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

MICHAEL FARRIS*

* J.D. 1976, Gonzaga University, LL.M. 2011, University of London, (Public International Law). Farris is the President, CEO, and General Counsel of Alliance Defending Freedom and Chancellor *Emeritus* at Patrick Henry College.

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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6. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Each issue will be developed in the following sequence:

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

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

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

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

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

I. DID THE CONVENTION DELEGATES EXCEED THEIR AUTHORITY?

A. The Call of the Convention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The States Begin the Official Process

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

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

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39. *Id.*

40. *Id.*

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

42. *Id.*

43. *Id.*

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

45. *Id.*

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

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

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

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

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47. *Id.*

48. *Id.*

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

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

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

52. *Id.*

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

54. *Id.* at 201.

55. *Id.* at 200–201.

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

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

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

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

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

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

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

62. *Id.*

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

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

2. Machinations in New York

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

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

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

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

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

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

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

68. *Id.*

69. *Id.*

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

71. *Id.* at 260.

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

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

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

3. Congress Responds to the Annapolis Convention Report

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

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

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

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

75. *Id.*

76. *Id.* at xxxvi–xxxix.

77. *Id*. at xl.

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

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

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

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

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

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

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

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

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

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 73.

85. *Id.*

86. *Id.* at 73–74.

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

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

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

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

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

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

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

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

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

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

4. The Six Remaining States Appoint Delegates

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

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

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

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

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

95. *Id.*

96. *Id.*

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

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

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

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

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

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99. *Id.*

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

101. *Id.* at 216.

102. *Id.*

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

104. *Id.*

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

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

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

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

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

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

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

108. *Id*. at 572–73.

109. *Id*. at 585–86.

110. *Id*. at 579–81.

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

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

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

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

B. Arguments about Delegates' Authority at the Constitutional Convention

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

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

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

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

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

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

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.* at 4.

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

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

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

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

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123. *Id.* at 20.

124. *Id.* at 34.

125. *Id.* at 43.

126. *Id.* at 41, 43.

127. *Id.* at 34, 43.

128. Virginia Convention Debates (June 10, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 811–813.

129. 1 FARRAND'S RECORDS, *supra* note 107, at 160–61.

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

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

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

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

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130. *Id.* at 177.

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

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

133. *Id.* at 242–45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Debates in the Confederation Congress

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

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

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

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

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

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

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

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

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

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164. *Id.* at 237–38.

165. *Id.* at 238–240.

166. *Id.* at 240.

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

168. *Id.* at 336.

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

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

D. Debates in the State Ratification Convention Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Who gave the delegates their instructions?

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

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

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

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

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

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

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

a. Anti-Federalist Views

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

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

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

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

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

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

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

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

183. *Id.* at 369.

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

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

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

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

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

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184. *Id.*

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

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

187. *Id*.

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

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

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

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

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

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

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

191. *Id.*

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

193. *Id.* at 79–82.

b. Federalist Views

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

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

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

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

195. *Id.*

196. *Id.* at 254.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

204. *Id.* at 817.

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

206. *See id.* at 674.

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

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

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

3. Was the Convention unlawful from the beginning?

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

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

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

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

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

211. *Id.*

212. *Id.* at 1156–57.

213. *Id.* at 1157.

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

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

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214. *Id.*

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

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

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

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

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

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

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

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

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

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

221. *Id.*

222. *Id.* at 704.

223. *Id.*

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

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

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

225. *Id.* at 138.

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

227. *Id.*

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

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

230. *Id.* at 625–26.

231. *Id.* at 628.

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

II. WAS THE CONSTITUTION PROPERLY RATIFIED?

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

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

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

A. The Source of Law for Ratification Authority

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

244. *Id.* at 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Debates in the Confederation Congress

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

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

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

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

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

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

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

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

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

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

330. *See id.* at 335.

331. *Id.* at 336.

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

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

334. *See id.*

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

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

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

D. Thirteen Legislatures Approve the New Process

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

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

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

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

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

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

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343. *Id.*

344. *Id.*

345. *Id.*

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

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

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

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

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

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

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

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

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

355. *Id.*

356. *Id.* at 161.

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

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

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

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

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

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

359. *Id.* at 164.

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

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

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

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

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

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

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

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

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

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

365. *Id.* at 133–34.

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

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

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

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

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

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

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

370. *Id.* at 704–07.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

380. *Id.*

381. *Id.*

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

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

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

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

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

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

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

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

386. *Id.*

387. *Id.* at 161.

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

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

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

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

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

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

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

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

393. *Id.*

394. *Id.* at 975–81.

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

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

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

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

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

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

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

398. Goebel, *supra* note 397, at 30.

399. *Id.*

400. *Id.*

401. Natelson, *supra* note 91, at 674–79.

402. *Id.* at 679.

403. *See id.* at 678.

While Natelson correctly analyzes the historical facts and the legal conclusions on the whole, I take issue with his use of the signing of the Constitution as the test for fidelity of these delegates. Signing was largely symbolic and was, at most, a personal pledge of support. This was at the end of a convention where every vote was made by states as states. The vote to approve the Constitution at the very end was counted by states, not by delegates. No delegate ever took official action as an individual. The Massachusetts delegates were either faithful or unfaithful to their commissions by casting dozens of votes in the process—especially the ultimate vote to approve the Constitution. As acknowledged by Natelson,[404] the charge is less credible against Hamilton because he never voted after Lansing and Yates left in July.[405] Hamilton's personal endorsement of the Constitution by signing it was not an act for the state of New York. Moreover, both the legislature of New York and the ratification convention in Massachusetts rejected the contention that the Convention had violated the directions given by the states.[406] Despite these relatively minor disputes with Natelson regarding these specific delegates, his article is singularly noteworthy for looking at the correct documents and reasoning to sound conclusions therefrom.

