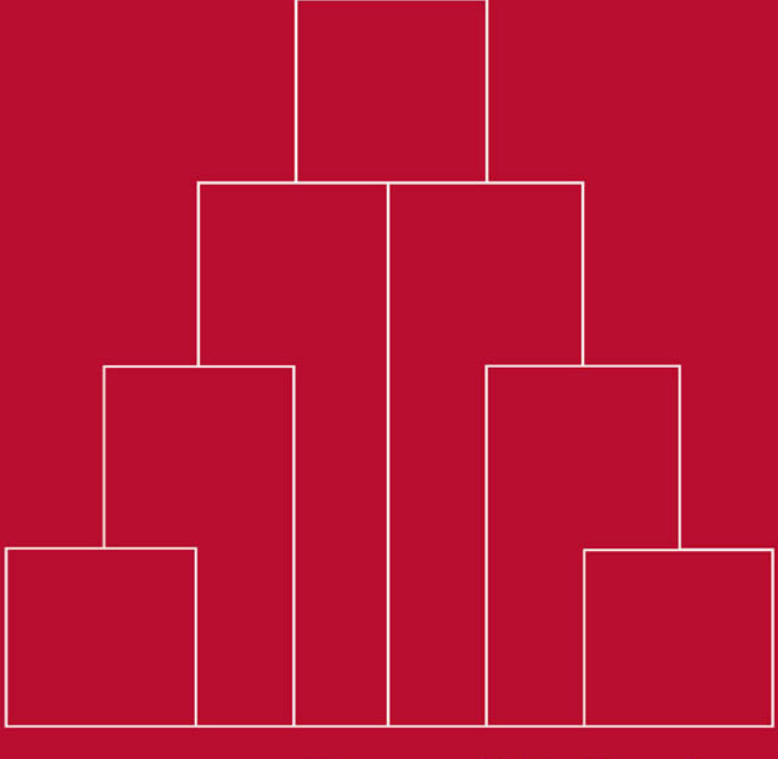
Constitutional Brinksmanship

Amending the Constitution by National Convention



Russell L. Caplan

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Russell L. Caplan

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To the memory of my father and mother
Alfred and June Caplan

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Preface

Thirty-two states in the past decade have filed applications with Congress for a convention to propose a constitutional amendment requiring a balanced federal budget. At this writing petitions are being considered in several other states and only two more are needed to force Congress to issue the call, an event that might initiate a procedure never used in the Constitution's two-hundred-year history. Under article V of the Constitution, amendments can be proposed either by Congress, the method so far used for the twenty-six amendments that have been adopted, or by national convention, when the legislatures of two thirds of the states so request. The convention procedure, because it is untried, has been surrounded by uncertainties, but the principal fear is that a convention, if held, will propose amendments on subjects other than those for which it was called. The convention route has been used throughout the nation's history, and even now other campaigns for amendments regarding abortion, prayer in public schools, and English as the official national language ensure that article V will remain a fixture in the political life of the United States.

Former Associate Justice Arthur Goldberg has written: "Article V of the Constitution does not limit the agenda of such a convention to specific amendments proposed by the states in their petitions to Congress. There is nothing in article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights."

Retired Chief Justice Warren Burger has said of the balanced-budget convention campaign that "it would be a grand waste of time to have a constitutional convention and start over. . . . We can deal with these things one at a time." Associate Justice William Brennan is more direct: "I honestly doubt there's any prospect we want to go through the trauma of redoing the Constitution," a convention being "the most awful thing in the world."[1]

A "runaway" convention spewing a welter of unauthorized amendments might be expected to claim as precedent the Philadelphia Convention, which framed the Constitution in 1787. That "Grand Convention," as it was known at the time, exceeded its mandate to amend the nation's first federal constitution, the Articles of Confederation, and produced a new charter. It is likewise possible, according to Richard Rovere, for another convention to

> reinstate segregation, and even slavery; throw out much or all of the Bill of Rights (free speech, free press, separation of church and state, the prohibition against unreasonable searches and seizures); eliminate the Fourteenth Amendment's due-process clause and reverse any Supreme Court decision the members didn't like, including the one-man-one-vote rule; and perhaps, for good measure, eliminate the Supreme Court itself.

