1, which discusses the other New England conventions dealing with prices, fails to mention Springfield.

200. 1 CONN. RECORDS, *supra* note 1, at 605.

201. *Id.* at 605–06. Hopkins' letter was read in Congress on August 18. 8 J. CONT. CONG., *supra* note 1, at 649–50.

recommendations to the states,²⁰² although not all recommendations were effectuated.²⁰³

G. The New Haven Price Convention of 1778 (and the Abortive Meetings in Charleston and Fredericksburg)

On November 22, 1777, as part of continuing efforts to curb price inflation, the Continental Congress issued calls for three separate multi-state conventions.²⁰⁴ Congress requested that the eight northernmost

202. 8 J. CONT. CONG., *supra* note 1, at 727, 731 (voting on September 10, 1777 to add five members to committee to consider Springfield recommendations). For further response, see 9 *id.* at 948, 953–58 (Nov. 22, 1777); *id.* at 967–970 (Nov. 26, 1777); *id.* at 970–971 (Nov. 27, 1777); *id.* at 985 (Dec. 2, 1777); *id.* at 988–89 (Dec. 3, 1777); 10 *id.* at 43, 46 (Jan. 13, 1778); 11 *id.* at 758–60 (Aug. 7, 1778); 8 R.I. RECORDS, *supra* note 1, at 286 (appointing legislative committee to encapsulate military supply recommendations in a bill).

203. Letter from William Greene, Governor of Rhode Island to Jonathan Trumbull, Governor of Connecticut (May 16, 1778), in 8 R.I. RECORDS, *supra* note 1, at 424 (complaining that Rhode Island had not received the troops promised from other states); Letter from William Greene, Governor of Rhode Island to the Council of Massachusetts (May 31, 1778), in 8 R.I. RECORDS, *supra* note 1, at 425 (same); Letter from Jonathan Trumbull, Governor of Connecticut, to William Greene, Governor of Rhode Island (Jun. 5, 1778), in 8 R.I. RECORDS, *supra* note 1, at 443 (excusing failure to meet Connecticut quota); see 8 R.I. RECORDS, *supra* note 1, at 519–20 (representing to Congress the difficulty this failure has inflicted on Rhode Island); Letter from Nicholas Cooke, Governor of Rhode Island, to General Sullivan (Mar. 30, 1778), in 8 R.I. RECORDS, *supra* note 1, at 526–27 (outlining same problems).

204. See 9 J. CONT. CONG., *supra* note 1, at 948, 955–57. The November 22 resolution stated:

Resolved, That it be recommended to the legislatures, or, in their recess, to the executive power of the respective states of New Hampshire, Massachusetts bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania [*sic*], and Delaware, respectively, to appoint commissioners to convene at New Haven, in Connecticut, on the 15 day of January next; and to the states of Virginia, Maryland, and North Carolina, respectively, to appoint commissioners to convene at Fredericksburg, in Virginia, on the said 15 day of January; and to the states of South Carolina and Georgia, respectively, to appoint commissioners to convene at Charleston, on the 15 day of February next; in order to regulate and ascertain the price of labour, manufactures, internal produce, and commodities imported from foreign parts, military stores excepted; and also to regulate the charges of inn-holders; and that, on the report of the commissioners, each of the respective legislatures enact suitable laws, as well for enforcing the observance of such of the regulations as they shall ratify, and enabling such inn-holders to obtain the necessary supplies, as to authorize the purchasing commissaries for the army, or any other person whom the legislature may think proper, to take from any engrossers, forestallers, or other person possessed of a larger quantity of any such commodities or provisions than shall be competent for the private annual consumption of their families, and who shall refuse to sell the surplus at the prices to be ascertained as aforesaid, paying only such price for the same.

Id. at 956–57 (footnote omitted).

states meet at New Haven, Connecticut on January 15, 1778; that Maryland, Virginia, and North Carolina convene at Fredericksburg, Virginia on the same day; and that South Carolina and Georgia gather on February 15 at Charleston. I have found no evidence the latter two conventions ever met.²⁰⁵

The call specified as the convention subject-matter developing a comprehensive schedule of price controls for non-military products, developing enforcement mechanisms, and empowering authorities to seize goods from engrossers (hoarders). The call further provided that state legislatures should adopt laws to implement “such of the regulations as they shall ratify.”²⁰⁶ The precatory nature of that language communicated that these gatherings, too, were to be merely agencies to propose.

Like the York Town and Springfield meetings, the New Haven Convention has received little scholarly attention.²⁰⁷ One reason may be that its journal was so thin.²⁰⁸ Yet the gathering at New Haven was one of the better-attended meetings of the kind. It was comprised of committees from seven states: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania. Delaware had been invited but did not send delegates.

The states had named 21 commissioners, but one from New Jersey and two from Pennsylvania failed to attend. By January 15, three committees had arrived; six days later, all seven were on hand.²⁰⁹ Except for the New York committee, all had been elected by their state legislatures,²¹⁰ with bicameral legislatures (Pennsylvania’s was unicameral) voting either jointly or by chambers *seriatim*. The New York committee was appointed by the state convention, a body that served as the legislature when the regular legislature was in recess or disrupted by the British.²¹¹

205. *Accord* CAPLAN, *supra* note 1, at 18.

206. 9 J. CONT. CONG., *supra* note 1, at 957.

207. The principal treatment, Baldwin, *supra* note 1, is a sketchy and unsatisfying account that spends much of its time on other events and gets some facts wrong (for example, claiming that New Jersey delegate John Neilson was subsequently a delegate at the Constitutional Convention). *Id.* at 46. This work is sometimes referred to by the consecutive titles of its first two papers: “The New Haven Convention of 1778; The Boundary Line between Connecticut and New York.”

208. The record devoted relatively few pages to the New Haven Convention proceedings. *See generally* 1 CONN. RECORDS, *supra* note 1, at 607–20.

209. *Id.* at 610–11 (reporting that “[t]he Commissioners arrived from the State of Pennsylvania” on that date).

210. The credentials stated how the committees were selected. *Id.* at 607–11; *see also* 8 R.I. RECORDS, *supra* note 1, at 340 (reproducing Rhode Island’s acceptance of the congressional call, and election of the commissioners by a joint ballot of both houses of the general assembly).

211. 1 CONN. RECORDS, *supra* note 1, at 609–10 (setting forth resolution of New York convention).

The convention elected Thomas Cushing of Massachusetts, a veteran of both the First Continental Congress and of Providence and Springfield, as its president. It chose Henry Daggett, a non-delegate, as secretary.²¹² Besides Cushing, four other commissioners had convention experience. William Floyd of New York had attended the First Continental Congress. Robert Treat Paine of Massachusetts had been at that Congress and at Springfield, as had Connecticut's Roger Sherman. Nathaniel Peabody of New Hampshire also had represented his state at Springfield.²¹³

On January 22, 1778, the New Haven convention adopted rules of conduct. The content of those rules does not appear in the journal, except the rule of suffrage: each state had one vote.²¹⁴ Like other such assemblies, the convention appointed its own committees.²¹⁵

The official journal tells us little of the proceedings. It does reproduce the lengthy text of the principal resolution,²¹⁶ which in accordance with the call is purely recommendatory.²¹⁷ The journal likewise includes a formal letter to Congress,²¹⁸ a letter to the absent state of Delaware,²¹⁹ and a recommendation that states write circular letters to other states assuring them that the senders had stopped issuing paper money and were honoring congressional requisitions.²²⁰

The New Haven convention also exercised its prerogative *not* to propose. For reasons it explained, the convention refused to list maximum prices for certain items listed in the congressional call.²²¹

The gathering apparently adjourned on February 1.²²² Congress received its recommendations on February 16.²²³ The convention proposals were the subject of later congressional debate and some implementation,²²⁴ and four states enacted its wage-price schedule into

212. 1 CONN. RECORDS, *supra* note 1, at 607.

213. *See* Appendix A.

214. 1 CONN. RECORDS, *supra* note 1, at 611.

215. *Id.* at 612 (appointing committees "to draw up a report of the doings of this Convention" and "draw up a letter" to Congress).

216. *Id.* at 613–18.

217. The resolution is not clearly identified as a recommendation until near the end. *Id.* at 618.

218. *Id.* at 618–19.

219. *Id.* at 619–20.

220. *Id.* at 620.

221. *Id.* at 615 (explaining why certain items of foreign production are excepted).

222. As unlikely as this appears, the journal seems to report that the delegates convened on a Sunday (February 1) at 5:00 p.m. to adopt the circular-letter resolution and to adjourn. *Id.* at 620.

223. 10 J. CONT. CONG., *supra* note 1, at 170, 172 (Feb. 16, 1778).

224. *Id.* at 53, 55 (Jan. 15, 1778) ("[N]o limitation to be made by the Board of War, with respect to price, shall contravene any . . . of the regulations which may be made hereafter by the convention of committees which is to meet at New Haven, in Connecticut, on this fifteenth day

law.²²⁵ Those price controls were soon repealed on the recommendation of Congress, but adopted to an extent on the local level.²²⁶

H. *The Hartford Convention of 1779*²²⁷

As the Revolutionary War continued, the value of paper money nosedived and trade wars grew among states.²²⁸ In a further effort to coordinate interstate price controls and other economic policies, the Massachusetts General Court (legislature) on September 28, 1779 called yet another multi-state convention.²²⁹ Massachusetts invited New York and the other New England states to meet at Hartford, Connecticut on October 20.²³⁰ The call provided that the convention was to promote “a free and general Intercourse . . . upon Principles correspondent with the public Good, and effectually to cut up and destroy the Practices of those People who prey both upon you and us . . .”²³¹ The commissions of the Massachusetts delegates instructed them specifically to explain the motives for Massachusetts’ embargo law, to “concert . . . such Measures as may appear proper to appreciate our Currency,” and to “open a free and general Intercourse of Trade upon Principles correspondent with the public Good.”²³²

The Massachusetts documents were not clear whether they contemplated a mere consultation or a meeting at which committees could “pledge the faith” of their respective governments. The call

of January[.]”). *See also id.* at 170, 172 (Feb. 16, 1778); *id.* at 258, 260 (Mar. 16, 1778); *id.* at 321–24 (May 8, 1778); 11 *id.* at 472 (May 7, 1778).

225. CAPLAN, *supra* note 1, at 18; *see also* 1 CONN. RECORDS, *supra* note 1, at 521–22 (reproducing Governor Trumbull’s recommendation based on the New Haven resolutions); 8 R.I. RECORDS, *supra* note 1, at 361 (reproducing resolution of the Rhode Island general assembly accepting the convention proceedings); *id.* at 381 (accepting committee report for bill controlling prices).

226. CAPLAN, *supra* note 1, at 18; *see* Letter from Jonathan Trumbull, Governor of Connecticut, to William Green, Governor of Rhode Island (May 19, 1778), in 8 R.I. RECORDS, *supra* note 1, at 423–24 (complaining of Rhode Island’s non-compliance); Letter from William Green, Governor of Rhode Island, to Jonathan Trumbull, Governor of Connecticut (May 29, 1778), in 8 R.I. RECORDS, *supra* note 1, at 425 (explaining that Rhode Island cannot comply until Massachusetts does).

227. As is true of the conventions at Providence, York Town, Springfield, and New Haven, little has been written about the 1779 Hartford Convention. One must not confuse it with the far more famous interstate gathering at Hartford in 1814.

228. Josiah Bartlett, who represented New Hampshire at 1779 Hartford conclave, observed that “Land Embargoes” were then in effect in most of the five states at the convention. *See* Letter from Josiah Bartlett to Nathaniel Peabody (Oct. 20, 1779), in BARTLETT PAPERS, *supra* note 1, at 271.

229. 21 MASS. RECORDS, *supra* note 1, at 165–66.

230. *Id.* at 165.

231. *Id.*

232. *Id.* at 175; *see also* 2 CONN. RECORDS, *supra* note 1, at 564 (reproduction of Massachusetts resolution).

denominated the convention as a "Consultation," but stated that its commissioners would have "full Powers to appear on the Part of this State."²³³ The Massachusetts commissions used the verb "concert" rather than merely "consult," "deliberate," or "recommend."

The documents issued by the other states were clearer, but the commissions issued by New Hampshire contradicted the rest. New Hampshire authorized its delegates to "consult and agree" to virtually any measures.²³⁴ Rhode Island authorized its commissioners only to "meet" with the other delegates.²³⁵ Connecticut empowered its delegates to "deliberate and consult,"²³⁶ and New York empowered its commissioners to "consult and confer" on the subjects identified by Massachusetts as well as any others that might arise.²³⁷ Because of conflicting commissions, the convention could do no more than propose.