B. Answering Ackerman and Katyal

Professors Bruce Ackerman and Neal Katyal[407] stand nearly alone[408] among legal scholars for having undertaken a

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404. *See id.* at 678 n.414.

405. Natelson, however, questions whether Hamilton should have continued as a commissioner after the departure of his two New York colleagues. *Id.* at 722.

406. *See* Assembly Proceedings (Jan. 31 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 704; 16 DHRC, *supra* note 4, at 68.

407. Katyal was a third-year student at Yale Law School at the time of publication. He is now a professor at Georgetown University Law Center.

408. Professor Akhil Amar has responded twice to the arguments of Ackerman and Katyal. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter *Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988) [hereinafter *Philadelphia*]. As the titles of both articles suggest, his discussions of the legality of the adoption of the Constitution are made in service of his argument that there are paths to amend the Constitution that are outside of Article V. *See* Amar, *Consent*, *supra*, at 494–508; Amar, *Philadelphia*, *supra*, at 1072–76. Moreover, his defense of the legality of the Constitution is much more like an affirmative defense in a criminal case than a true de-

comprehensive review of the legality of the adoption of the Constitution.[409] An earlier article, not cited by Ackerman and Katyal, makes very similar arguments.[410] Ackerman and Katyal's premises and conclusions are concisely described in their fourth paragraph:

> Our main task, however, is to confront the problem raised by the *Federalists' flagrant illegalities*. Movements that *indulge in systematic contempt for the law* risk a violent backlash. Rather than establish a new and stable regime, *revolutionary acts of illegality* can catalyze an escalating cycle of incivility, violence, and civil war. How did the Federalists avoid this dismal cycle? More positively: How did the Founders manage to win acceptance of their claim to speak for the People at the same moment that *they were breaking the rules of the game*?[411]

This excerpt is typical of the highly charged language that pervades their work. The illegality of the adoption of the Constitution is not treated as a close question—the process of adopting

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fense. He essentially argues that while there is a facial inconsistency with Article XIII of the Articles of Confederation, the Constitution was lawfully adopted because the Articles were a treaty that had been breached by the states. Amar, *Consent*, *supra*, at 465–69. Thus, having been breached, the states were at liberty to write a new document that would otherwise be illegal. While we certainly find elements of international law parallels in the arguments of the Federalists, his concession that there is a facial violation is a much different defense than is argued here. His thesis that there is an extra-constitutional method of amending the Constitution takes the contention outside of anything that would amount to an originalist or textualist defense of the Constitution. It is a creative argument, but Ackerman and Katyal's critiques of it are powerful. *See* Ackerman & Kaytal, *supra* note 14, at 476–487. This article is the first comprehensive direct defense (as opposed to Amar's affirmative defense) of the legality of the Constitution.

409. *See* Ackerman & Katyal, *supra* note 14.

410. Kay, *supra* note 14. Kay bases his argument on the familiar and erroneous assertion that the Annapolis Convention "proposed that Congress call another convention to be held in Philadelphia." *Id.* at 63. He fails to cite or quote the actual language of the report from the Annapolis Convention which clearly addressed its recommendations to the state legislatures to call a convention. The convention's stated reasons for sending a copy to Congress was to demonstrate courtesy. He then asserts the common claim that Congress called the Convention and limited their authority to the revision of the Articles. *Id.* at 63–64. Kay embellishes on this claim by stating "the Congressional resolution calling the convention, as well as the instructions to a number of state delegations, restricted the convention's mission to 'revising the Articles . . . .'" *Id.* at 64. He fails to examine the actual language of any state's delegation, nor does he consider the argument made by Madison in *Federalist No. 40* that the actual call of the Convention came from the states.

411. *See* Ackerman & Katyal, *supra* note 14, at 476–77 (emphasis added).

the Constitution was "flagrant[ly]" illegal.[412] The Founders demonstrated "systematic contempt for the law."[413] They committed "revolutionary acts of illegality."[414] They were not merely "breaking the rules of the game"—Madison, Hamilton, and Washington were doing so with deliberate disdain.[415]

Ackerman and Katyal purport to paraphrase the Founders' justification for this unscrupulous maneuvering:

> Granted, we did not play by the old rules. But we did something just as good. We have beaten our opponents time after time in an arduous series of electoral struggles within a large number of familiar lawmaking institutions. True, our repeated victories don't add up to a formal constitutional amendment under the existing rules. But we never would have emerged victorious in election after election without the considered support of a mobilized majority of the American People. Moreover, the premises underlying the old rules for constitutional amendment are deeply defective, inconsistent with a better understanding of the nature of democratic popular rule. We therefore claim that our repeated legislative and electoral victories have already provided us with a legitimate *mandate from the People* to make new constitutional law. Forcing us to play by the old rules would only allow a minority to stifle the living voice of the People by manipulating legalisms that have lost their underlying functions.[416]

This paraphrase was unsupported by any citation to the actual words of the Federalists. Statements can be found from Madison and other Federalists that support the claim that they believed their actions were morally justified,[417] but nothing at all can be found to support the overall tone and thesis of this effort at historical ventriloquism. The Federalists defended both the legal and moral basis of their actions. They would at times argue these defenses in the alternative. But absolutely nothing can be found from the Framers that demonstrates that they believed their actions were clearly illegal and revolutionary and were nonetheless justified.