Others, even supporters of a balanced-budget amendment, consider other dimensions. "Fettered or unfettered," Governor Thomas H. Kean of New Jersey has said, "the convention would intimidate all branches of government, confuse the financial markets, and chill international relations."[2] Could this happen under article V?

I

The Constitution sets out the central features of the convention route. Article V states:

> The Congress, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which . . . 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.

The constitutional text describes in literal terms, and implies of necessity, a series of steps:

1. Two thirds of the state legislatures (currently thirty-four) must send applications to Congress.
2. Once Congress has received the correct number of applications, it must, if all other requirements are met, call the convention.
3. If a convention is called, delegates would be selected, meet at the convention, and decide whether to propose amendments.
4. Congress must determine whether the amendments proposed by the convention (if any) meet all constitutional requirements.
5. Whether a convention or Congress itself proposes the amendments, Congress must choose the method of ratification for the proposals—either by the state legislatures or by specially held state conventions.
6. Three fourths of the states (currently thirty-eight) must approve an amendment for it to become part of the Constitution.

If constitutional requirements are misunderstood or misapplied, a juggernaut resulting in a convention might be set in train unwittingly and even contrary to the wishes of convention proponents. If, on the other hand, Congress resists a mandate for change despite the fulfillment of all prerequisites, an amendment desired by an overwhelming part of the nation will have been unconstitutionally thwarted and confidence in the government lost.

Notwithstanding the despair of eminent students such as Laurence Tribe of Harvard Law School that the article V convention presents "many critical questions" that "are completely open" with no "authoritative answer," and Charles Black of Yale Law School that "neither text nor history give any real help," the convention clause, like every other in the Constitution, has a historical meaning that can be successfully retrieved. The clause is just as viable as the procedure for impeaching and removing the President, even though that mechanism also has never been employed to its completion. It was the mere threat of impeachment that drove Richard Nixon to resign from the presidency in 1974.[3]

The article V convention, Philip Kurland has said, "is not a weapon ready for use and its cumbersome method is both its virtue and its vice."[4] Now an exotic institution, the convention was a tradition already over a century old when it became part of the Constitution with article V. The convention clause was far from the Constitution's most obscure provision at the time of adoption. By 1787, in contrast, it had not been settled whether ex post facto laws, forbidden in article I, retroactively imposed liability in civil cases or related to criminal mat-

ters only. At Philadelphia John Dickinson had to consult Blackstone's *Commentaries on the Laws of England* to justify his position to the other delegates.

Once the underlying decisions were made the choice of words at Philadelphia was second nature, and one reason article V is so terse is because the salient features of conventions were generally well understood. In his *Manual of Parliamentary Practice*, composed for his own use as presiding officer of the Senate during his vice presidency, Thomas Jefferson remarked that for the most familiar rules of British practice "no written authority is or can be quoted, no writer having supposed it necessary to repeat what all were presumed to know." For the same reason, many aspects of the convention route have been hidden from view because conventions were a well-known part of the landscape when the Constitution was drafted, with the result that elaborate discussions of the subject that have survived are rare. Many original historical sources have been consulted, including a previously unnoticed early Supreme Court decision referring to the convention process, *Smith v. Union Bank of Georgetown*; this book is accordingly in the nature of a guide to the evidence.[5]

The question of a national convention's limitability is in reality two inquiries: (1) whether the states can apply for a convention on specific topics or, as some writers like Professor Black have held, must request a convention with full powers to revise the Constitution; (2) whether, if the states may apply for a convention on specific topics, amendments proposed by that convention on topics outside the applications become part of the Constitution if submitted to the states for ratification and the required three fourths do in fact approve. The evidence indicates that both plenary and limited-topic conventions may be applied for, and that a limited convention is bound by article V to propose only those amendments described in the triggering applications. Amendments proposed by a limited convention on topics not specified may be withheld by Congress from ratification and additionally can, for the most part, be challenged in the federal courts. If an irregularly adopted amendment is not contested over a period of years, probably decades, the amendment can attain a secure place in the Constitution by virtue of public acquiescence.

This book, the first systematic examination of the history and operation of the federal convention clause, is not a survey of the social and

intellectual developments of the founding age. It is not, in other words, a rival or descendant of Gordon Wood's magisterial *Creation of the American Republic 1776–1787* (1969). Rather, its focus is first on a lost chapter of our constitutional history, namely, the role conventions and convention drives have played since colonial times; and second on the legal problems relating to the convention mechanism of article V, presenting the requisite case law and historical records to suggest specific answers.