The five states appointed 14 commissioners, of whom 13 attended. Massachusetts appointed its committee by legislative action, as did Connecticut and New York. In Rhode Island, commissioners were designated by the council of war, to which the legislature had delegated legislative power.²³⁸ In New Hampshire, they were appointed by the Committee of Safety, charged with the affairs of state during legislative recess.²³⁹

The proceedings opened promptly on October 20, 1779. The more notable figures present included three Connecticut commissioners: Eliphath Dyer, veteran of three prior conventions;²⁴⁰ Benjamin Huntington, who had been at New Haven; and Oliver Ellsworth, new to the convention circuit, but fated to be a central figure at the Constitutional Convention and eventually Chief Justice of the Supreme Court.²⁴¹ Representing Massachusetts were Thomas Cushing, now serving in his fifth multi-state convention, and Nathaniel Gorham, who eight years later would chair the Committee of the Whole in Philadelphia.²⁴² From New Hampshire came Josiah Bartlett, attending his third convention, and from New York William Floyd and John Sloss Hobart, each also attending his third. Stephen Hopkins, one of the two

233. 21 MASS. RECORDS, *supra* note 1, at 165.

234. 2 CONN. RECORDS, *supra* note 1, at 563.

235. *Id.* at 564.

236. *Id.* at 564–65.

237. *Id.* at 565.

238. *Supra* note ___ and accompanying text.

239. 2 CONN. RECORDS, *supra* note 1, at 563–65.

²⁴⁰ See Appendix A (setting forth convention experience for each commissioner).

241. For a short sketch of Ellsworth's contributions to this meeting and to the Philadelphia Price Convention, see BROWN, *supra* note 1, at 72.

²⁴² ROSSITER, *supra* note 1, at 171 (reporting Gorham's chairmanship of the committee of the whole).

Rhode Island delegates, was now serving in his fifth multi-state meeting. He was elected president, as he had been at Providence and Springfield. In keeping with the tradition of choosing a non-delegate for secretary, the assembly elected Lt. Col. Hezakah Wyllys.²⁴³

With this kind of accumulated experience, it was scarcely necessary to adopt formal rules, and the journal mentions none. After reproducing the credentials, the journal does little but report final recommendations.²⁴⁴ They included repeal of embargoes, supplying Massachusetts, Rhode Island, and New Hampshire with flour, and further price regulations. Perhaps as a result of growing skepticism about the efficacy of the latter, the convention stressed the need to obtain supplies by taxing and borrowing rather than printing.²⁴⁵

The group also decided to propose yet another multi-state convention. The call read as follows:

That a Convention of Commissioners from the States of New Hampshire, Massachusetts, Rhode Island, Connecticut [*sic*], New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, be requested to meet at Philadelphia on the first Wednesday of January next, for the purpose of considering the expediency of limiting the prices of merchandize and produce, and if they judge such a measure to be expedient, *then to proceed to limit the prices* of such of said articles as they think proper in their several States in such manner as shall be best adapted to their respective situation and circumstances, *and to report their proceedings to their respective Legislatures.*²⁴⁶

As the italicized language suggests, decisions at the Philadelphia meeting would bind their sovereigns. Hopkins's circular letter to the other states also asserted that the proposed Philadelphia convention would "proceed to limit the prices" of articles, if it deemed proper.²⁴⁷

The Hartford Convention did not invite the three southernmost states to Philadelphia. The purported reason was "[t]he great distance of North Carolina, South Carolina, and Georgia."²⁴⁸ Another possible reason is that those states may have been even more skeptical about price controls

243. 2 CONN. RECORDS, *supra* note 1, at 564. For his rank, see *id.* at 356.

244. *Id.* at 566–69.

245. *Id.* at 569. Josiah Bartlett of New Hampshire believed that price controls remained necessary because taxes would be insufficient to stabilize the currency. Letter from Josiah Bartlett to Nathaniel Peabody (Nov. 4, 1779), in BARTLETT PAPERS, *supra* note 1, at 272–73.

246. 2 CONN. RECORDS, *supra* note 1, at 568 (emphasis added).

247. *Id.* at 571.

248. *Id.* at 570.

than some northerners were.²⁴⁹ Recall that all those states had refused to honor the two congressional calls for price conventions at Charleston.²⁵⁰

After issuing its recommendations, the gathering adjourned, probably on October 28.²⁵¹ Its proceedings seem to have been generally approved in Congress,²⁵² and the convention's price recommendations served as the basis for some of Congress's own price edicts.²⁵³

I. *The Philadelphia Price Convention of 1780*

The call for the Philadelphia Price Convention—yet another multi-government gathering largely overlooked by scholars—was issued by the preceding Hartford Convention.²⁵⁴ The Philadelphia Price Convention was fated to be the final chapter in the sorry history²⁵⁵ of Revolutionary-Era interstate price controls.

Of the ten states invited, seven attended.²⁵⁶ They were Massachusetts, New Hampshire, Rhode Island, Connecticut,

249. See, e.g., Letter from the Connecticut Delegates to the Governor of Connecticut (Apr. 29, 1778), in 3 LETTERS, *supra* note 1, at 202 (quoting the Connecticut delegates to Congress as doubting that the southern states would regulate prices).

250. See *supra* notes ___ and accompanying text.

251. The journal is not completely clear on that point, but the final documents are dated October 28. 2 CONN. RECORDS, *supra* note 1, at 570–71.

252. See Letter from Henry Marchant to William Greene, Governor of Rhode Island (Nov. 14, 1779), in 4 LETTERS, *supra* note 1, at 518–19 (expressing confidence that Congress would approve the convention's proceedings); Letter from Samuel Huntington to Oliver Wolcott (Nov. 26, 1779), in 4 LETTERS, *supra* note 1, at 527 (expressing a similar view).

253. 15 J. CONT. CONG., *supra* note 1, at 1287–91 (Nov. 19, 1779 resolution); Letter from Elbridge Gerry to the President of Congress (Feb. 19, 1780), in 5 LETTERS, *supra* note 1, at 41–42 (stating that Congress fixed the price of flour according to the price agreed on at Hartford).

254. See *supra* text accompanying note 190; see also 8 R.I. RECORDS, *supra* note 1, at 634 (reproducing Rhode Island resolution reciting the Hartford call while empowering a commissioner to Philadelphia).

255. As one historian recounts:

Attempts at price control during the Revolution were all ineffectual. In general even advocates of such regulation looked upon it as a temporary expedient and palliative, while taxation, retrenchment in government expenditures, no further emissions of irredeemable paper currency, and the sinking of such paper already emitted were considered as the true cure for inflationary prices. Most members of Congress realized that large issues of fiat money would cause a decline in its value. . . . New Hampshire and other states learned from trial that price ceilings could be imposed but that producers could not be forced to sell their wares, that control often produced shortages in the midst of plenty, that beef would appear on the market when ceilings were removed and would vanish when they were imposed. People learned, too, that black-market operations would flourish under regulation. . . .

See Scott, *supra* note 1, at 472.

256. Cf. BROWN, *supra* note 1, at 72 (alleging that four invited states did not show, but this refers to the very beginning of the convention).

Pennsylvania, Delaware, and Maryland. Those states were represented by 20 commissioners, among them such experienced convention hands as Connecticut's Roger Sherman (three prior multi-state conventions) Oliver Ellsworth and Samuel Huntington (each with one prior); Delaware's Thomas McKean (one), Maryland's William Paca (one prior, but also a signer of the Declaration of Independence); and New Hampshire's Nathaniel Folsom and Nathaniel Peabody (two each). This was also the first multi-state convention for Elbridge Gerry of Massachusetts, who like Ellsworth and Sherman would play a significant role in writing the Constitution.²⁵⁷

State legislatures had elected all these delegates.²⁵⁸ In Massachusetts, and perhaps in other states, the two chambers acted by joint ballot rather than *seriatim*.²⁵⁹ Unicameral Pennsylvania required, of course, only the vote of one house.²⁶⁰

The commissions empowering the delegates displayed more uniformity than they had at Hartford. As requested by the call, all the commissions authorized delegates to bind their respective states. For example, New Hampshire empowered its commissioners "to limit the prices of articles,"²⁶¹ New Jersey to "consult and agree" and "confer and agree,"²⁶² and Massachusetts "to pledge the faith of this government."²⁶³ These commissions restricted the scope of delegates' authority to bind their states to the subject of price limitation, sometimes with explicit reference to the call.²⁶⁴ Additionally, Rhode Island empowered its delegates to urge the convention to recommend repeal of state embargoes.²⁶⁵

Initially, hopes had been high. In preparation for the convention, some commissioners conferred during early January of 1780.²⁶⁶ Formal proceedings began on January 29, 1780 in the Pennsylvania state house,

257. 2 CONN. RECORDS, *supra* note 1, at 415.

258. Connecticut designated its delegates in Congress as commissioners. *Id.*

259. *Id.* at 573. Some of the other commissions are not clear on this point. *See, e.g., id.* at 576 (describing Pennsylvania's selection of commissioners).

260. *See* PA. JOURNALS, *supra* note 1, at 398 (Nov. 18, 1779).

261. 2 CONN. RECORDS, *supra* note 1, at 572.

262. *Id.* at 575. The New Jersey commission also empowered its committee to "report whatever measures the said Convention may think proper to recommend, to this Legislature," *id.* at 576, but in light of the earlier wording this presumably applied to recommendations outside the call.

263. *Id.* at 573.

264. The commissions are reproduced at *id.* at 572–77. The commissions of Connecticut and New Jersey refer explicitly to Hartford. *Id.* at 574, 575.

265. *Id.* at 574 (reproducing resolution appointing William Ellery as commissioner).

266. Letter from Roger Sherman to Andrew Adams (Jan. 7, 1780), in 5 LETTERS, *supra* note 1, at 4 (reporting that six commissioners from four states had met, as well as an unauthorized representative from New York).

the building now called Independence Hall.²⁶⁷ The convention elected William Moore, then serving as vice president of Pennsylvania, as its president. Contrary to custom, the commissioners elected one of their number, Samuel Osgood of Massachusetts, as secretary.²⁶⁸ Because Osgood was a delegate, the convention decided that in the president's absence Osgood was "authorized to take and declare the sense of the [convention] on all questions that shall come before them."²⁶⁹

The convention soon encountered snags. New Jersey had appointed two delegates, but when the convention opened they were nowhere to be found. The assembly wrote to request their attendance, apparently without success.²⁷⁰ In addition, they wrote to New York and Virginia, which also were absent.²⁷¹

Most of the delegates believed that without the participation of Virginia and New York, any general price-fixing agreement would fail.²⁷² The results for the convention were multiple adjournments and inconclusive discussions.

Whatever the reason for New Jersey's absence, the non-participation by Virginia and New York seems to have been calculated. Virginia had attended the abortive and frustrating price convention at York Town (where it apparently had supported a price control recommendation),²⁷³ but when Congress later asked Virginia to convene with neighboring states at Fredericksburg, it failed to do so.²⁷⁴ During the Philadelphia gathering a New Jersey congressional delegate complained that "Virginia seems to hang back; no members have attended fr[m] [sic] thence, and as far as I can learn none have been appointed."²⁷⁵ As for New York, there was no overt political basis for its absence, since the government in Albany already had "pledge[d] the faith of the State for carrying into effect a general plan for regulating prices"²⁷⁶ Nor was there a practical basis, for Ezra L'Hommedieu, who had represented the state at Hartford, was readily available. In fact, he had been in Philadelphia meeting with authorized delegates since early January.²⁷⁷

The fundamental reason for the failure of Virginia and New York to

267. 2 CONN. RECORDS, *supra* note 1, at 572.

268. *Id.* at 577.

269. *Id.*

270. *See id.*

271. *Id.* at 578.

272. *Id.*

273. *Supra* note ___ and accompanying text.

274. *Supra* note ___ and accompanying text.

275. Letter from Abraham Clark to Caleb Camp, Speaker of the Assembly (Feb. 7, 1780), in N.J. SELECTIONS, *supra* note 1, at 212.

276. 2 CONN. RECORDS, *supra* note 1, at 578.