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412. *Id.* at 476.

413. *Id.*

414. *Id.*

415. *See id.* at 476–77.

416. *Id.* at 478.

417. *See, e.g.*, THE FEDERALIST NO. 40, at 252–54 (James Madison) (Clinton Rossiter ed., 1961).

Ackerman and Katyal allege "three legal obstacles" that purportedly demonstrate the illegality of the Founders' conduct:

- Problems with the Articles of Confederation
- Problems with the Convention
- Problems with State Constitutions[418]

The professors allege ten distinct violations under these three categories.[419] However, their "three legal obstacles" and ten specific allegations are not well-organized. A more logical organization of the professors' legal arguments would be:

- The process was illegal from beginning to end because Article XIII provided the exclusive method for amending the form of governance of the United States.
- The delegates went beyond the call of the convention containing their controlling instructions.
- The method of ratification chosen violated both Article XIII and several state constitutions.[420]

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418. Ackerman & Katyal, *supra* note 14, at 475–487.

419. *See id*. at 478–486. The violations are as follows: (1) the Constitution invited secession; (2) the Constitutional Convention ignored the role the Articles "expressly assigned to the Continental Congress" for approving subsequent amendments; (3) the Founders cut the state legislatures out of the ratifying process; (4) the entire process was done "in the face of the Articles' express claim to specify the exclusive means for its revision;" (5) the Convention was a secessionist body; (6) Delaware's delegation "recognized that it was acting in contempt of its commission;" (7) the delegates had been "charged" by the "Continental Congress" to meet "for the sole and express purpose of revising the Articles" and the delegates went "beyond their legal authority when they ripped up the Articles and proposed an entirely new text;" (8) the delegations from New York, Connecticut, and Massachusetts clearly violated their commissions; (9) all states that gave instructions as to the mode of ratification specified approval by Congress followed by approval of the state legislatures—which was not followed; and (10) the Supremacy Clause of the Constitution created an implied conflict with and de facto change in several state constitutional amendments. Thus, the process for obtaining amendments to state constitutions was applicable and was not followed. *Id.*

420. One of their arguments does not fit this outline but can be easily dismissed. The contention that the Convention was secessionist is nothing more than a political criticism and does not rise to the level of a serious legal argument. Moreover, it is a stretch to contend that it is a secessionist act to invite all states to a convention to discuss possible changes to the form of government. The fact that one state chose not to attend does not alter the nature of the Convention. If Rhode Island had been excluded by the others from the drafting convention it would plausibly raise the specter of secessionism. Describing Rhode Island's refusal to attend the Convention as an act of secession by the other twelve states is facially without merit.

1. The Contention that the Whole Process Was Illegal under the Articles of Confederation May Be Summarily Dismissed

Although the professors' argument that the entire process was done "in the face of the Articles' express claim to specify the *exclusive* means for its revision"[421] made the list of their ten specific illegalities, a reader must hunt diligently through the remainder of their article for any supporting argumentation. Random statements in support of this argument are sprinkled throughout the article, but if this theory is to be considered seriously, it demands robust development and careful consideration rather than scattered and disjointed assertions.[422]

The longest single presentation of this theory is a mere two sentences that refer to the Annapolis Convention:

> The commissioners had taken upon themselves the right to propose a fundamental change in constitutional law. While Article XIII had confided exclusive authority in Congress to propose amendments, Annapolis was making an end run around the existing institution by calling for a second body, the convention, unknown to the Confederacy's higher lawmaking system.[423]

Ackerman and Katyal critique their rival Akhil Amar for making claims unsupported by evidence from the contemporaneous debates.[424] Amar's theory (alleging a breach of treaty obligations) should be rejected, they say, because there wasn't "any evidence that Americans took Amar's argument seriously."[425] However, in their own article, despite their self-described exhaustive research,[426] they cite very slender evidence that anyone at the time

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421. Ackerman & Katyal, *supra* note 14, at 480.

422. If this theory was advanced in this manner in an appellate brief, it is clear that it would be dismissed under the familiar standard for undeveloped claims. *See* Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 59 F.3d 284, 293–94 (1st Cir. 1995) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."); United States v. Hayter Oil Co., 51 F.3d 1265, 1269 (6th Cir. 1995) (finding that defendants waived issue by making conclusory statements and failing to develop their theory).

423. Ackerman & Katyal, *supra* note 14, at 497.

424. *See, e.g.*, *id.* at 488 n.35.

425. *Id.* at 539–540.

426. *Id.* at 540 ("[W]e have amassed an enormous body of evidence expressing legalistic objections to the Federalists' unconventional activities.").

even raised the argument that the entire Convention was illegal from the beginning. And they offer no evidence at all that Americans at the time took the argument seriously.