II

Since 1787 no other national convention has met, but more than 230 state constitutional conventions have been held, a disparity explainable in part by the fact that each state is a much more compact and homogeneous region than the entire Union, and so an easier arena in which to effect political change; in part by the fact that the federal Constitution and Bill of Rights have come to be respected as the fundamental and indispensable bulwark on which the state charters depend.[6] State convention practice after 1787 is nonetheless of secondary importance in interpreting article V, because that practice was unknown to the founders, and is governed in the first instance by the provisions of state law, although subject at the periphery to the restraints of federal statutes and the Constitution through the supremacy clause of article VI, which proclaims that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."

It is sometimes assumed that there was a consensus to the effect that Revolution-era conventions possessed unlimited capacities; as this essay demonstrates, the reality was different. The misconception may have arisen because those early bodies were often both conventions and legislatures, acting as provisional governments in first framing a constitution and subsequently enacting legislation under it. In any event the idea that because a convention is in some sense "sovereign" it may override its commission flourished in the state conventions of the nineteenth century. After adoption of the federal Constitution, the states, both original and newly admitted, held conventions to draft and revise their constitutions. At the 1821 New York convention, delegate Peter

R. Livingston denied all limitations in an effort to show that the convention had the authority to disenfranchise blacks (a ploy to dilute their voting strength in New York City):

> the people are here themselves. They are present in their delegates. No restriction limits our proceedings. What are these *vested* rights? Sir, we are standing upon the foundations of society. The elements of government are scattered around us. All rights are buried, and from the shoots that spring from their grave, we are to weave a bower that shall overshadow and protect our liberties. Our proceedings will pass in review before that power that elected us; and it will be for the people to decide whether the blacks are elevated upon a ground which we cannot reach.

At the Illinois convention of 1847, Onslow Peters added currency to Livingston's doctrine:

> We are here the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—"We are the state." We can trample the constitution under our feet as waste paper, and no one can call us to an account save the people.

Other delegates shared Peters's perspective, although Thompson Campbell "did not believe in the omnipotence of this body. . . . We must abide by the law which has called us here for a particular purpose." Arguments for the boundless powers of delegates were made at the Kentucky convention of 1849 and the 1853 Massachusetts convention.[7]

The Illinois convention of 1862 was pivotal for convention scholarship. That body had been called to propose a new state constitution, but in addition to submitting a charter for ratification—which was rejected—the assembly engaged in numerous unauthorized acts that were highly publicized and profoundly alienating to its constituents. Among other measures, the convention ratified a proposed amendment to the federal Constitution that Congress had stipulated was to be approved by the state legislatures, reapportioned the state's congressional districts, approved a bond issue to aid wounded Illinois soldiers in the Union army, and began investigating the conduct of the state governor's office.[8]

A select committee of the convention was assigned to determine whether the assembly was bound by the limitations of its enabling act. The committee, influenced by the proceedings of the 1847 convention, announced in its report (adopted by the full membership) that a convention represents "a peaceable revolution of the state government . . . a

virtual assemblage of the people of the state, sovereign within its own boundaries." Accordingly, "after due organization of the Convention, the law calling it is no longer binding" and "the Convention has supreme power in regard to all matters incident to the alteration and amendment of the constitution." The Illinois convention was rebuffed on all fronts: the ratification of the federal amendment was rejected by Congress as invalid, and state officials refused to issue the relief bonds ordered by the convention.[9]

These extravagant claims of sovereign power followed on the secession of the Confederacy the year before. The state conventions that proclaimed withdrawal from the Union, and the Montgomery Convention that framed the Confederacy's two constitutions, had renounced the authority of the federal government and promulgated statutes in the manner of regular legislatures. The actions of the secession and Illinois conventions inspired the first scholarly examination of the subject, A *Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding*, originally published in 1866, by an Illinois superior court judge and later a distinguished law professor at the University of Chicago, John Alexander Jameson.