277. Letter from Roger Sherman to Andrew Adams (Jan. 7, 1780), in 5 LETTERS, *supra* note 1, at 4 (reporting on L'Hommedieu's meeting with six commissioners from four states).

cooperate may have been widespread doubts about the feasibility and justice of price controls. Even in 1777, the same year Congress called several price conventions, Dr. Benjamin Rush had argued that:

The wisdom & power of government have been employed in all ages to regulate the price of necessaries to no purpose. It was attempted in Eng^d in the reign of Edward II by the English parliament, but without effect. The laws for limiting the price of every thing were repealed, and M^f Hume [David Hume, the historian and philosopher], who mentions this fact, records even the very attempt as a monument of human folly. The Congress with all its authority have failed in a former instance of regulating the price of goods.²⁷⁸

At the time, Rush's views had been seconded by such leading figures as James Wilson, Jonathan Witherspoon, and John Adams.²⁷⁹

Since 1777, reservations about the prudence of price controls had grown. The York Town Price Convention had failed, and the southernmost states had refused to hold any price conventions at all. Where controls had been imposed, they had proved spectacularly unsuccessful.²⁸⁰ So by the time the Philadelphia convention met, "[e]nthusiasm for [price] regulation was on the wane."²⁸¹ In instructions withheld from the rest of the convention, the Massachusetts legislature had communicated to its own commissioners grave doubts about the entire price-fixing enterprise.²⁸²

In an effort to rescue the situation, on February 7 an unnamed commissioner moved several resolutions. One was to request the presence of Virginia and another of New York. A third resolution was to appoint a committee to draft a price-limitation plan. The journal is unclear whether this motion was adopted, although it likely was.²⁸³ What is clear is that the following day the assembly adjourned until April 4, apparently never to re-convene.²⁸⁴

J. *The Boston Convention of 1780*

278. Rush, *Notes*, *supra* note 1, at 135.

279. *Id.* at 137–38.

280. *See* Scott, *supra* note 1, at 472.

281. *Id.* at 471.

282. 21 MASS. RECORDS, *supra* note 1, at 307–08 (stating perhaps half the instruction letter consists of an attack on price controls, but that portion is deleted in the convention version); *see also* 2 CONN. RECORDS, *supra* note 1, at 573.

283. 2 CONN. RECORDS, *supra* note 1, at 578–79.

284. *Id.* at 579; *see also* BROWN, *supra* note 1, at 72–73; CAPLAN, *supra* note 1, at 19; PA. JOURNALS, *supra* note 1, at 422 (Feb. 14, 1780).

The Boston Convention of 1780 was the smallest of the Founding Era multi-government conventions: five delegates from three states.²⁸⁵ Contemporaries sometimes referred to it as “the Committee from the New England States”²⁸⁶ or the “Eastern Convention.”²⁸⁷ It has received slightly more scholarly attention than most of the other Founding-Era conventions.²⁸⁸

The motive for the gathering appears to have been military, although Daniel of St. Thomas Jenifer of Maryland thought it might also have been related to New York’s diplomatic movement away from New England and toward Virginia.²⁸⁹ But no other motive other than military appears in the records.

For the Americans, the military situation in 1780 was grave. Moreover, New England (specifically Rhode Island) was hosting a French army, and that army needed to be supplied. Letters from General Washington asked Congress to ensure adequate supplies, and Congress in turn urged the states to do so.²⁹⁰

The convention call came from Connecticut, and was addressed to the other three New England states.²⁹¹ It was initiated in a letter dated July 14, 1780 from Governor Jonathan Trumbull to Governor William Greene of Rhode Island in which Trumbull sought the support of Rhode Island for the meeting.²⁹² In the letter, Trumbull bemoaned the war situation and noted the difficulties of supplying the French and their irritation from high prices, and proceeded as follows:

To effect which, with the greater Expedition, we have thought it necessary to send one of our Board [i.e., council] to meet such Gentlemen as may be appointed from the States of Rhode Island, Massachusetts and New Hampshire, or such of them as shall concur in the Measure,

285. If 1768 be judged part of the Founding Era, the statement in the text must be qualified. That year, only three colonies attended a meeting with the Iroquois at Fort Stanwix (Rome), rendering it as small (aside from the Iroquois) as the Boston Convention. The attending colonies at Fort Stanwix were New Jersey, Pennsylvania, and Virginia. *IROQUOIS DIPLOMACY*, *supra* note 1, at 197.

286. Letter from Ezekial Cornell to William Greene (Aug. 29, 1780), in 5 *LETTERS*, *supra* note 1, at 347.

287. Letter from James Duane to George Washington (Sept. 19, 1780), in 5 *LETTERS*, *supra* note 1, at 378–79.

288. *See generally* *BOSTON PROCEEDINGS*, *supra* note 1.

289. Letter from Daniel of St. Thomas Jenifer to Thomas Sim Lee (Sept. 26, 1780), in 5 *LETTERS*, *supra* note 1, at 391–92.

290. *See* *BOSTON PROCEEDINGS*, *supra* note 1, at ix–xxix (reproducing correspondence).

291. Baldwin, *supra* note 1, at 38; *see* *BOSTON PROCEEDINGS*, *supra* note 1, at 53–55 (reproducing letter); 9 *R.I. RECORDS*, *supra* note 1, at 153 (same).

292. *See* Letter from Jonathan Trumbull to William Green (July 15, 1780), in *BOSTON PROCEEDINGS*, *supra* note 1, at 53–55.

at Boston, as early next Week as possible, to confer on these and other important Subjects peculiarly necessary at this Day; to agree upon and adopt such similar Measures as may be most conducive to the general Interest.

We have forwarded this Intimation by an Express to the Council of War, at Providence; and if agreeable to them, it is requested they would unite in their request with ours, to the Council of War at Boston, by them immediately to be communicated to the President and Council in New Hampshire, for the Purpose that such Convention may be held at Boston with all possible Expedition.²⁹³

The call seemed to ask for Rhode Island and Massachusetts commissioners to be designated by those states' councils of war and for the New Hampshire commissioners to be appointed by the legislature. However, a call from one sovereign could not dictate how other sovereigns selected their delegates, as the convention realized by seating delegates however selected. In Massachusetts and Connecticut, the council of safety did appoint the commissioners, but in both of the other states the authorities deviated from Governor Trumbull's suggested method of appointment. In New Hampshire, the delegate was chosen not by the legislature, but by the committee of safety.²⁹⁴ In Rhode Island, the governor referred the request to the general assembly,²⁹⁵ which elected William Bradford.²⁹⁶

When the convention met on August 3, three commissioners from Massachusetts were in attendance together with one each from Connecticut and New Hampshire. Bradford, the Rhode Island delegate, proved unable to attend.²⁹⁷

Three of the five commissioners had prior convention experience. They were Nathaniel Gorham and Thomas Cushing of Massachusetts and Jesse Root of Connecticut, who substituted for Eliphalet Dyer (another seasoned conventioneer). Cushing had attended five previous conventions.²⁹⁸ The group elected him president, and a non-delegate, Henry Alline, clerk.²⁹⁹

293. BOSTON PROCEEDINGS, *supra* note 1, at 54–55.

294. 3 CONN. RECORDS, *supra* note 1, at 559–60.

295. 9 R.I. RECORDS, *supra* note 1, at 161 (reproducing letters from Governor William Greene of Rhode Island to the governor of Connecticut and the president of the council [governor] of Massachusetts).

296. *Id.* at 172–73.

297. 3 CONN. RECORDS, *supra* note 1, at 559; *see* Letter from James Bowdoin, President of Massachusetts Council, to William Greene, Governor of Rhode Island (July 24, 1780), *in* 9 R.I. RECORDS, *supra* note 1, at 300 (complaining of Rhode Island's absence).

298. 3 CONN. RECORDS, *supra* note 1, at 559.

299. *Id.* at 561.

This was a proposal convention merely. The Massachusetts commission empowered delegates only to

consult and advise [deliberate] on all such business and affairs as shall be brought under consideration, relative to the war, and to promote and forward the most vigorous exertions of the present campaign, and to cultivate a good understanding and procure a generous treatment of the officers and men of our great and generous Ally [i.e., France], and make report thereof accordingly.³⁰⁰

The language of the other commissions was similar, except that New Hampshire, as at Hartford, permitted its commissioner to wander farther afield: He could "consult and advise . . . on any other matters that may be thought advisable for the public good."³⁰¹

The journal tells us little about the substance of the convention, except for a lengthy list of recommendations. Most dealt with matters of military detail. However, the convention further recommended that land embargoes be repealed and water embargoes be continued, that bills of credit be sunk, and that those states that had not ratified the Articles of Confederation do so.³⁰² The recommendations dealing with bills of credit and embargoes might seem to be outside the scope of the convention, but prices and trade restrictions were key aspects of the military struggle. In fact, the convention call included specific reference to the need to protect the French army from "being imposed and extorted upon by extravagant Prices by Individuals."³⁰³ The convention justified its two-fold recommendations on embargoes by stating that land embargoes should be repealed because they tended to injure rather than serve the common cause, while water embargos should remain with "particular care . . . to prevent all illicit trade with the enemy."³⁰⁴

Just as the first Hartford Convention had called the convention at Philadelphia, the Boston gathering extended a conditional invitation to any and all other states to a second meeting at Hartford.³⁰⁵ It adjourned on August 9.³⁰⁶

These proceedings and recommendations were praised in Congress as consistent with congressional policies.³⁰⁷ General Washington wrote

300. *Id.* at 559.

301. *Id.* at 560–61.

302. *Id.* at 561–64.

303. See BOSTON PROCEEDINGS, *supra* note 1, at 54.

304. 3 CONN. RECORDS, *supra* note 1, at 562.

305. *Id.* at 564.

306. *Id.*

307. See Letter from the Connecticut Delegates to the Governor of Connecticut (Sept. 1, 1780), in 5 LETTERS, *supra* note 1, at 351–52.

that they were “the most likely Means that could be adopted to rescue our Affairs from the complicated and dreadful Embarrassments under which they labor, and will do infinite Honor to those with whom they originate.”³⁰⁸ The Massachusetts legislature took note of the recommendations that all states adhere to the Articles of Confederation and that the confederation government be organized on a regular basis. The Massachusetts legislature signaled its willingness to overlook the unanimity rule and “to confederate with such other nine, or more, of the United States, as will accede to the Confederation.”³⁰⁹

K. *The Hartford Convention of 1780*

The Boston Convention’s call to Hartford was conditional in form. It read as follows:

And it is further recommended, that in case the war continues and Congress should not take measures for the purpose and notify the States aforesaid by the first of November next, that the said States do at all events furnish their quota of men and provisions, and charge the same to the United States; and to procure uniformity in the measures that may be necessary to be taken by these States in common with each other, this Convention recommend a meeting of Commissioners from the several States to be held at Hartford on the 2d Wednesday of November next, and invite the State of New York and others to join them that shall think proper.³¹⁰

Pursuant to this call, nine of the eleven commissioners elected by the legislatures of New York and the four New England states gathered on November 8, 1780.³¹¹ Among them was Rhode Island’s William Bradford who also had been elected to the Boston Convention, but had been unable to attend.³¹² The convention elected Bradford as its president and Hezakiah Wyllys, a non-delegate, as secretary.³¹³ Wyllys had served as secretary at the Hartford gathering the previous year.³¹⁴

308. BOSTON PROCEEDINGS, *supra* note 1, at xxxii–xxxiii.

309. 21 MASS. RECORDS, *supra* note 1, at 640; *cf.* U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

310. 3 CONN. RECORDS, *supra* note 1, at 563–64.

311. *Id.* at 564 (setting forth commissions and attendance list). Connecticut had elected as a third member of its committee Andrew Adams, Jr., *Id.* at 179, but he withdrew for several reasons. *Id.* at 237; 9 R.I. RECORDS, *supra* note 1, at 258–59 (reproducing legislative resolution).

312. *Supra* note ___ and accompanying text.

313. 3 CONN. RECORDS, *supra* note 1, at 564.

314. *Supra* note ___ and accompanying text.

During the proceedings, his father George (the Connecticut secretary of state)³¹⁵ replaced him for a time,³¹⁶ but Hezekiah returned for the end.³¹⁷

Most of the delegates were veterans of previous conventions. Bradford was attending his third convention, Connecticut's Eliphalet Dyer his fifth, and Thomas Cushing of Massachusetts his seventh. Cushing's colleague, Azor Orne, was attending his second convention, and John Sloss Hobart of New York his fourth.

The commissions issued by the New England states all specified military affairs as the topic and limited their delegates to conferring and recommending. New York commissioned its committee to consider "all measures as shall appear calculated to give a vigor to the governing powers equal to the present crises."³¹⁸ Accompanying the New York commission were instructions to propose and agree to, in the said Convention, "that Congress should, during the present War, or until a perpetual Confederation shall be completed, be explicitly authorized and empowered, to exercise every Power which they [i.e., Congress] may deem necessary for an effectual Prosecution of the War . . ."³¹⁹ In other words, the New York delegates had been instructed to seek a grant of plenary power to Congress.