The professors' meager suggestion of contemporary support comes from a statement on the floor of the Massachusetts legislature by Rufus King:

> The Confederation was the act of the people. No part could be altered but by consent of Congress and confirmation of the several Legislatures. Congress therefore ought to make the examination first, because, if it was done by a convention, no Legislature could have a right to confirm it . . . . Besides, if Congress should not agree upon a report of a convention, the most fatal consequences might follow. Congress therefore were the proper body to propose alterations . . . .[427]

But King stopped well short of the argument advanced by Ackerman and Katyal. He did not say that it was illegal to call a convention of states to draft amendments. Rather he began with the premise that nothing could be finally altered except by the consent of Congress and all of the states. In light of the legal requirement for ratification, King makes a political argument that it is wiser to have Congress make the proposed alterations in the first place.

This explanation of King's argument makes much more sense in light of the fact that he was the co-author the successful motion in Congress to endorse the Constitutional Convention on February 21st, 1787.[428] The professors acknowledge King's role in the congressional resolution[429] but shrug it off without explanation—as if King had somehow been swept into the vortex of Madison and Hamilton's grand revolutionary conspiracy. If King believed it was illegal for a convention to be called, he was a hypocrite of the first order by making the motion. But a wise politician can change his views on the practicality of a particular approach without duplicity. The better reading of King's words and actions leads to the conclusion that he believed it was illegal to adopt changes without approval of Congress and the states.

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427. *Id.* at 501 (quoting *Proceedings of Government, Boston, October 12*, WORCESTER MAGAZINE, 3rd week of Oct. 1786, at 353).

428. Ackerman & Kaytal, *supra* note 14, at 503.

429. *See id.* at 501.

Moreover, in the footnote citing the original source of King's speech in the Massachusetts legislature, the professors quote Nathan Dane on this topic.[430] Dane, also speaking in the state legislature, said:

> [A] question arises as to the best mode of obtaining these alterations, whether by the means of a convention, or by the constitutional mode pointed out in the 13th article of the confederation. In favour of a convention, it is said, that the States will probably place more confidence in their doings, and that the alterations there may be better adjusted, than in Congress.[431]

Far from arguing that Article XIII was the exclusive path for changes, Dane clearly posits a convention as a legitimate alternative. The criteria for choosing one or the other, Dane suggests, is simply political expediency.

I have found two contemporary critics of the Constitution who did in fact make the argument advanced by Ackerman and Katyal. In the New York ratification convention, Abraham Yates unleashed a scattershot attack on the legality of the entire process. He argued that on February 19th, 1787, the New York legislature violated the state constitution when it instructed its delegates in Congress to move an act recommending the convention.[432] Moreover, Congress violated Article XIII when it passed its resolution of approval on February 21st.[433] Congress again violated Article XIII, on September 28th, when it sent the Constitution to the state legislatures.[434] And the New York legislature violated its Constitution when it approved the calling of the ratification convention in February 1788.[435] The best reading of Yates is that he was an ardent Anti-Federalist and that he was willing to make shotgun attacks that were a mix of political and legal rhetoric designed to serve his political viewpoint. Treating Yates as a legal purist—or even as someone who merits consideration as a serious legal critic—overstates both his arguments and his importance.

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430. *See id.* at 501 n.72.

431. *Id*. (quoting Nathan Dane, Speech to Massachusetts House of Representatives, *in Proceedings of Government*, NEWPORT MERCURY, Nov. 17, 1786).

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

433. *Id.*

434. *Id.* at 1157.

435. *Id*.

Moreover, the standard that Ackerman and Katyal raise against Amar is truly appropriate: did Americans at the time pay any serious attention to these arguments? Yates' position was never confirmed by the vote of any convention or legislative body. Not Congress, not the Constitutional Convention, not any ratification convention, and not any state legislature. New York, Massachusetts, Rhode Island, and North Carolina all had problems with the adoption of the Constitution at one time or another. Not even in any of these states was there ever a successful resolution that condemned the very calling of a Convention from its inception.

The void-from-the-beginning position did have one other contemporary source of support not mentioned by the professors. The Town Meeting of Great Barrington, Massachusetts approved the following resolution as an instruction to their delegate to the state ratification convention:

> First as the Constitution of this Commonwealth Invests the Legslature [sic] with no such Power as sending Delligates [sic] To a Convention for the purpose of framing a New System of Fedderal [sic] Government—we conceive that the Constitution now offered us is Destituce [sic] of any Constituenal [sic] authority either states or fodderal [sic].[436]

The small town in Massachusetts, relying primarily on its state constitution, took the position that the legislature had no power to appoint delegates to the Constitutional Convention. The additional contention that the proposed Constitution was "Destituce" of any federal "Constituenal" authority was summarily made. This paragraph represents the pinnacle of contemporary acceptance of the Ackerman/Katyal theory. Such scant evidence fails to meet their own standard requiring evidence that "Americans took [their] argument seriously."[437]

There was nearly universal acceptance of the idea that a Convention was a proper alternative to Congress for drafting proposed changes, as Dane's state legislative speech demonstrates. Moreover, no one believed that the Convention had any power to make law. They merely had the power to make a recommendation. As James Wilson said:

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436. Draft Instructions (Nov. 26, 1787), *reprinted in* 5 DHRC, *supra* note 4, at 959.
437. Ackerman & Katyal, *supra* note 14, at 539.