Jameson, reacting to the trauma of the Civil War, cited a wealth of precedents from state cases and conventions for his thesis that conventions are limited in their powers by the acts calling them into existence and by the federal Constitution; in the case of state conventions, by the respective state constitution as well. Intent on domesticating the procedure, he traced the "dogma" of illimitable convention power to the "pro-slavery fanaticism" of Livingston at the 1821 New York convention, and concluded that the convention-as-sovereign theory had been formulated to justify slavery and disunion:

> it is difficult to resist the conviction, that the assertion of that theory was connected with the great conspiracy which culminated in the late Secession war. Was it foreseen, that to carry out the design of disrupting the Union, with an appearance of constitutional right, new conceptions must become prevalent, as to the powers of the bodies by which alone the design could be accomplished?[10]

The *Treatise* was one of a spate of Reconstruction-era commentaries, including Timothy Farrar's *Manual of the Constitution of the United States* (1867) and Thomas Cooley's *Treatise on Constitutional Limitations* (1868), that stressed the limits to state powers and the subordination of the states to the federal Union. For Jameson and Cooley, one

concern was to demonstrate the limitability of state conventions. They agreed that the Philadelphia Convention had exceeded its powers by proposing the Constitution, rendering that submission invalid as a controlling precedent. To the 1862 Illinois convention's claim of unrestrainable sovereignty based on parity with the Philadelphia Convention, Jameson countered that the Illinois assembly, as an instance of delegated power, could act only within the scope of its enabling act. Judge Cooley wrote: "The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority, to put in proper form the questions of amendment upon which the people are to pass." The limits to state powers were enforceable, if necessary, but henceforward in court rather than in battle. In 1867, The United States Supreme Court for the first time decided that a clause in a state constitution violated the federal Constitution.[11]

The commentators who followed Jameson, notably Professor Walter Fairleigh Dodd of the Johns Hopkins University, and later Yale, and Roger Sherman Hoar, a state senator and lawyer who practiced with Louis Brandeis and served as legal adviser to the Massachusetts constitutional convention of 1917, were also concerned with the conventions held in the states to establish or revise their own constitutions, and touched incidentally on article V only insofar as it shed light on state practice. As the Civil War receded into history, fewer constraints were held to apply. Both Dodd, writing in 1910, and Hoar, writing in 1917, agreed with Jameson that the results of a state convention are invalid if repugnant to the federal Constitution—for example, to the prohibition against ex post facto legislation. Both agreed also, contrary to Jameson, that a state convention could disregard the legislative act calling it into existence. Hoar even argued that for extraconstitutional conventions, held despite the absence of an enabling provision in the constitution, the state charter imposes no limits because such an assemblage, like a regular convention or constitution, derives its authority from a higher source "inherent in the people."[12]

Though Jameson's book was well received and went through four editions by 1887, the convention-as-sovereign notion persisted. In 1869, when Congress considered submitting the fifteenth amendment for ratification by state conventions, Senator Orris Ferry of Connecticut, probably recalling the 1862 Illinois gathering, warned that a convention cannot be limited to "the simple amendment which you are

proposing to it. It may go on to amend your State constitution and to subvert the whole machinery of your State government, and there is no power in your State to stop it." Congress has by and large kept with this theory, and has used it to repel subsequent national convention drives. The denouement of this tug-of-war may be a monumental confrontation should two thirds of the states ever file applications on the same subject, a balanced-budget amendment being currently the most likely candidate. "It is not inconceivable," Michael Kammen has written, "that the Constitution's Bicentennial will be observed amidst the largest governmental ruckus the nation has seen since 1860–61."[13]

III

The sources for the history of article V extend, in time, from seventeenth-century England right up to the present. The principal focus for interpreting the convention provision is necessarily on the framing of the Constitution at the Philadelphia Convention in 1787 and the deliberations in the ratifying conventions to which the Constitution was transmitted for the states' decisions on adoption. Before the final ratification, by Rhode Island in 1790, a campaign by opponents of the Constitution for another convention to revise the work done at Philadelphia generated a fair amount of commentary on the convention clause.

Original documents relating to the framing and adoption of the Constitution are located chiefly in the Library of Congress, the National Archives, the Library of the Supreme Court of the United States, and to a lesser extent the state libraries and historical associations. With four exceptions, only published documents have been used in this study. The actions of Congress during the Revolutionary War and under the Articles of Confederation are detailed in Worthington Chauncey Ford et al., eds., *Journals of the Continental Congress 1774–1789* (34 vols., 1904–1937), which are supplemented by Edmund C. Burnett, ed., *Letters of Members of the Continental Congress* (8 vols., 1921–1936), and a recent work in progress, Paul H. Smith et al., eds., *Letters of Delegates to Congress 1774–1789* (13 vols. to date, 1976–).