Nothing of the debates survives except for formal recommendations, a letter to Congress, and a letter to the non-participating states. The recommendations were sweeping, but all were connected with the war and with issues of military funding and supply.³²⁰ New York's proposal to grant broad powers to Congress was not acted on.

Some of the recommendations were noteworthy. The convention asserted that "the Commander-in-Chief ought to have the sole discretion of the military operations, and an individual should have the charge of each department."³²¹ Congress adopted the department proposal rather

315. 3 CONN. RECORDS, *supra* note 1, at 6.

316. *Id.* at 569. For the relationship, see Portal for Online Museum Catalog, CONN. HIST. SOC'Y MUSEUM & LIBR., <http://emuseum.chs.org:8080/emuseum/> (search for "Hezekiah Wyllys"; then follow second "Hezekiah Wyllys" hyperlink) (last visited Apr. 19, 2012).

317. 3 CONN. RECORDS, *supra* note 1, at 574. The transition from son to father and back to father was not surprising. Three generations of Wyllyses held the office of secretary of Connecticut continuously from 1712 to 1810. 3 DOCUMENTARY HISTORY, *supra* note 1, at 317 (editor's note).

318. 3 CONN. RECORDS, *supra* note 1, at 566.

319. THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW YORK AT THE FIRST MEETING OF THE FOURTH SESSION BEGUN AND HOLDEN AT POUGHKEEPSIE IN DUTCHESS COUNTY ON THURSDAY, SEPTEMBER 7TH, 1780 58-59 (Munsell & Rowland reprint, 1859)

320. 3 CONN. RECORDS, *supra* note 1, at 570-72.

321. *Id.* at 573.

quickly.³²² The convention further recommended that states “pledge their faith” to legally enforce legally congressional fund-raising decisions.³²³ This proposal became law, at least in theory, a few months later, when the thirteenth state (Maryland) ratified the Articles of Confederation.

Frustrated by the failure of states to meet their fund-raising quotas, the convention also recommended

the several states represented in this Convention, to instruct their respective Delegates to use their influence in Congress that the Commander-in-Chief . . . be authorized and empowered to take such measures as he may deem proper and the publick [*sic*] service may render necessary, to induce the several States to a punctual compliance with the requisitions which have been made or may be made by Congress for supplies for the year 1780 and 1781.³²⁴

This proposed grant of near dictatorial authority to George Washington proved controversial,³²⁵ and Congress never approved it.

The gathering apparently dissolved on November 22. That, at least, was the date of the convention’s letter to the other states.³²⁶

L. *The Abortive and Successful Providence Conventions of 1781*

At the 1780 Hartford Convention the participating states called for yet another meeting at an early date.³²⁷ The subject would be military affairs, and the gathering would include representatives of the French military stationed in Providence.³²⁸ On February 21, the Connecticut general assembly asked that the call be expanded to include the request of Vermont to be admitted to the union.³²⁹ Governor Trumbull accordingly wrote to the other states announcing the expanded subject

322. See 19 J. CONT. CONG., *supra* note 1, at ix (editor’s prefatory note); *id.* at 124–26 (Feb. 7, 1781); *id.* at 155–57 (Feb. 16, 1781). The convention’s recommendations were first noted in Congress on December 12, 1780. 18 *id.* at 1141 (Dec. 12, 1780).

323. 3 CONN. RECORDS, *supra* note 1, at 571.

324. *Id.*

325. See, e.g., Letter from John Witherspoon to William Livingston, Governor of New Jersey (Dec. 16, 1780), in 5 LETTERS, *supra* note 1 at 487; Letter from James Warren to Samuel Adams (Dec. 4, 1780), in *id.* at 488 n.8.

326. 3 CONN. RECORDS, *supra* note 1, at 573.

327. See Letter from Connecticut Governor Trumbull to Governor of Rhode Island (Mar. 9, 1781), in 9 R.I. RECORDS, *supra* note 1, at 378.

328. 3 CONN. RECORDS, *supra* note 1, at 575–76.

329. *Id.* at 316–17 (Feb. 21, 1781); see also 9 R.I. RECORDS, *supra* note 1, at 343 (reproducing resolution).

matter.³³⁰ In the same letter, he fixed a meeting date of April 12, 1781.³³¹

At the appointed time, only five delegates had arrived: Thomas Cushing from Massachusetts, Jonathan Trumbull, Jr. from Connecticut, and three Rhode Island commissioners. New York, New Hampshire, and the French all failed to appear. Those present tarried until April 17, then returned home. Before leaving, they agreed to “represent with much regret to the several States, that the seeming neglect on this occasion could not but give them a painful prospect . . . of any future proposed meeting of the States,” and that “the interests of the States might be subjected to very substantial detriment.”³³²

On June 12, 1781, the Massachusetts legislature issued a resolution calling for the New England states to meet at Providence on June 25, and appointing two Massachusetts commissioners.³³³ The call described as the purpose of the gathering “to agree upon some regular method of sending on supplies of beef, &c. to the army, during the present year.”³³⁴ Only five delegates convened on June 26, but they represented all four New England states. Two delegates were convention veterans: Jabez Bowen of Rhode Island, who had been at New Haven, and John Taylor Gilman of New Hampshire, a commissioner the preceding year at Hartford. The little group chose Bowen as president and, contrary to usual practice, one of its own members, Justin Ely of Massachusetts, as clerk.³³⁵

This second Providence Convention made several supply recommendations, and disbanded after its second day.³³⁶

M. *On the Road to Annapolis: Abortive Conventions and the First State Legislative “Application”*

As noted earlier, the New York commissioners to the 1780 Hartford Convention had been instructed to promote a grant of greater powers to Congress.³³⁷ On July 21, 1782, that state’s legislature followed up with a resolution concluding as follows:

330. *E.g.*, Letter from Connecticut Governor Trumbull to Governor of Rhode Island (Mar. 9, 1781), in 9 R.I. RECORDS, *supra* note 1, at 378 (reproducing Trumbull’s circular letter).

331. *Id.*; 3 CONN. RECORDS, *supra* note 1, at 574.

332. 3 CONN. RECORDS, *supra* note 1, at 575.

333. 1780–1781 MASS. RECORDS, *supra* note 1, at 614.

334. *Id.* at 614.

335. 3 CONN. RECORDS, *supra* note 1, at 575.

336. *Id.* at 575–76. At least one state, Rhode Island, proceeded to put some of the recommendations into effect. 9 R.I. RECORDS, *supra* note 1, at 439–40 (reproducing legislative resolution); Letter from Governor Greene to General Washington (July 11, 1781), in 9 R.I. RECORDS, *supra* note 1, at 453–54 (outlining state’s compliance). The state paid Bowen £2/5s for his service as commissioner. 9 R.I. RECORDS, *supra* note 1, at 453.

³³⁷ *Supra* Part III.K.

It appears to this Legislature, that the foregoing important Ends, can never be attained by partial Deliberations of the States, separately, but that it is essential to the Common Welfare, that there should be as soon as possible a Conference of the Whole on the Subject; and that it would be advisable for this Purpose, to propose to Congress to recommend, and to each State to adopt, the Measure of assembling a General Convention of the States, specially authorised to revise and amend the Confederation, reserving a Right to the respective Legislatures, to ratify their Determinations.³³⁸

Similarly, on February 13, 1783, the Massachusetts legislature called a more modest convention: a meeting of New York and the New England states to be held at Hartford

to confer . . . on the necessity of adopting within the said States, for their respective uses, such general and uniform system of taxation by impost and excise, as may be thought advantageous to the said States, which system being agreed on by the majority of the delegates so to be convened, shall be recommended to the legislatures of the said States. . . .³³⁹

John Hancock, now occupying the newly-created office of governor, extended the formal invitation to the other states.³⁴⁰

The Massachusetts call was extraordinary for the suggestion that delegates vote as individuals rather than as states. None of the other calls had attempted to specify voting rules for a proposed convention, and all previous multi-government gatherings apparently had operated on a one-state/one vote principle.³⁴¹ This may explain the subsequent response: Although in recess of the legislature, the governor and council of safety of Connecticut appointed three commissioners,³⁴² New Hampshire and Rhode Island simply refused to do so. Massachusetts rescinded the call the following month.³⁴³

Undaunted, on May 31, 1785, Massachusetts Governor James

³³⁸ 5 DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, No. 11, Pt. 2, 28-29 (1904).

³³⁹ 1782-1783 MASS. RECORDS, *supra* note 1, at 382.

³⁴⁰ Letter from William Greene, Governor of Rhode Island, to John Hancock, Governor of Massachusetts (Feb. 28, 1783), in 9 R.I. RECORDS, *supra* note 1, at 685 (stating, "I am favored with your Excellency's letter respecting the proposed convention of the five Eastern states, which is now before our General Assembly").

³⁴¹ See generally this Part III.

³⁴² 5 CONN. RECORDS, *supra* note 1, at 101-02.

³⁴³ 1782-1783 MASS. RECORDS, *supra* note 1, at 482-83 (Mar. 26, 1783) (rescinding call due to two states "having refused to choose delegates to meet")

Bowdoin addressed the state's lawmakers, urging them to promote a "Convention or Congress" of "special delegates from the States" to amend the Articles of Confederation and grant the Confederation Congress more authority.³⁴⁴ The legislature responded on July 1 by adopting the New York formula in a resolution asking Congress for a general convention to revise the Articles.³⁴⁵ In its accompanying circular letter to the other states, the legislature designated this action as "[making] *application to the United States in Congress assembled*."³⁴⁶ This pre-constitutional use of the word "application" is almost identical to the use of that word in Article V. Previous discourse sometimes referred to the call as an "application."³⁴⁷

In addition to its "application" and circular letter, the Massachusetts legislature issued a letter to the president of Congress. This asked

344. See 1784–1785 MASS. RECORDS, *supra* note 1, at 709–10 (speech of May 31, 1785); see also *id.* at 708.

345. The full text is as follows:

RESOLVE RECOMMENDING A CONVENTION OF DELEGATES FROM
ALL THE STATES, FOR THE PURPOSE MENTIONED.

As the prosperity and happiness of a nation, cannot be secured without a due proportion of power lodged in the hands of the Supreme Rulers of the State, the present embarrassed situation of our public affairs, must lead the mind of the most inattentive observer to realize the necessity of a revision of the powers vested in the Congress of the United States, by the Articles of Confederation:

And as we conceive it to be equally the duty and the privilege of every State in the Union, freely to communicate their sentiments to the rest on every subject relating to their common interest, and to solicit their concurrence in such measures as the exigency of their public affairs may require:

Therefore Resolved, That it is the opinion of this Court, that the present powers of the Congress of the *United States*, as contained in the Articles of Confederation, are not fully adequate to the great purposes they were originally designed to effect.

Resolved, That it is the opinion of this Court, that it is highly expedient, if not indispensibly necessary, that there should be a Convention of Delegates from all the States in the Union, at some convenient place, as soon as may be, for the sole purpose of revising the confederation, and reporting to Congress how far it may be necessary to alter or enlarge the same.

Resolved, That Congress be, and they are hereby requested to recommend a Convention of Delegates from all the States, at such time and place as they may think convenient, to revise the confederation, and report to Congress how far it may be necessary, in their opinion, to alter or enlarge the same, in order to secure and perpetuate the primary objects of the Union.

1784–1785 MASS. RECORDS, *supra* note 1, at 666 (July 1, 1785).

346. Circular Letter of the Massachusetts General Court to the Supreme Executive of Each State (July 1, 1785), in 1784–1785 MASS. RECORDS, *supra* note 1, at 667.

347. *E.g.*, 1 CONN. RECORDS, *supra* note 1, at 589.

Congress “to recommend a Convention of the States at some convenient place, on an early day, [so] that the evils so severely experienced from the want of adequate powers in the foederal [*sic*] Government, may find a remedy as soon as possible.”³⁴⁸ The legislature issued formal instructions to Massachusetts’ congressional delegates to promote the application.³⁴⁹

Yet Congress failed to act.