> I think the late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen.[438]

Second, the overwhelming understanding was that the states—which were clearly in possession of ultimate political power—had the power to convene a convention if they wished. In fact, the clear supremacy of the states was the very reason a new Constitution was needed. The States created the Union. The States created the Articles of Confederation. The States appointed the members of Congress. The state legislatures could and did issue binding directions to their members in Congress. Indeed, the February 21st, 1787, resolution by Congress approving the Convention was the result of a process started by the New York congressional delegation who were acting in obedience to directions received from their legislature.[439]

The States called the Convention. The States appointed delegates to the convention and gave them instructions on the scope of their authority and quorum rules for casting the single vote of their state. Natelson records that from "1774 until 1787, there were at least a dozen inter-colonial or interstate conventions."[440] Convening conventions of the states to recommend solutions for problems was common political practice. The argument that it was a violation of Article XIII for the states to convene a convention to propose changes in the Constitution was made by a scant few at the time and accepted only by the single town of Great Barrington. Ackerman and Katyal's contention that the convention was *void ab initio* cannot bear up under focused scrutiny.

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438. Convention Debates, A.M. (Dec. 4, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 483.

439. *See* 19 DHRC, *supra* note 4, at xl; 32 JOURNALS OF CONGRESS, *supra* note 70, at 72.

440. Robert Natelson, *James Madison and the Constitution's "Convention for Proposing Amendments"*, 45 AKRON L. REV. 431, 434 (2012).

2. *Conspiracy Theories and Character Attacks: Exploring the Legality of the Delegates' Conduct*

Ackerman and Katyal paint a picture of the Federalists as "dangerous revolutionaries"[441] who "lacked the legal authority . . . to make such an end run"[442] around the existing legal requirements. Yet, here again, the professors make a scattershot attack, failing to ever engage in a focused analysis of the questions of: (a) who called the convention; and (b) what were the instructions given to the delegates. Some of their analytical difficulty seems to arise from the professors' failure to make any distinction between informal measures that suggest, support, or endorse a convention and formal "calls" for a convention.[443]

a. The Call

The professors claim that in "calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet 'for the *sole and express* purpose of revising the Articles.'"[444] Later, they say that the Continental Congress "join[ed] the call for the convention."[445] In other places, they say that the "commercial commissioners" at the Annapolis Convention called the Convention.[446] Then later, they describe the Annapolis Convention with a bit more nuance: "[T]he commissioners did not take decisive action unilaterally. They merely called upon Congress and the thirteen state legislatures to issue such calls."[447] The report language from Annapolis clearly contradicts even this version of their assertion. The Annapolis delegates asked their state legislatures to appoint commissioners with broader powers and to use their good offices to get other states to do the same.[448] They sent copies of

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441. Ackerman & Katyal, *supra* note 14, at 495.

442. *Id.* at 487.

443. *See, e.g.*, *id.* at 486 (describing the Federalists' general plan for ratification as the "Federalists' call for ratifying conventions"); *id.* at 498 (describing Hamilton's recommendation at Annapolis as a "dramatic call").

444. *Id. a*t 481; *see also id.* at 501 ("[King and Dane] would be the authors of the congressional resolution calling upon the states to send delegates to Philadelphia.").

445. *Id.* at 483.

446. *Id.* at 496.

447. *Id.* at 497.

448. 1 ELLIOT'S DEBATES, *supra* note 23, at 118.

their report both to Congress and to the Governors "from motives of respect."[449] By Ackerman and Katyal's logic, it would be equally valid to suggest that the Annapolis delegates asked the thirteen governors to call a convention.

The professors review the historical sequence leading up to the Convention without ever trying to conclusively answer the question: Who formally called the convention? In their sequential narrative, Ackerman and Katyal begin with efforts to amend the Articles in 1781, move on to the Mount Vernon Conference between Virginia and Maryland, then to the Annapolis Convention, then to a discussion of the impact of Shay's Rebellion, onto the February, 1787 resolution by Congress, a protest from Rhode Island, and finally to the Constitutional Convention itself.[450]

There is a significant gap in this sequence. Ackerman and Katyal do not give any consideration to the actions of the legislatures in actually calling for the Philadelphia Convention. This failure is no mere oversight, since *Federalist No. 40* expressly contended that the delegates' authority did not come from either the Annapolis Convention or the resolution from the Confederation Congress—but from the several states.[451] Moreover, the professors themselves noted that the Annapolis Convention had "called upon" both Congress and the thirteen state legislatures to call the Convention.[452] They duly discuss the role of Congress but inexplicably fail to discuss the role of the state legislatures. Avoiding this inconvenient set of facts relieves them of the difficulty of explaining how Congress could issue the official call for a convention when in fact, before Congress acted, six states had already named the time and place, chosen delegates, set the agenda, and had issued instructions to control their delegates' actions in Philadelphia.

While this is the professors' principal failure in describing the sequence of events, their reference to "Rhode Island's Protest" is

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449. *Id.*

450. Ackerman & Katyal, *supra* note 14, at 489–514.

451. *See* THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961) ("[B]y the assent . . . of the legislatures of the several states . . . a convention of delegates, who shall have been appointed by the several states . . . ."); *see also id.* at 249 ("The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation.").