The indispensable record of the Philadelphia Convention remains the full set of notes taken by James Madison, delegate from Virginia. Though he disclaimed the title "Father of the Constitution," Madison

was its chief architect, having drafted the Virginia Plan, which formed the nucleus of the instrument; left the fullest record of the Constitution's drafting, notes he later revised for publication from his own and other delegates' private papers; earned the reputation at Philadelphia, according to a fellow delegate, of being "the best informed Man of any point in debate," taking the lead in "the management of every great question" before the convention; advocated ratification as the coauthor with Alexander Hamilton and John Jay of *The Federalist*, the series of newspaper essays written to persuade New York to ratify, and eventually recognized as the preeminent commentary on the Constitution; served in the Virginia ratifying convention; and as a member of the First Federal Congress, which concluded the work of the Philadelphia Convention in establishing the new government, devised and shepherded the Bill of Rights to its successful proposal.

The proceedings of the Philadelphia Convention remained, on the whole, secret for many years. Only when Madison's notes were published in 1840, appearing posthumously by his wish, could an intelligible notion be had of the Constitution's gestation.[14] The Philadelphia delegates had conducted their proceedings behind closed doors, and entrusted the official journal to Congress. The journal was kept by William Jackson, the convention secretary, and is a bare-bones recital of motions made and carried or made and rejected, with none of the discussion behind them. Even this sparse account was not published until 1819, at the direction of Congress. The decision of Congress was taken by the surviving delegates as a signal lifting the ban on disclosure, and the private records of several members—Hamilton (who had died in 1804), Rufus King, John Lansing, Luther Martin, James McHenry, William Paterson, William Pierce, and Robert Yates—began to appear.

The notes, working papers, and correspondence of the delegates are the core of Max Farrand's *The Records of the Federal Convention of 1787*, first issued as three volumes in 1911, with an additional volume containing subsequently discovered material in 1937. In conjunction with the bicentennial observance of the Philadelphia Convention, Dr. James H. Hutson of the Library of Congress Manuscript Division published his *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (1987), incorporating delegates' notes and correspondence brought to light during the intervening fifty years.

Our knowledge of the framers' understanding has been enriched by

publication of comprehensive editions of the writings of the founders along with the essays and pamphlets written during ratification. These works include, in particular, Julian P. Boyd's edition of *The Papers of Thomas Jefferson* (22 vols to date, 1950–), which set the standard for projects of the type; Gaillard Hunt's collection of *The Writings of James Madison* (9 vols., 1900–1910), soon to be completely replaced by William T. Hutchinson, Robert Allen Rutland, et al., eds., *The Papers of James Madison* (15 vols. to date, 1962–); John C. Fitzpatrick's edition of *The Writings of George Washington* (39 vols., 1931–1944), prepared for the bicentennial of Washington's birth; and the exhaustive compilation of Hamilton's writings by Harold C. Syrett and Jacob E. Cooke, *The Papers of Alexander Hamilton* (26 vols., 1961–1979).

The publication of these reliable editions affords now a better picture of eighteenth-century constitutional ideas than was available in 1832 or 1861. "Not until Max Farrand's *The Records of the Federal Convention* appeared in 1911," one historian has written, "was it possible to see clearly just what had occurred in Philadelphia." Yet, in an eye-opening appraisal of the shortcomings of the records, Dr. Hutson found that reportorial inexperience and partisan bickering severely compromised many recollections. According to Dr. Hutson, even Madison, while a reliable reporter, can have set down no more than ten percent of the entire proceedings on the floor of the Philadelphia Convention.[15]

The proceedings in the states when the Constitution was transmitted for their decisions on adoption are preserved in the records of the state legislatures and ratifying conventions. At a minimum, outlines of the proceedings are documented for all thirteen states, but the fullest accounts exist for the legislatures of New York, Pennsylvania, Virginia, and South Carolina, and the conventions in New York, Virginia, Massachusetts, Pennsylvania, Virginia, and North Carolina. Very little, by contrast, is known of the ratifying assemblies in Connecticut and Georgia, outside of a few speeches.