While New York and Massachusetts were promoting a general convention, Pennsylvania decided to seek another regional one. Pennsylvanians wished to improve the navigability of the Susquehanna and Schuylkill Rivers,³⁵⁰ and Marylanders wished to improve the navigability of the Susquehanna.³⁵¹ Pennsylvanians also discussed connecting Susquehanna and Schuylkill River navigation by digging a canal across what is now called the Delmarva Peninsula,³⁵² a project that would require cooperation from Maryland and Delaware. The latter state was, however, upset with both of its neighbors because of the tariffs imposed on Delawareans when they imported goods through Baltimore and Philadelphia.³⁵³

Pennsylvania political leaders suggested a tri-state convention to foster a comprehensive settlement. On November 18, 1785, a committee of Pennsylvania’s unicameral General Assembly proposed

that a negotiation [*sic*] be entered into with the States of Maryland and Delaware upon the ground of reciprocal advantages to be derived, to all the States concerned, from a communication between the said two Bays as well as from an effectual improvement of the navigation of the river Susquehanna and its streams.³⁵⁴

On November 23, the assembly authorized the Supreme Executive Council to open negotiations.³⁵⁵ On November 25, the council president, Benjamin Franklin, sent a letter of invitation to the governor of Maryland.³⁵⁶ The next day, the council vice president, Charles Biddle

348. 1784–1785 MASS. RECORDS, *supra* note 1, at 667 (italics omitted) (July 1, 1785).

349. *Id.* at 668 (July 1, 1785).

350. See Lillard, *supra* note 1, at 10–11; 10 PA. ARCHIVES, *supra* note 1, at 128–30 (1783 legislative committee report); *id.* at 312 (election of replacement commissioner on subject); *id.* at 315 (committee report received).

351. See Lillard, *supra* note 1, at 11.

352. See *id.* at 16; see also MINUTES, PA. ASSEMBLY, *supra* note 1, at 29 (proposed bill from 1st session, November 8, 1785).

353. Lillard, *supra* note 1, at 12.

354. 10 PA. ARCHIVES, *supra* note 1, at 538 (Nov. 18, 1786).

355. 14 MINUTES, PA. COUNCIL, *supra* note 1, at 582.

356. *Id.* at 585; see also 10 PA. ARCHIVES, *supra* note 1, at 540 (containing the text of the letter).

(who seems to have been carrying much of the burden for the aged Franklin), dispatched a similar invitation to Delaware.³⁵⁷ The negotiations were to be “for the purpose of opening ‘a navigable communication between the Bays of Chesepeak [*sic*] and Delaware, and for an effectual improvement of the river Susquehanna, and its streams.’”³⁵⁸ Consistently with the wording of these letters, the proposed meeting came to be referred to as the “Navigation Convention,” to distinguish it from the more general “Commercial Convention” then being planned for Annapolis.

Commissioners at the navigation conclave would negotiate, but any results were to constitute proposals only. There was no suggestion that the convention would bind the participating states.

Delaware’s initial reaction was negative. In January, 1786, a committee of that state’s legislature recommended against participating. The reason cited was that the proposed canal would devalue Delaware’s carrying trade. The committee recommended instead that the legislature concentrate on improving the roads spanning the peninsula.³⁵⁹

Maryland was willing to meet, provided the agenda be expanded beyond improvements on the Susquehanna and the projected canal. On February 20, Maryland lawmakers approved participation if the meeting included “other subjects which may tend to promote the commerce, and mutual convenience of the said states.”³⁶⁰ On the same day, a joint legislative session elected its commissioners: Samuel Chase, Samuel Hughes, Peregrine Lethbrury, William Smith, and William Hemsley.³⁶¹

A few days later, Vice President Biddle wrote to the Pennsylvania legislature celebrating this progress, and advocating that his state also participate in Virginia’s proposed “Commercial Convention” at Annapolis. Biddle added that Navigation Convention negotiations had begun, but failed to mention when or where.³⁶²

In March, 1786, the Maryland legislature authorized its Navigation Convention delegates to discuss interstate tariffs.³⁶³ The following month, the Pennsylvania assembly authorized payment for its delegates and selected its committee: Francis Hopkinson (who had signed the Declaration of Independence), John Ewing, David Rittenhouse (the famous astronomer), Robert Milligan and George Lattimer.³⁶⁴

357. 10 PA. ARCHIVES, *supra* note 1, at 540–41.

358. *Id.* at 540.

359. Report upon the President’s Message, Jan. 11, 1786 (read, Jan. 16, 1786) (on file with Delaware State Archives).

360. *See generally* PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 149–50 (Feb. 20, 1786); *id.* at 199 (Mar. 12, 1786).

361. PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 150 (Feb. 20, 1786).

362. *See* 14 MINUTES, PA. COUNCIL, *supra* note 1, at 644–45 (Feb. 22, 1786).

363. PROCEEDINGS, MD. HOUSE OF DELEGATES, *supra* note 1, at 199 (Mar. 12, 1786).

364. 10 PA. ARCHIVES, *supra* note 1, at 755; 15 MINUTES, PA. COUNCIL, *supra* note 1, at 2

Delaware finally responded positively in June, approving participation in both the Navigation Convention and the more general Annapolis Commercial Convention.³⁶⁵ As its Navigation Convention committee, Delaware lawmakers chose William Killen; Gunning Bedford, Jr.; John Jones; Robert Armstrong, and Eleazar McComb.³⁶⁶ Authority was limited to proposing only, but encompassed not only the Susquehanna and the canal, but “any other subject that may tend to promote the commerce and the mutual convenience of the said states.”³⁶⁷

It is doubtful whether the three state committees ever met or even corresponded. In August, 1786, President Benjamin Franklin reported to the Pennsylvania assembly that “[s]ome farther progress has been made in the negotiation [sic] with the States of Delaware and Maryland since your last session: Commissioners have been appointed, an interview proposed, and every inclination to meet this Commonwealth on the ground of reciprocal advantage discovered [revealed].”³⁶⁸ This statement of “progress” rather more suggests a lack of substantive discussion than its occurrence.

The reasons the Navigation Convention proved abortive are not fully understood. One reason may have been that the invitations issued by President Franklin and Vice President Biddle (essentially, the convention “call”) were radically defective: Unlike all successful calls, they failed to specify a time and place of meeting. Also, the project may have been lost amid the more momentous bustle in Annapolis and Philadelphia. Once the Navigation Convention’s scope was extended beyond two specific projects to include commerce in general, it overlapped the topics on the agenda in Annapolis and Philadelphia. Not surprisingly, therefore, both contemporaneous accounts and subsequent generations sometimes mistook Navigation Convention records for those pertaining to Annapolis.³⁶⁹

(Apr. 5, 1786). There were some delays in selecting the Pennsylvania commissioners. 14 MINUTES, PA. COUNCIL, *supra* note 1, at 669 (assigning a future date for the election); *id.* at 672 (postponing the date and erroneously stating the date of the original resolution as March 21 instead of March 23).

365. See MINUTES, DELAWARE COUNCIL, *supra* note 1, at 970–72; PROCEEDINGS, DELAWARE ASSEMBLY, *supra* note 1, at 375–76 (June 15, 1786).

366. MINUTES, DELAWARE COUNCIL, *supra* note 1, at 971. For the commissions’ backgrounds, see *id.* at 25 (editors’ introduction).

367. PROCEEDINGS, DELAWARE ASSEMBLY, *supra* note 1, at 376.

368. 15 MINUTES, PA. COUNCIL, *supra* note 1, at 70 (Aug. 25, 1786).

369. See, e.g., 14 MINUTES, PA. COUNCIL, *supra* note 1, at 672 (erroneously identifying the resolution authorizing the Navigation Convention, adopted March 23, 1786, with the Annapolis Convention resolution adopted on March 21, 1786); see also MINUTES, PA. ASSEMBLY, *supra* note 1, at 227 (2d Session, Mar. 21, 1786) (regarding the Annapolis resolution); *id.* at 230 (Mar. 23, 1786) (regarding the National Convention resolution).

A Delaware archivist has informed me that records in his office pertaining to the Navigation

N. *The Annapolis Commercial Convention of 1786*

More concrete progress toward another multi-state convention came from Virginia. Successful negotiations with Maryland in March, 1785 over Potomac and Chesapeake navigation rights encouraged Virginia political leaders to seek further inter-governmental cooperation.³⁷⁰ On January 21, 1786, the state legislature adopted a resolution calling a convention

to take into consideration the trade of the United States; to examine the relative situations and trade of the States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same.³⁷¹

This call was for a general, not a mere regional, convention. Its subject matter was commerce. Thus, in the contemporaneous records, the Annapolis conclave often is referred to as a “commercial convention.”³⁷²

The Virginia legislature followed up this resolution with a circular letter inviting the other states to meet on “the first Monday in September next,” September 4, 1786.³⁷³ In March, Governor Bowdoin excitedly relayed the news to Massachusetts lawmakers,³⁷⁴ and three months later those lawmakers elected four delegates³⁷⁵ and fixed their compensation.³⁷⁶ Shortly thereafter, they empowered the governor and council to fill any vacancies.³⁷⁷

Yet a full week after the convention was to have met, the Massachusetts delegates were still absent. So also were the appointed commissioners from Rhode Island. Only five states were in attendance,

Convention were erroneously filed in the location for the Annapolis Convention. E-mail from Bruce H. Haase to Robert G. Natelson (Aug. 13, 2012) (on file with author).

370. CAPLAN, *supra* note 1, at 22.

371. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 15 (2d ed. 1937) (internal quotation marks omitted) (quoting HOUSE OF DELEGATE OF THE COMMONWEALTH OF VIRGINIA, 1786, 153 (Thomas W. White ed. 1828)).

372. *See, e.g.*, 14 MINUTES, PA. COUNCIL, *supra* note 1, at 645 (Feb. 23, 1785); 15 MINUTES, PA. COUNCIL, *supra* note 1, at 82, 86 (Sept. 20, 1786).

373. CAPLAN, *supra* note 1, at 23 (quoting 1 DOCUMENTARY HISTORY, *supra* note 1, at 180).

374. *See* 1784–85 MASS. RECORDS, *supra* note 1, at 915 (communication of March 20, 1786).

375. 1786–87 MASS. RECORDS, *supra* note 1, at 286–87.

376. *Id.* at 304.

377. *Id.* at 312.

represented collectively by 12 commissioners. The states were New York, New Jersey, Delaware, Pennsylvania, and Virginia. The commissioners from Massachusetts and Rhode Island were to learn in mid-journey that the meeting already had adjourned.³⁷⁸

The delegates present included several convention alumni. John Dickinson of Pennsylvania and served in the Stamp Act Congress, and also in the First Continental Congress with his colleague, George Read.³⁷⁹ New York's Egbert Benson had been at Hartford in 1780.³⁸⁰ There also were notable newcomers: James Madison and Edmund Randolph of Virginia, Alexander Hamilton of New York, William Houston of New Jersey, and Richard Bassett of Delaware. All these newcomers were to represent their states in Philadelphia the following year—as would Dickinson and Read. Also present were Tench Coxe of Pennsylvania and St. George Tucker of Virginia, both of whom became highly influential in molding the public's perception of the Constitution.³⁸¹

The delegates' credentials closely tracked the call,³⁸² except that those of Delaware stipulated that any convention proposal had to be reported “to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State.”³⁸³

The commissioners unanimously elected Dickinson, then the most distinguished of their number, as Chairman. The proceedings do not disclose a secretary.

Although other multi-state conventions had succeeded with a representation from only five states, the delegates did not believe that number was sufficient for crafting a trade regime national in scope.³⁸⁴ They therefore took the same course the commissioners at the abortive 1781 Providence convention had taken—they issued a statement and adjourned. The statement read in part as follows:

Your Commissioners, with the most respectful deference,
beg leave to suggest their unanimous conviction, that it

378. CAPLAN, *supra* note 1, at 24. Caplan blames the tardiness of their appointment, but the Massachusetts legislature had appointed its commissioners on June 17. *See* 1786–87 MASS. RECORDS, *supra* note 1, at 286–87.

379. 1 J. CONT. CONG., *supra* note 1, at 13–14, 74.

380. 2 CONN. RECORDS, *supra* note 1, at 565.

381. Coxe was among the most influential Federalist essayists during the ratification fight. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978) (describing Coxe's influence). Tucker wrote the first formal legal commentary on the Constitution, THE VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803).

382. Proceedings, *available at* http://avalon.law.yale.edu/18th_century/annapoli.asp (last visited Apr. 21, 2012).

383. *Id.* (internal quotation marks omitted).

384. *Id.* (“Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.”).

may essentially tend to advance the interests of the union, *if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours [sic] to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.*³⁸⁵

The first italicized passage makes it clear that the Annapolis Convention was directing its resolution to the five states that had sent commissioners—not to other states, and not to Congress.