452. Ackerman & Katyal, *supra* note 14, at 497.

simply odd. It is the only state action that is reviewed in this sequence of events. And this discussion is placed prior to the discussion of the Convention itself. Rhode Island's "protest" was issued September 15th, 1787, just two days before the conclusion of the Convention.[453] Moreover, Ackerman and Katyal fail to note that Rhode Island's protest was itself protested by the towns of Newport and Providence.[454] Yet, in their discussion of Rhode Island's protest, the professors give yet another explanation for the call of the Convention. They note that "the Philadelphia Convention was a creature of state legislatures."[455] However, three pages later Ackerman and Katyal return to their claim that Congress called the convention and gave the delegates their instructions—a claim repeated at least twice thereafter.[456]

The best explanation for this shifting cloud of confusion is that the professors simply did not think through the difference between a formal call and various informal suggestions, endorsements, and encouragements. The full historical record and documents give us the correct answer: Virginia called the Convention and this formal call was joined by eleven other states.

b. The Delegates' Authority

Ackerman and Katyal continue their inconsistent analysis with respect to the source of the delegates' instructions and authority. At times they argue that "Congress had charged the delegates" to only amend the Articles.[457] They favorably recite Anti-Federalist claims that the federalist proposals "were simply beyond the convention's authority."[458] And yet, they be-

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453. Nearly every mention of Rhode Island in the debates of the Philadelphia Convention and the subsequent ratification conventions was pejorative in nature. *See, e.g.*, The Virginia Convention Debates (Jun. 25, 1788), *reprinted in* 10 DHRC, *supra* note 4, at 1515, 1516 (Benjamin Harrison V stated that "Rhode-Island is not worthy of the attention of this House—She is of no weight or importance to influence any general subject of consequence." Harrison was a signer of the Declaration of Independence and former Governor of Virginia).

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

455. Ackerman & Katyal, *supra* note 14, at 505.

456. *Id.* at 508–509, 514.

457. *Id.* at 481.

458. *Id.* at 508.

grudgingly admit, often in footnotes, that the instructions from the states actually mattered.[459] The following passage is crucial:

> In calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet "for the *sole and express* purpose of revising the Articles." Given this explicit language, did the delegates go beyond their legal authority when they ripped the Articles up and proposed an entirely new text?
>
> This charge was raised repeatedly—and justifiably in the cases of Massachussetts [sic], New York, and Connecticut, where legislatures had expressly incorporated Congress's restrictive language in their own instructions to delegates. Other state delegations, however, came with a broader mandate, allowing them to make any constitutional proposal they thought appropriate. Thus, while some key delegates may well have acted beyond their commission, this was not true of all.[460]

While the strong inference is raised that all delegates were bound by the "explicit language" from Congress, Ackerman and Katyal make the curious claim that the delegates from Massachusetts, New York, and Connecticut were justifiably accused of violating their instructions *from their own state legislatures.* The professors do not explain how New York's delegation could be accused of violating their instructions by voting for the Constitution since New York cast no vote one way or the other. Yet, they inexplicably contend that New York's delegates are "justifiably" charged of going "beyond their commission" when they "ripped the Articles up and proposed an entirely new text."[461]

As to Connecticut, the professors fail to quote or consider the actual legislative language appointing the delegates. As we have already seen, while the Connecticut resolution refers to the congressional resolution, its delegates were ultimately given much broader authority.[462] Connecticut more properly belongs in the category of states essentially following the Virginia model, granting broad authority to their

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459. *See, e.g.*, *id.* at 482 n.18, 483 n.20.

460. *Id.* at 481–83 (footnotes omitted).

461. *Id.* at 482–83.

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

delegates. The charge against the Massachusetts delegation is facially more plausible. However, there are two significant factors, previously reviewed, that place this claim in a different light.[463] The professors fail to mention that the Massachusetts legislature debated the question of whether the Convention had "assum[ed] powers not delegated to them by their commissions."[464] Despite this contention, that legislature agreed to call the state ratification convention by a vote of 129 to 32.[465] Moreover, the Massachusetts convention, by a vote of "90 & od to 50 & od," expressly rejected the argument that their delegates had violated their instructions.[466] Moreover, James Madison strongly defended the legality of the actions of the delegates from those states that adopted the congressional language in their instructions.[467] In their review of *Federalist No. 40*, the professors summarily pronounce Madison's legal analysis of the instructions as "strained" without the benefit of further discussion.[468] Thus, we are left with the choice of accepting the conclusions of the Massachusetts legislature, ratifying convention, and James Madison or the undeveloped assertions of two leading modern scholars in pursuit of a grand theory that the Federalists were unconventional revolutionaries.

But we should not lose sight of the fact that Ackerman and Katyal make an important admission regarding the other nine states. As to the charge that the delegates from these states violated their commissions, the professors pronounce judgment: "this was not true."[469] Notwithstanding this begrudging exoneration of the actions of delegates from nine states, the balance of the article proceeds on the basis of a cloud of assumed impropriety by all delegates. "Illegality was a leitmotif at the convention from its

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463. *See supra* notes 229–33 and accompanying text.

464. *Speech of Dr. Kilham*, MASS. CENTINEL, Oct. 27, 1787, *in* 4 DHRC, *supra* note 4, at 135.

465. MASS. CENTINEL (Oct. 27, 1787) *reprinted in* 4 DHRC, *supra* note 4, at 135, 138.

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

467. *See* THE FEDERALIST NO. 40, at 248–55 (James Madison) (Clinton Rossiter ed., 1961).