For over a century the standard compilation of the ratification debates has been Jonathan Elliot's *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, which appeared in 1830 and, as revised, in 1836. In the 1820s and 1830s Elliot, a political journalist rather than a scholar, collected the published accounts of the ratifying assemblies, originally committed to print by commercial publishers. Elliot admitted in his first edition that "the sentiments" contained in the published accounts "may, in some instances, have been

inaccurately taken down, and, in others, probably, too faintly sketched," but scrupulous reporting of all sides in the debates was not the objective. The intended audience would be more interested in learning the opinion of Patrick Henry than of Zachariah Johnson. Consequently, the words of the less celebrated were slighted, omitted, or, as in the case of Massachusetts, doctored by the editors. Still, in the better renditions (Virginia, particularly, and New York) the flavor of individual speakers and their ideas often shines through. Many additional sources—delegates' notes, contemporary newspaper accounts—have since been uncovered and are included in what promises to be a thorough and reliable replacement for Elliot, *The Documentary History of the Ratification of the Constitution*, the first volume of which was published in 1976 under the late Merrill Jensen's editorship.[16]

The considerable body of writings produced by opponents of ratification, who were called antifederalists, has only recently been collected in Herbert J. Storing's definitive *The Complete Anti-Federalist* (7 vols., 1981). Abridged versions of the corpus are available in William B. Allen, Gordon Lloyd, and Margie Lloyd, eds., *The Essential Antifederalist* (1985); Morton Borden, ed., *The Antifederalist Papers* (1965); and Cecelia M. Kenyon, ed., *The Antifederalists* (1966). A recent study is Steven R. Boyd's *The Politics of Opposition: Antifederalists and the Acceptance of the Constitution* (1979).

The primary reference for the early years of the Federal Congress, as that body was called starting in 1789, is *The Debates and Proceedings in the Congress of the United States*, better known as the *Annals of Congress*, which began publication in 1834. This compilation is not a complete or systematic record, consisting mostly of speeches that private journalists had been reporting since the first session of Congress in 1789. Reporters, with the rest of the public, were not even permitted to attend sessions of the Senate until 1795, with the result that the record of the early Senate is much leaner than that of the House. The quality of reporting is uneven, and met at various times with praise and condemnation from the quoted members. One stenographer, according to Madison, was indolent and drank too much. It is, of course, impossible to assess the accuracy either of the reports or the reviews, for some of the protest may have come from politicians chagrined upon seeing their words in cold print. Granting the deficiencies, Madison's latest editors claim that the various contemporary sources reveal fundamental agree-

ment in the reporting of his speeches, perhaps because he spoke unusually slowly.[17]

Congress has never kept regular track of incoming convention applications, and there exists no official catalogue of the applications adopted by the states since 1789. No federal official has ever been designated to receive and keep track of applications separately, although the rules adopted by the Senate and House of Representatives specify that memorials to Congress (which state a grievance but do not ask for any remedy) and petitions (which request specific action) are to be delivered to the Secretary of the Senate and the Clerk of the House. Convention applications are usually deemed to fall under one or the other category of submission.[18]

This study has necessarily relied on several publications for application listings. The listings have been verified from original sources: usually the state statute reporter, but occasionally the official journals of the Senate and the House of Representatives, kept pursuant to the command in article I of the Constitution that "Each House shall keep a Journal of its Proceedings." The application totals for convention campaigns is more often than not inexact; even the question whether there are thirty-two valid applications for a convention to propose a balanced-budget amendment is disputed.[19]

Arriving at a consensus has been the watchword not only in Madison studies but also in reconstructing what article V's convention procedure meant to the founding generation—to the Philadelphia Convention delegates, the members of the ratifying conventions, and those contemporaries who, like Noah Webster and Tench Coxe, propagandized for the Constitution and left important writings. The central task of reconstruction was primarily one of recovering the meaning of words whose definitions had quietly changed, or unearthing the history behind a clause that illuminated its relationship to the amending process, rather than one of construing a provision in accordance with the precepts of one or another school of constitutional interpretation. The difference between the competing schools of thought, now and in various incarnations over the last two hundred years, has chiefly been the amount of emphasis placed on the constitutional text and its history vis-à-vis judicial decisions and social values. Article V is a provision that, unlike some others, can be sensibly and objectively interpreted in accordance with its original meaning because of its unique features: the wealth of

data from the founding era, the existence of broad agreement among the founders, and the sparseness of judicial precedent.[20]