The second italicized passage contemplated a convention that could do more than merely propose changes in the Articles of Confederation. It contemplated a convention to propose changes “to render the *constitution of the Federal Government* adequate to the exigencies of the Union.” The word “constitution” in this context was *not* limited to the Articles of Confederation, as some modern writers assume. The prevailing political definition of “constitution” at the time was the political structure as a whole—much as we refer today to the British “constitution.” Although Americans had begun to apply the word a few years earlier to specific documents organizing state governments, the usage was not yet dominant, and no contemporaneous dictionary defined “constitution” that way.³⁸⁶ What we today call a “constitution” was more often called an “instrument,” “frame,” “system,” or “form” of

385. *Id.* (emphasis added).

386. See, e.g., 1 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775) (“The act of constituting, the state of being, the corporeal frame, the temper of the mind, and established form of government, a particular law.”); NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (25th ed. 1783) (“[A]n ordinance or decree; the state of the body; the form of government used in any place; the law of a kingdom.”); SAMUEL JOHNSON, *1 A DICTIONARY OF THE ENGLISH LANGUAGE* (8th ed. 1786) (giving as political meanings “[e]stablished form of government; system of laws and customs” and “[p]articular law; establishment; institution”); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (2d ed. 1789) (similar definitions).

Perhaps the closest analogue in these definitions to the modern use of “constitution” is the phrase “particular law,” a usage deriving from the Roman *constitutio*, which denominated any official ruling by the emperor. WOLFGANG KUNKEL, *INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 127 (2d ed. J.M. Kelly tr. 1973).

government.”³⁸⁷ Thus, the Annapolis report was recommending a convention to consider and propose alterations in the federal *political system*, not merely to the Articles. Subsequent proceedings in Congress confirm that understanding.³⁸⁸

The Annapolis Convention adjourned on September 14, and Chairman Dickinson’s letter on its behalf was read in Congress on September 20.³⁸⁹ On October 11, Congress referred the letter to a committee for consideration.³⁹⁰ But Congress took no further action for several months.

O. *The Constitutional Convention of 1787*

It is commonly said that the Constitutional Convention was called by Congress for the sole purpose of recommending changes in the Articles of Confederation, and that by writing an entirely new Constitution the delegates exceeded their authority. The claim was first raised during the ratification debates by opponents of the Constitution—and not always in good faith.³⁹¹

The facts are otherwise: Congress did not call the Constitutional Convention, Congress had no power to limit its scope, and the overwhelming majority of delegates did not exceed their authority.

The commissioners at the Annapolis Convention had recommended to the five states they represented that those states “concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia. . . .”³⁹² Arguably, this represented the formal call to Philadelphia. If not, the call had come by November 23, 1786 from the Virginia and New Jersey legislatures.³⁹³

The Virginia resolution of that date was similar to state calls for at least two prior conventions in that the invitation was implied in the

387. Even when states began to entitle their basic laws as “constitutions,” they often included the more established titles as well. *E.g.*, DEL. CONST. of 1776 (“Constitution, or System of Government”); MD. CONST. of 1776 (“Constitution and Form of Government”); MASS. CONST. of 1780, pmbl. (“declaration of rights and frame of government as the constitution”); VA CONST. of 1776 (“Constitution or Form of Government”).

388. *Infra* Part III.N.

389. *See* 31 J. CONT. CONG., *supra* note 1, at 677–80.

390. *Id.* at 770.

391. *See, e.g.*, *A Georgian*, GAZETTE OF THE STATE OF GEORGIA, Nov. 15, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 1, at 236–37 (an anti-federalist tract that misrepresents the delegates’ authority by substituting “the articles of confederation” for “the federal constitution” in quoting their commission).

392. Proceedings, *supra* note ___ and accompanying text.

393. 3 FARRAND’S RECORDS, *supra* note 1, at 559, 563.

appointment of commissioners.³⁹⁴ It read as follows:

Be It Therefore Enacted . . . 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 [sic] 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.³⁹⁵

This resolution followed the Annapolis formula in suggesting that the convention propose any “Alterations and farther Provisions as may be necessary to render the Foederal [sic] Constitution [i.e., the political system]³⁹⁶ adequate.” Perhaps significantly, the language provided not for approval by *every* state (as had the Annapolis recommendation), but by the “several [individual] States”—leaving open the possibility that changes could bind the assenting states even in the absence of unanimous approval. This was a formula for a convention with plenipotentiary, rather than limited, proposal power.³⁹⁷

On November 23, 1786, the same day Virginia acted, New Jersey commissioned several delegates “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.”³⁹⁸ New Jersey made no mention of consent by Congress or the other states.

On December 30, the Pennsylvania legislature also decided to send commissioners to Philadelphia, reciting as a reason the prior resolution of Virginia and empowering its delegates according to the Virginia

394. *E.g.*, AMERICAN ARCHIVES, *supra* note ___ and accompanying text (quoting the call for the 1776–77 Providence Convention); Proceedings, *supra* note ___ and accompanying text (discussing the call for the 1781 Providence Convention).

395. 3 FARRAND’S RECORDS, *supra* note 1, at 559–60.

396. *Supra* Part III.M.

397. *Cf.* Letter from James Madison to George Lee Turberville (Nov. 2, 1788), in 5 MADISON, WRITINGS, *supra* note 1, at 297, 299 (distinguishing between a convention recurring to “first principles,” which depends on the unanimous consent of the parties who are to be bound by it and a convention for proposing amendments under “the forms of the Constitution,” binding even non-consenting states).

398. 3 FARRAND’S RECORDS, *supra* note 1, at 563.

formula.³⁹⁹ By mid-February of the following year, North Carolina, New Hampshire, Delaware, and Georgia (in that order) also had selected commissioners, or authorized the selection of commissioners.⁴⁰⁰ All granted them broad power to propose reform, and none limited them to merely proposing changes in the Articles.⁴⁰¹ Thus, seven states already had enlisted in the cause, and none had restricted its delegates to revising the Articles.

On February 21, 1787, the congressional committee to which Dickinson's Annapolis letter had been entrusted moved that Congress "strongly recommend" to the states that they send delegates to a convention that would devise "such farther provisions as shall render the same adequate to the exigencies of the Union."⁴⁰² At that point, the New York congressional delegates, citing their instructions, objected. They moved to postpone the committee report, and they offered a resolution by which Congress would recommend to the states a convention only "for the purpose of revising the Articles of Confederation."⁴⁰³ Their insistence on that wording confirms that people understood that the convention recommended by the delegates at Annapolis, endorsed by seven states, and promoted by the congressional committee was *not* limited to proposing changes in the Articles.

New York's motion to postpone was defeated, with only three states

399. *Id.* at 565–66 (directing commissioners "to meet such Deputies as may be appointed and authorized by the other States, to assemble in the said Convention at the City aforesaid, and to join with them in devising, deliberating on, and discussing, all such alterations and further Provisions, as may be necessary to render the foederal [sic] Constitution fully adequate to the exigencies of the Union").

400. 3 *id.* at 567–77.

401. *E.g., id.* at 568 (showing that North Carolina elected its delegates in January 1787); *id.* at 571–72 (showing the New Hampshire resolution passing on January 17, 1787); *id.* at 574 (showing the Delaware authorization as passing on February 3, 1787); *id.* at 576–77 (reproducing the Georgia ordinance, adopted February 10, 1787).

The wording of each commission varied somewhat, with some phrases repeating themselves:

North Carolina: "for the purpose of revising the Foederal [sic] Constitution . . . To hold, exercise and enjoy the appointment aforesaid, with all Powers, Authorities and Emoluments to the same belonging or in any wise appertaining." *Id.* at 567–68.

New Hampshire: "devising & discussing all such alterations & further provisions as to render the federal Constitution adequate to the Exigencies of the Union." *Id.* at 572.

Delaware: "deliberating on, and discussing, such Alterations and further Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union." *Id.* at 574.

Georgia: "devising and discussing all such Alterations and farther Provisions as may be necessary to render the *Federal Constitution* adequate to the exigencies of the Union." *Id.* at 56–77.

402. 32 J. CONT. CONG., *supra* note 1, at 71–72 (Feb. 21, 1787).

403. *Id.* at 72.

voting in favor.⁴⁰⁴ However, Massachusetts then successfully obtained a postponement, and offered a substitute resolution.⁴⁰⁵ This resolution was adopted.⁴⁰⁶

Notably, the successful resolution neither “called” a convention nor made a recommendation. In fact, it omitted the language of recommendation in the committee proposal and in the New York motion. The adopted resolution merely asserted that “in the opinion of Congress it is expedient” that a convention be

held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.⁴⁰⁷

It is, perhaps, truly extraordinary that so many writers have repeated the claim that Congress called the Constitutional Convention and legally limited its scope. First, the Confederation Congress had no power to issue a legally-binding call.⁴⁰⁸ If the states decided to convene, as a matter of law they—not Congress—fixed the scope of their delegates’ authority.⁴⁰⁹ Second, the Articles gave Congress no power to limit that scope. To be sure, Congress, like any agent, could recommend to its principals a course of action outside congressional authority. But this is not the same as legally restricting the scope of a convention. Third, by its specific wording the congressional resolution was not even a *recommendatory* call or restriction. As shown above, Congress *dropped* the formal term “recommend” in favor of expressing “the opinion of Congress.”

Despite Congress’s expression of its “opinion,” none of the seven states that had decided to participate in the convention narrowed their commissions. On the contrary, the list of states favoring a plenipotentiary proposing convention continued to grow. Connecticut, Maryland, and South Carolina all gave their delegates broad authority to

404. *Id.* at 73.

405. *Id.* at 73–74.

406. *Id.* at 73.

407. *Id.* at 74 (internal footnote omitted).

408. ARTICLES OF CONFEDERATION of 1778, art. II (“Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.”).

409. See CAPLAN, *supra* note 1, at 97; see also THE FEDERALIST NO. 40, *supra* note 1, at 199 (James Madison).

propose.⁴¹⁰ Only Massachusetts and New York restricted their commissions to amending the Articles.⁴¹¹ This is why, during the convention proceedings it was a Massachusetts delegate, Elbridge Gerry, who questioned to that assembly's authority venture beyond changes in the Articles,⁴¹² and why two of the three New York delegates left early.⁴¹³ Of the 39 delegates who signed the Constitution, only three—Rufus King and Nathaniel Gorham of Massachusetts and Alexander Hamilton of New York⁴¹⁴—could be charged credibly with exceeding their powers.

The credentials of the Delaware commissioners, while broad enough to authorize scrapping most of the Articles, did impose an important limitation: they were not to agree to any changes that altered the rule that “in the United States in Congress Assembled each State shall have one Vote.”⁴¹⁵ However, the Constitution's bicameral Federal Congress was a very different entity with very different powers than the Confederation's “United States, in Congress Assembled,”⁴¹⁶ so the Delaware delegates could maintain that they had stayed within their commissions. Moreover, any convention delegate could point out that the law permitted an agent to recommend to his principals a course of action outside the agent's sphere of authority; such recommendations merely had no legal effect.⁴¹⁷ As James Wilson summed up the delegates' position, they were “authorized to conclude nothing,

410. Connecticut resolved that

for the purposes mentioned in the said Act of Congress that may be present and duly empowered to act in said Convention, *and to discuss* upon such Alterations and Provisions agreeable to the general principles of Republican Government as they shall think proper to render the federal Constitution adequate to the exigencies of Government and, the preservation of the Union.

3 FARRAND'S RECORDS, *supra* note 1, at 585 (emphasis added). Maryland gave its delegates authority to “consider[] such Alterations and further Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union.” *Id.* at 586. Finally, South Carolina granted authority for “devising and discussing all such Alterations, Clauses, Articles and Provisions, as may be thought necessary to render the Foederal [sic] Constitution entirely adequate to the actual Situation and future good Government of the confederated States.” *Id.* at 581.

411. *Id.* at 584–85 (reproducing Massachusetts credentials); *id.* at 579–80 (reproducing New York credentials).

412. *See* 2 *id.* at 42–43.

413. *See* 1 *id.* at xiv (editor's comments).

414. The charge is less credible with respect to Hamilton than with respect to King and Gorham. Because the majority of his delegation had gone home, arguably Hamilton no longer could act as a commissioner from New York and signed, therefore, only as an individual.

415. 3 FARRAND'S RECORDS, *supra* note 1, at 574–75 (internal quotation marks omitted).

416. ARTICLES OF CONFEDERATION of 1778, art. II.

417. Natelson, *Rules*, *supra* note 1, at 723.

but . . . at liberty to propose any thing.”⁴¹⁸

The Philadelphia Convention of 1787 was the largest meeting its kind since the First Continental Congress, including 55 commissioners from 12 states.⁴¹⁹ It also lasted more than three and a half months, longer than any other American eighteenth century multi-government convention.⁴²⁰ Because of the quality of its deliberation, the completeness of its record, and the quality of its product, it deservedly has become the most famous meeting of its kind.