468. Ackerman & Katyal, *supra* note 14, at 544.

469. *Id.* at 483.

first days to its last."[470] Musical imagery is no substitute for actual evidence nor does it resolve the professors' numerous internal inconsistencies on this issue. We have previously reviewed the full historical record on this subject. The claim that recognized and deliberate illegality was the overriding theme of the Convention is without merit.

c. The Delaware Claim

The professors make the particular claim that Delaware's delegation "recognized that it was acting in contempt of its commission."[471] This assertion is supported by a footnote with a variety of citations—not one of which supports the claim that the Delaware delegates recognized that they were violating their commissions.[472] The first citation is nothing more than Merrill Jensen's reproduction of the commission by the Delaware legislature.[473] Ackerman and Katyal then say that the "Delaware problem was broadly recognized by the delegates to Philadelphia."[474] For this assertion, they cite the minutes of Convention when the Delaware credentials were first read.[475] This was a mere notation that Delaware's delegates had been directed by their legislature to not support a form of voting in Congress that failed to recognize the equality of states. They offer no explanation of the specific actions taken by the Delaware delegates that were in violation of their commissions. The professors do not quote a single statement by any source from Delaware. Such a citation should be the bare minimum when asserting that the Delaware delegates "recognized" their "contempt" for their instructions. The final citation in this footnote is a comment by Luther Martin, an Anti-Federalist who claimed in his own Maryland ratifying convention that Delaware's delegates had violated their instructions.[476] Not one piece of evidence is offered which demonstrates that the Delaware delegates themselves knew or believed they were violating their instructions.

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470. *Id.* at 506.
471. *Id.* at 481.
472. *See id.* at 481 n.16.
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*

The preservation of the equality of the states was indeed a major topic at the Constitutional Convention. Delaware's delegates supported the Great Compromise which created our bicameral system with the House based on equality of population and the Senate based on the equality of States.[477] This compromise was consistent with the tenor of Delaware's instructions to preserve the equality of the states in Congress. The opinion of a single Anti-Federalist from Maryland does not prove Ackerman and Katyal's assertion that Delaware's delegates knowingly violated their instructions. And the ultimate proof of the delegates' fidelity is found in the fact that Delaware was the first state to ratify the Constitution.[478] Its vote was unanimous.[479]

3. The Legality of the Ratification Process

a. Article XIII

Ackerman and Katyal's principal attack on the legality of the adoption of the Constitution rests on the alleged improprieties of the ratification process. This is logical given that, at least occasionally, they admit that the vast majority of delegates were faithful to their instructions. Thus, they focus the majority of their article on the more complex and plausible issue that the ratification process was improper.

The professors make a straightforward legal argument.[480] Article XIII required all amendments to be first proposed by Congress and then ratified by all thirteen state legislatures. The new Constitution itself was not approved by Congress, nor by the state legislatures—thus the ratification process was illegal.

Ackerman and Katyal make three fundamental errors in their ratification argument. First, they fail to identify the correct source for the rule that ratification was to proceed first to Congress and then to the state legislatures. Second, they fail to consider the legal implications arising from the "Ratification and Transition" Resolution of the Philadelphia Convention.[481]

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477. *See* 1 FARRAND'S RECORDS, *supra* note 107, at 664.

478. 3 DHRC, *supra* note 4, at 41.

479. *Id.*

480. Kay's arguments on this point are essentially parallel to those of Ackerman and Katyal. *See* Kay, *supra* note 14, at 67–70.

481. Kay does reference this second act of the Convention in his arguments on ratification. However, he inaccurately classifies this act as a letter. *See id.* at 68. Kay

Third, they fail to acknowledge that the new process itself was, in fact, approved by Congress unanimously and then by all thirteen state legislatures.

It is only by ignoring the full documentary and historical record that Ackerman and Katyal so easily reach their conclusion that the change in the ratification process was unsanctioned. But the plain facts are that the states set the expectation for the ratification process in their appointments of delegates, and the states were free to lawfully change this process provided that Congress and all thirteen legislatures agreed. And this is what actually happened.[482]

The professors make much ado about the political and moral arguments raised by Madison to justify for the new process. From such statements by Madison, they contend that he argued that the end of obtaining the Constitution was so important that it justified illegal and revolutionary means to achieve this end.[483] Two things are abundantly clear from the historical record about these contentions. First, the supporters of the Constitution genuinely believed that a government based on the consent of the governed was morally superior to a government assented to only by elected legislators. All political legitimacy rested on this standard. Second, it is beyond legitimate debate that the Founders would have proceeded with the new process and entered into the government under the new Constitution even if one or more state legislatures refused to endorse the new process for ratification. The Framers clearly believed that the nation was on the verge of collapse and that moral and political legitimacy, based on the direct consent of the governed, was more important than legalistic correctness.[484] However, proof that the Founders were willing, if it had become necessary, to take such steps is not proof that they acted illegally. We judge the legality of their

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gives no consideration to the legal effects of the approval of the process set forth in these resolutions by both the Confederation Congress and all thirteen state legislatures.

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

483. Ackerman & Katyal, *supra* note 14, at 488.

484. *See* THE FEDERALIST NO. 40, at 252–55 (James Madison) (Clinton Rossiter ed., 1961).

actual actions, not what they probably (or even certainly) would have done if the legally proper method failed.