The framers themselves denied that the "intent" or discernible purpose of the Philadelphia Convention was necessary or even significant; complete records, after all, were hidden until 1840. Madison in particular demurred, emphasizing instead the debates in the ratifying conventions; he considered the Philadelphia proceedings as, at most, "presumptive evidence of the general understanding at the time of the language used," and reportedly "did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question." The framers shared the traditional assumption, bred by their training in the common law, that the document would be construed mostly by reference to the intrinsic meaning of its words—what Hamilton called in *The Federalist* "the natural and obvious sense of its provisions." Failing that, the standard judicial process of case-by-case interpretation would be employed. This procedure allowed for construction of a word or phrase when, as the framers knew was inevitable, unforeseen situations arose.[21]

The meaning and history of the text, however, should not be minimized. Some scholars have pointed to early applications requesting a "general" convention as proof that only wide-ranging assemblies are contemplated by article V.[22] Yet "general" at the time primarily referred not to deliberative scope but to breadth of attendance. In April 1783, a member of Congress reported to his colleagues that the New England states were planning a convention with the intent of developing a uniform tax code for that region. The proposed convention, which never met, was criticized by various members as a dangerous precedent under the Articles of Confederation. "Mr. Madison & Mr. Hamilton disapproved of these partial conventions, not as absolute violations of the Confederacy, but as ultimately leading to them," Madison wrote in his notes, "the latter observing that he wished instead of them to see a general Convention take place."[23] A "general" convention was simply one inviting representatives from all the states; a "partial" convention included delegations from fewer than the total number. In the preamble to the Constitution, the framers declared the national scope of the enterprise: to "provide for the common defence" and "promote the general Welfare." A wide-ranging convention was "plenary" or "plen-

ipotentiary," signaling that the delegates had received full deliberative powers from their constituents.[24]

In this book, disagreements among the sources as well as agreements have been noted. The original spelling and punctuation have been retained; italicized words reflect the original unless otherwise indicated. There is still much about the Constitution's drafting and adoption that we do not know, and perhaps never will know. The convention portion of article V seems derived in important respects from the equivalent clause in Georgia's 1777 constitution, but as yet no evidence has turned up that explicitly links the two provisions. The journal of the 1777 convention is a two-page summary of the proceedings, with no material on the amending clause.[25]

The purpose of this essay is not to recommend or disparage any specific amendment proposal, but to heed Madison's admonition that in constitutional analysis "the danger of error must increase with the increasing oblivion of explanatory circumstances, and with the continual changes in the import of words and phrases." In 1974, the Special Constitutional Convention Study Committee of the American Bar Association, among its members Dean Albert Sacks of Harvard Law School, former Deputy Attorney General Warren Christopher, and federal judge Sarah T. Hughes, reported:

> We recognize that some believe that it is unfortunate to focus attention on this method of amendment and unwise to establish procedures which might facilitate the calling of a convention. The argument is that the establishment of procedures might make it easier for state legislatures to seek a national convention, and might even encourage them to do so. . . .
>
> If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

Of an expedient but dubious stratagem during a constitutional dispute in New York, Secretary of the Treasury Alexander Hamilton wrote to Senator Rufus King: "The precedent may suit us to day; but tomorrow we may rue its abuse."[26]

This study is the better for the encouragement and advice of those who assisted in providing the evidence and refining its conclusions—but

share no responsibility for the result—especially Charles Chehebar, Gary Waxbar, Owen Fiss, Linda Grant DePauw, Jack P. Greene, Gerald A. Greenberger, Dr. James Hutson, John P. Kaminski, H. Jefferson Powell, Walter F. Pratt, Jr., Richard A. Ryerson, Celeste Walker, and G. Edward White. Critical documents were furnished by the staffs of the Library of Congress Rare Book Room, the American Antiquarian Society, the Connecticut State Library Archives, the Indiana State Library, the Office of the Secretary of State of the Commonwealth of Massachusetts, the Rare Books and Manuscripts Division, New York Public Library, and the United States Supreme Court Bar Library. My editors at Oxford University Press, Valerie Aubry and Marion Osmun, were unfailingly gracious and helpful.

Washington, D. C. R. L. C.
November 1982

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PART I

History

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