Yet in other ways it was unremarkable. The composition, protocols, rules, and prerogatives of the convention were well within the pattern set by prior multi-colonial and multi-state gatherings. This was to be expected, since at least 17 commissioners in Philadelphia had attended prior multi-government conventions. Some particularly influential delegates, such as John Dickinson, Roger Sherman, and Oliver Ellsworth, were veterans of several.

As was true of prior assemblies of this kind, the overwhelming majority of delegates at Philadelphia were selected by the state legislatures.⁴²¹ The only exception occurred when Governor Edmund Randolph of Virginia selected James McClurg to replace Patrick Henry (who had refused to serve), in accordance with a legislative authorization to the governor to fill vacancies.⁴²² As at prior conventions, the delegates all were empowered through commissions issued by their respective states, and were subject to additional state instructions. All but a handful of delegates remained within the scope of their authority or, if that was no longer possible, returned home.⁴²³

As in prior multi-government conventions, the rule of suffrage was one vote per state committee. As at previous conventions, the journal listed states from north to south, and they voted in that order. As in all the previous conventions discussed in this Part III other than the Albany Congress, the assembly elected its own president from among the commissioners present—in this case, George Washington.⁴²⁴ In accordance with established custom also, the Constitutional Convention

418. 1 FARRAND'S RECORDS, *supra* note 1, at 253. Wilson's use of "proposed" here means "recommend." This should not be confused with the technical term employed in Article V. See Natelson, *Rules*, *supra* note 1, Part XI.A.

419. 3 FARRAND'S RECORDS, *supra* note 1, at 557–59.

420. 1 *id.* at xi (introductory notes).

421. 3 *id.* at 559–86 (reproducing credentials).

422. 2 *id.* at 562–63.

⁴²³ Thus, Robert Yates and Robert Lansing, two of the three commissioners from New York (which had granted them only limited authority) returned home early. ROSSITER, *supra* note 1, at 252. Caleb Strong from Massachusetts, another state granting only limited authority, also left early. *Id.* at 211

424. 1 *id.* at 1–2.

elected its own secretary, William Jackson, and other officers.⁴²⁵ In choosing a secretary, it followed the usual practice of selecting a non-delegate.

As previous gatherings had done, the Constitutional Convention adopted its own rules,⁴²⁶ kept its own journal, established and staffed its own committees,⁴²⁷ and fixed its periods of recess and adjournment. In fundamental structure, protocol, and practices, there were few, if any, innovations.

IV. DID PRIOR MULTI-GOVERNMENT CONVENTIONS FORM THE CONSTITUTIONAL MODEL FOR THE AMENDMENTS CONVENTION?

The legal force of the Constitution's words and phrases depends, at least in part (and some would argue "entirely"), on the meaning of the words communicated to the ratifiers when they approved the document.⁴²⁸ What the words communicated included not only their strict meaning, but the attributes and incidents implied by them. Hence the modern observer needs to consult contemporaneous customs and usages to understand the words fully.

The phrase "Convention for proposing Amendments" denoted a *general convention*.⁴²⁹ To be "general" it was not necessary that every state participate, or even that every state be invited. The founding generation had experienced four gatherings then called general conventions—the Stamp Act Congress, the First Continental Congress, the Constitutional Convention, and the Philadelphia Price Convention, and none included every British colony in North America nor every state. The criterion that rendered a convention "general" rather than "partial" was not that every colony or state participated, but that the convention was not limited by region (at least not entirely)⁴³⁰—and that most colonies or states did take part.

This renders it easier to understand that in all attributes other than inclusivity, a general convention was the same creature as a regional or "partial" convention. The critical line of distinction was not between

425. *Id.* at 2. As befits the relatively large size and long duration of the convention, the delegates also selected a doorkeeper and messenger. 15 PA. RECORDS, *supra* note 1, at 351.

426. *See generally* 1 FARRAND'S RECORDS, *supra* note 1, at 8–13, 15–16 (listing rules and James Madison recounting rulemaking proceedings).

427. *E.g., id.* at 16 (resolving into committee of the whole).

428. *See generally* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (arguing that standard Founding-Era methods of interpretation would require that the Constitution be interpreted according to the understating or the ratifiers, if coherent and available; and if not according to the original public meaning of the document).

429. *Supra* note ___ and accompanying text (defining "general convention").

430. The call to the Philadelphia Price Convention included the southern states of Maryland and Virginia, but excluded the Carolinas and Georgia. *Supra* Part III.H.

general and partial, but between multi-government and intra-governmental. Multi-government conventions were diplomatic meetings of commissioners empowered by their respective governments, and they had common characteristics (such as “one committee/one vote”) that distinguished them from intrastate meetings.

Whether those common characteristics were incorporated into the Constitution’s phrase “Convention for proposing Amendments” depends on whether the “Convention for proposing Amendments” was based on its multi-government predecessors. Put another way, was the amendments convention to be same sort of entity that prior multi-government conventions had been? Or did the Framers and Ratifiers contemplate that the phrase “Convention for proposing Amendments” might permit procedures and protocols entirely new?

The historical record on this point is nearly as clear as historical records ever are: The Founders contemplated an amendments convention fitting the universally-established model.

The first reason for believing this is the fact that there *was* a universally-established model. The diplomatic meeting among committees commissioned by their respective governments was the only sort of multi-jurisdictional convention—general or partial—known to the Founders. This model was not only universal but very well ingrained. As noted throughout Part III, the attendance rosters of these meetings show considerable overlap, and included many leading Founders. Among the Framers at the Constitutional Convention, Roger Sherman of Connecticut was attending his fifth multi-government convention. Delaware’s John Dickinson was attending his fourth. Sherman’s Connecticut colleague Oliver Ellsworth, Dickinson’s colleague George Read, South Carolina’s John Rutledge, and Nathaniel Gorham of Massachusetts all were attending their third. At least eleven other Framers were serving at their second: Madison, Franklin, Washington, Richard Bassett, Elbridge Gerry, Alexander Hamilton, William C. Houston, William Livingston, Thomas Mifflin, Edmund Randolph, and William Samuel Johnson. These veterans influenced the Constitution to a degree disproportionate to their numbers,⁴³¹ and most were leaders in the ratification debates.

Many other leaders in the ratification debates were veterans of multi-

431. Madison is usually accounted the delegate with the most impact. Among other convention alumni, Washington served as convention president; Gorham chaired the committee of the whole and was one of five members of the Committee of Detail, which prepared the Constitution’s first draft; Randolph presented the Virginia Plan and served on the Committee of Detail; Rutledge chaired that committee; Johnson was on the Committee of Style, which prepared the final version of the Constitution; Franklin kept the gathering humane and civil; and Dickinson, Ellsworth, Johnson, and Sherman were all key convention moderates who negotiated crucial settlements such as the Connecticut [“Great”] Compromise.

government conventions as well. Jabez Bowen, a prominent Federalist, had represented Rhode Island in the New Haven and second Providence conventions, and he chaired the latter meeting. William Paca of Maryland, a moderate Anti-Federalist and central figure in the fight for amendments, had attended the First Continental Congress and the Philadelphia Price Convention. Thomas McKean, second only to James Wilson as a Federalist spokesman at the Pennsylvania ratifying convention, had served in the Stamp Act Congress and with Paca at the New Haven and second Providence conclaves. Azor Orne (first Providence and second Hartford conventions) and Tristram Dalton (first Providence) served as delegates to the Massachusetts ratifying convention.⁴³² Finally, ratifiers who had not attended multi-government gatherings but had served in Congress, in state legislatures, or in state executive office had been involved in convention selection procedures or had read convention reports.

Thus the Founders, either by personal experience or second-hand communication, all were familiar with a single multi-government model, and knew no other.

Nor did anything in the Constitution suggest that a “Convention for proposing Amendments” would follow any other than the universally-established pattern. The Constitution says nothing to indicate that an amendments convention would be popularly elected like the House of Representatives, for example; or that Congress could set the rules or supervise its composition. On the contrary, where the Constitution does provide rules it does so *precisely* in those few areas where existing practice had permitted variations. This point is explored further below in the Conclusion.

Those facts should be sufficient to close the question, but there are still more indicators pointing in the same direction. One of these is the fundamental reason the convention-proposal method was included in Article V: as a way of proposing amendments without congressional interference. If an amendments convention were to follow any model other than that established by precedent, the model likely would have to be specified by Congress, presumably as part of the congressional call. But allowing Congress to determine the composition and rules of the convention would cede to Congress significant power over the convention-proposal method, thereby frustrating its central purpose. Departing from the Founding-Era model, therefore, makes no sense as a matter of constitutional interpretation.

That Congress would have only a ministerial role in the process was confirmed during the ratification debates by the influential Federalist

432. 6 DOCUMENTARY HISTORY, *supra* note 1, at 1155 (listing Massachusetts ratifying convention delegates).

Tench Coxe. Through the state application and convention procedure, he wrote, the states could obtain amendments “although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them.”⁴³³ This representation was flatly inconsistent with a power in Congress to manipulate convention composition or rules.

Madison’s *Federalist* No. 43 contains a comment also inconsistent with any but the traditional model. This is the observation that the Constitution “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”⁴³⁴ Of course, the only way for the state governments to be “equally enable[d]” with Congress in the proposal process is if the convention is a meeting of representatives from those state governments. Mere power to apply for a convention outside state control would not fit Madison’s criterion.

That the states in convention assembled were the true proposers is assumed in other ratification-era writings as well. A *Federalist* writing as “Cassius” asserted that “*the states may propose any alterations which they see fit*, and that Congress shall take measures for having them

433. Tench Coxe, *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 284 (emphasis in original).

434. THE FEDERALIST NO. 43, *supra* note 1, at 275 (James Madison). Similarly, at the North Carolina ratifying convention, the following colloquy took place:

Mr. BASS observed, that it was plain that the introduction of amendments depended altogether on Congress.

Mr. IREDELL replied, that it was very evident that it did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress shall call such convention, so that they will have no option.

4 ELLIOT’S DEBATES, *supra* note 1, at 178.

During the debates in New York, John Lansing, Jr., a former delegate to the federal convention, gave additional reasons for the alternative routes to amendment:

In the one instance we submit the propriety of making amendments to men who are sent, some of them for six years, from home, and who lose that knowledge of the wishes of the people by absence, which men more recently from them, in case of a convention, would naturally possess. Besides, the Congress, if they propose amendments, can only communicate their reasons to their constituents by letter, while if the amendments are made by men sent for the express purpose, when they return from the convention, they can detail more satisfactorily, and explicitly the reasons that operated in favour of such and such amendments—and the people will be able to enter into the views of the convention, and better understand the propriety of acceding to their proposition.

23 DOCUMENTARY HISTORY, *supra* note 1, at 2522–24.

carried into effect.”⁴³⁵ Again, for the states to “propose,” the convention must be their instrumentality. Similarly, Samuel Jones, a supporter of the Constitution, explained Article V this way:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which *Congress might procure more*, if in the operation of the government it was found necessary; and they prescribed *for the states a mode of restraining* the powers of the government, if upon trial it should be found they had given too much.⁴³⁶

Jones thus tells us that the procedure gives the states a “mode of restraining the powers of government.” The states do not share that mode with others; the Constitution “prescribe[s]” that they have it. This can be true only if the convention is their assembly.

Further evidence on the point comes from the spring of 1789, when the First Federal Congress had assembled, eleven of the original thirteen states had ratified, but North Carolina and Rhode Island had not yet done so. Those two states, as well as Virginia and New York, were still unsatisfied with the Constitution as written, and wanted early action on amendments, particularly a Bill of Rights. Virginia and New York both applied for a convention to propose amendments.⁴³⁷ The Virginia application demanded

that a convention be immediately called, of *deputies from the several States*, with full power to take into their consideration the defects of this Constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.⁴³⁸

The italicized language reveals the assumption that an amendments convention was state-based, and was similar to language that long had

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

436. 23 DOCUMENTARY HISTORY, *supra* note 1, at 2520–22 (Feb. 4, 1789) (emphasis added).

437. See CAPLAN, *supra* note 1, at 35–39.

438. H.R. JOURNAL, 1st Cong., 1st Sess. 28–29 (1789) (emphasis added) (internal quotation marks omitted).

been used to denominate an interstate convention.⁴³⁹ It paralleled the language of the Massachusetts application and accompanying letter sent to Congress in 1785 (“Convention of Delegates from all the States” and “Convention of the States”).⁴⁴⁰ Thus, in the view of the Virginia legislature, the Constitution had not changed the nature of a multi-government convention.

The New York application similarly asked

that a Convention of *Deputies from the several States* be called as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.⁴⁴¹

One might, perhaps, argue that the view of Virginia and New York were atypical, but in fact they were not. Already quoted have been several corroborative comments from the ratification debates. The legislature of Federalist Pennsylvania declined to join the applications of Virginia and New York, but in its resolution doing so it also assumed the pre-constitutional model, referring to the proposed gathering as *a convention of the states*.⁴⁴² This remained for many years a common method of designating an amendments convention.⁴⁴³ Over four decades later, the Supreme Court still referred to such a gathering as a “a convention of the states.”⁴⁴⁴

I have been able to find no Founding-Era evidence suggesting that a convention for proposing amendments was anything else.

439. *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 578 (reproducing a resolution of the 1780 Philadelphia Price Convention, referring to it as a “meeting of the several States”).

440. 1784–1785 MASS. RECORDS, *supra* note 1, at 666 (July 1, 1785) (“Convention of Delegates from all the States”); *id.* at 667 (accompanying letter to president of Congress describing the meeting as a “Convention of the States”).

441. H.R. JOURNAL, 1st Cong., 1st Sess. 29–30 (1789) (emphasis added).

442. William Russell Pullen, *The Application Clause of the Amending Provision of the Constitution* 23 (1951) (unpublished dissertation, University of North Carolina) (on file with University Library, University of North Carolina and with author) (“[T]he calling of a convention of the states for amending the foederal [*sic*] constitution.” (quoting MINUTES OF THE GEN. ASSEMBLY OF PA., 58–61, (1789))). By contrast, a convention *within* a state was referred to as a “Convention of the people.” *Id.* at 26 (quoting a South Carolina report recommending against applying for an Article V convention).

443. Pullen, *supra* note 372, at 528; *See also* Natelson, *First Century*, *supra* note 1, at 5, 7, 12 (providing other examples).

444. *Smith v. Union Bank of Georgetown*, 30 U.S. (1 Pet.) 518, 528 (1831).

CONCLUSION: WHAT PRIOR CONVENTIONS TELL US ABOUT THE CONVENTION FOR PROPOSING AMENDMENTS

As noted above, Founding-Era customs assist us in understanding the attributes and procedures inherent in a “convention for proposing amendments,” and the powers and prerogatives of the actors in the process.⁴⁴⁵ This Conclusion draws on the historical material collected above, together with the brief constitutional text, to outline those attributes and procedures.

The previous record of American conventions made it clear that a convention for proposing amendments was to be, like its immediate predecessors, an inter-governmental diplomatic gathering—a “convention of the states” or “convention of committees.” It was to be a forum in which state delegations could meet on the basis of sovereign equality. Its purpose is to put the “states in convention assembled” on equal footing with Congress in proposing amendments.⁴⁴⁶

Founding-Era practice informs us that Article V applications and calls may ask for either a plenipotentiary convention or one limited to pre-defined subjects. Most American multi-government gatherings had been limited to one or more subjects, and the ratification-era record shows affirmatively that the Founders expected that most conventions for proposing amendments would be similarly limited.⁴⁴⁷ Founding-Era practice informs us also that commissioners at an amendments convention were to operate under agency law and remain within the limits of their commissions.⁴⁴⁸ Neither the record of Founding Era conventions nor the ratification debates offer significant support for the modern claim⁴⁴⁹ that a convention cannot be limited.

445. *Supra* note ___ and accompanying text.

446. The modern perception that the Constitution does not give the states parity with Congress in the amendment process has induced some commentators to propose abolishing the convention system in favor of a system in which a certain number of states directly propose an amendment by agreeing on its precise. *See e.g., Why the Madison Amendment?*, THE MADISON AMENDMENT, <http://www.madisonamendment.org> (last visited Jan. 25, 2013). A correct understanding of the convention process makes clear that the states already occupy an equal position.

447. *See Natelson, Rules*, *supra* note 1, at 727–30.

448. *Supra* Part III.

449. Those pressing this claim invariably do so with little or no consideration of either the prior history of multi-government conventions or the ratification record. *See, e.g., Bruce M. Van Sickle & Lynn M. Boughley, A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 HAMLIN L. REV. 1 (1990). This article does not discuss, or even reference, eighteenth century convention practice, and its treatment of the “limitability” issue in the ratification record is limited to a single quotation by Alexander Hamilton. *Id.* at 32-33 & 45-46. Its principal argument is that the applying states cannot limit a convention to one subject because the Constitution provides for the convention to propose “amendments” (plural). *Id.* at 28, 45. This is like saying that when a speaker seeks

The only Founding Era efforts to insert in a convention call prescriptions other than time, place, and subject-matter were abortive. When Massachusetts presumed to set the voting rules while calling a third Hartford convention, two of the four states invited refused to participate.⁴⁵⁰ In the few instances in which convention calls suggested how sovereign governments should select their commissioners, some of those governments disregarded the suggestions, but their commissioners were seated anyway.⁴⁵¹ This record therefore suggests that a convention call, as the Constitution uses the term, may not include legally-binding terms other than time, place, and subject. However, the occasional Founding-Era practice of making calls and applications conditional and of rescinding them⁴⁵² suggests that Article V applications and calls also may be made conditional or rescinded.⁴⁵³ In accordance with Founding-Era practice, states are free to honor or reject calls, as they choose.

Universal pre-constitutional practice tells us that states may select, commission, instruct, and pay their delegates as they wish, and may alter their instructions and recall them. Although the states may define the subject and instruct their commissioners to vote in a certain way, the convention as a whole makes its own rules, elects its own officers, establishes and staffs its own committees, and sets its own time of adjournment.

All Founding-Era conventions were deliberative bodies. This was true to a certain extent even of conventions whose formal power was limited to an up-or-down vote. When Rhode Island lawmakers submitted the Constitution to a statewide referendum in town meetings rather than to a ratifying convention, a principal criticism was that the referendum lacked the deliberative qualities of the convention.⁴⁵⁴ Critics contended that a ratifying convention, unlike a referendum, provided a central forum for a full hearing and debate and exchange of information among people from different locales.⁴⁵⁵ They further contended that the

“questions” from the audience, if those in the audience have only one question they may not ask it.

450. *Supra* Part III.M.

⁴⁵¹ *Supra* Parts III.B (Stamp Act Congress) & III.J (Boston Convention).

452. *See, e.g.*, note ___ *supra* and accompanying text.

453. *Cf.* Natelson, *Rules*, *supra* note 1, at 712 (conditions and rescissions probably permitted).

454. *E.g.*, Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 131–32; *A Freeman*, PROVIDENCE GAZETTE, Mar. 15, 1788, *reprinted in id.* at 137; *A Freeman*, NEWPORT HERALD, Apr. 3, 1788, *reprinted in id.* at 220–22; *A Rhode Island Landholder*, PROVIDENCE U. S. CHRON., Mar. 20, 1788, *reprinted in id.*, at 146–47; Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193–98.

455. Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 131 (stating that the referendum, “though it gave every person an opportunity to enter his assent or dissent, precluded all the before-mentioned

convention offered a way to supplement the affirmative or negative vote with non-binding recommendations for amendments.⁴⁵⁶

Before and during the Founding Era, American multi-government conventions enjoyed even more deliberative freedom than ratifying conventions—as, indeed, befits the dignity of a diplomatic gathering of sovereignties. No multi-government convention was limited to an up-or-down vote. Each was assigned discrete problems to work on, but within that sphere each enjoyed freedom to deliberate, advise, consult, confer, recommend, and propose. Multi-government conventions also could refuse to propose.⁴⁵⁷ Essentially, they served as task forces where delegates from different states could share information, debate, compare notes, and try to hammer out creative solutions to the problems posed to them.

History and the constitutional text inform us that a convention for proposing amendments is, like its direct predecessors, a multi-government proposing convention. This suggests that an amendments convention is deliberative in much the same way its predecessors were.⁴⁵⁸ This suggests further that when a legislature attempts in its

advantages arising from a general Convention, and excluded the light and information which one part of the State could afford to the other by means thereof”); Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193, 196.

456. Letter from James Madison to George Nicholas (Apr. 8, 1788), *in* 24 DOCUMENTARY HISTORY, *supra* note 1, at 226 (criticizing the referendum because it “precludes every result but that of a total adoption or rejection”); Report of Rhode Island Legislature, U.S. CHRON., Mar. 6, 1788, *reprinted in id.* at 132 (stating that Rhode Island lost the opportunity to deliberate at the Constitutional Convention, and also lost the opportunity to deliberate over amendments at a ratifying convention); *A Rhode Island Landholder*, PROVIDENCE U. S. CHRON., Mar. 20, 1788, *reprinted in id.* at 146–50; Providence Town Meeting: Petition to General Assembly of March 26, U.S. CHRON., Apr. 10, 1788, *reprinted in id.* at 193, 97; *see Amendment*, PROVIDENCE GAZETTE, Mar. 29, 1788, *reprinted in id.* at 218.

457. *Supra* notes ___ and accompanying text.

458. Modern case law is consistent in requiring that legislatures and conventions operating under Article V have some deliberative freedom. *See, e.g.,* Hawke v. Smith, 253 U.S. 221, 226–27 (1920); Miller v. Moore, 169 F.3d 1119, 1123 (8th Cir. 1999); Gralike v. Cook, 191 F.3d 911, 924–25 (8th Cir. 1999), *aff’d on other grounds*, 531 U.S. 510, 527 (2001); Barker v. Hazetina, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998) (“Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota’s congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost.”); League of Women Voters v. Gwadosky, 966 F. Supp. 52, 58 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 119, 127 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997) (requiring an assembly that can engage in “intellectual debate, deliberation, or consideration”); AFL-CIO v. Eu, 686 P.2d 609, 621–22 (Cal. 1984), *stay denied sub nom.* Uhler v. AFL-CIO, 468 U.S. 1310 (1984); State *ex rel.* Harper v. Waltermire, 691 P.2d 826, 829–30 (Mont. 1984); *In re* Opinion of the Justices, 167 A. 176, 180 (Me. 1933); *cf.* Kimble v. Swackhamer, 439 U.S. 1385, 1387 (1978) (Rehnquist, J.), *dismissing appeal from* 439 U.S. 1041 (upholding a referendum on an Article V question because it was advisory rather than mandatory); Dyer v. Blair, 390 F. Supp.

application to compel the convention to merely vote up-or-down on prescribed language,⁴⁵⁹ it is not utilizing the application power in a valid way.

Prevailing convention practice during the Founding Era permitted a few procedural variations, and it is precisely in these areas that the text of Article V prescribes procedure. Specifically:

- During the Founding Era, multi-state conventions could be authorized merely to *propose* solutions for state approval, or, less commonly, to *resolve* issues; in the latter case each state “pledged its faith” to comply with the outcome. Article V clarifies that an amendments convention only may propose. At the Constitutional Convention, the Framers rejected proffered language to create an amendments convention that could resolve.⁴⁶⁰
- During the Founding Era, a proposing convention could be plenipotentiary or limited. Article V clarifies that neither the states nor Congress may call plenipotentiary conventions under Article V, because that Article authorizes only amendments to “this Constitution,” and, further, it proscribes certain amendments.⁴⁶¹
- During the Founding Era, an “application” for a multi-government convention could refer either to (1) a request from a state to Congress to call, or (2) the call itself. Article V clarifies that an application has only the former meaning.⁴⁶²
- During the Founding Era a call could come from one or more states, from Congress, or from another convention. Article V prescribes that the call for an amendments convention comes only from Congress, but is mandatory when two thirds of the states have submitted similar applications.⁴⁶³
- During the Founding Era, one proposing convention (that of 1787) had attempted to specify how the states were to review

1291, 1308–09 (N.D. Ill. 1975) (Stevens, J.) (upholding a rule of state law on an Article V assembly, but only because the assembly voluntarily adopted it).

459. *E.g.*, 133 CONG. REC. S4183 (daily ed. Mar. 30, 1987) (reproducing Utah application specifying precise text of amendment).

460. Natelson, *Founders' Plan*, *supra* note 1, at 9.

461. U.S. CONST. art. V (“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.”).

462. U.S. CONST. art. V (“[O]n the Application of the Legislatures of two thirds of the several States, [Congress] shall call.”).

463. U.S. CONST. art. V (“or, on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments”).

its recommendations. Article V clarifies that an amendments convention does not have this power.⁴⁶⁴

Thus do text and history fit together to guide us in the use of Article V.

464. U.S. CONST. art. V (“[Congress’s call for a convention], 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.”).