Thus, Ackerman and Katyal's recitation of the Federalists' moral arguments and appeals to popular sovereignty are historically interesting and demonstrate that our country came very close to making a quasi-revolutionary decision in the ratification process. But, in the end they found a path that was not revolutionary. They asked Congress and all thirteen state legislatures to approve the new ratification process and they did. Thus, there is no need for either an apology or a moral justification from the Framers nor forgiveness from their political descendants. Congress and all thirteen legislatures gave legal sanction to the new process.

b. State Constitutions

Ackerman and Katyal make a second argument as to the illegality of the ratification process. They contend that several state constitutions contained a required process for amendments thereto.[485] And since the Supremacy Clause in Article VI represented a *de facto* amendment to these state constitutions, these states were required to follow that process first.[486] Each state constitution would have to be amended to authorize the legislature to call a ratification convention for a Constitution that proclaimed itself to be supreme over the states in matters delegated to the new central government.[487]

This argument borders on frivolousness, ignoring, as it does, the text of Article XIII. The first sentence of that Article contained a supremacy clause: "Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them."[488] Nothing in Article VI of the Constitution says anything materially different.[489] The Constitution and all laws made in furtherance of the Constitution are supreme over inconsistent state laws and state constitutions. The provisions of the Articles of Confederation and the Constitution on the ques-

485. Ackerman & Katyal, *supra* note 14, at 484.
486. *See id.*
487. *See id.* at 484–87.
488. ARTICLES OF CONFEDERATION OF 1781, art. XIII.
489. *See* U.S. CONST. art. VI, cl. 1.

tion of supremacy are functionally identical. Moreover, if the state constitutions of these select states required the use of the state amending process to adopt a supremacy clause, then that requirement was equally applicable to the adoption of the Articles of Confederation. No state did this, of course, which underscores the absurdity of this argument.

Although Ackerman and Katyal never mention it, this argument was made and answered during the ratification debates. The Republican Federalist argued that the Massachusetts constitution would be effectively amended by the new federal constitution.[490] Accordingly, prior to ratification, permission would have to be obtained by first following the provisions of the Massachusetts state constitution.[491] This suggestion was never given serious consideration in either the Massachusetts legislature or its ratification convention.

This theory was also argued by the town of Great Barrington, Massachusetts in proposed instructions to their original delegate to the state ratification convention, William Whiting.[492] He was one of the Common Pleas judges from Great Barrington, Massachusetts who was convicted of sedition for his role in Shay's Rebellion.[493] A Federalist writer answered such arguments by pointing out that, if true, they would equally demonstrate that the Articles of Confederation had been illegally adopted:

> [I]f we put the credentials of our rulers in 1781 to the test; if we dare to try the extent of their authority by the criterion of *first principles*; if in our researches after truth on this point we follow *these* whithersoever they will guide us, may it not be safely and fairly asserted that the States of South Carolina Virginia, New Jersey, Connecticut, Rhode-Island and New Hampshire even from the date of Independence to that of the confederation to which we are objecting, never invested their respective Legislatures with sufficient powers permanently to form and ratify such a compact.[494]

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490. *The Republican Federalist III*, MASS. CENTINEL, Jan. 9, 1787, *reprinted in* 5 DHRC, *supra* note 4, at 661–65.

491. *See id.*

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

493. *See id.* at 958.

494. Letter from John Brown Cutting to William Short London (Jan. 9, 1788), *reprinted in* 14 DHRC, *supra* note 4, at 493–94.

As Ackerman and Katyal suggest, we must ask if there is evidence that there was broad agreement as to the validity of the argument among Americans at the time. The answer is clearly no. The professors cite no contemporary evidence in support of their interpretation of the interplay between state constitutions and Article VI's Supremacy Clause. And the supporting evidence this article has discovered and cited above hardly rises to the level of general contemporary agreement.

Moreover, we cannot escape the parallel between the supremacy clause in Article XIII of the Articles of Confederation and the one in Article VI of the Constitution. No serious contention was ever made that state constitutions had to be revised before either of these provisions should be adopted. Ackerman and Katyal's argument in this regard is much like the contention by the plaintiffs in *Leser v. Garnett*.[495] There, the plaintiffs sought to strike the names of women voters from the list of eligible voters on the ground that the 19th Amendment was improperly adopted.[496] One of their arguments was that the state legislatures were without power to approve a constitutional amendment allowing women to vote if the state constitution prohibited such voting.[497] The plaintiffs contended that legislators who voted for the 19th Amendment in states where suffrage was limited to males "ignored their official oaths [and] violated the express provisions" of their state constitutions.[498] The Court quickly and unanimously rejected this contention.[499] State constitutions do not have to be first amended to allow the legislature to vote to ratify amendments that impliedly contravene provisions thereof.

4. The Professors' Real Agenda

The reason that Ackerman and Katyal advance their theory that the Constitution was adopted by a revolutionary and illegal process is revealed in their article's final section. They contend that such revolutionary actions—changes in the governing structure without adherence to the proper processes—are appropriate whenever the need is sufficiently great to justify ille-

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495. 258 U.S. 130 (1922).
496. *Id.* at 135.
497. Brief for Petitioner at 100, Leser v. Garnett, 258 U.S. 130 (1922) (No. 553).
498. *Id.* at 110.
499. *See Leser*, 258 U.S. at 137.

gal means.[500] They contend that the constitutional revolutions of Reconstruction and those of the era of judicial activism are just as valid as the Constitution itself:

> In justifying their end run around state-centered ratification rules, nineteenth-century Republicans and twentieth-century Democrats not only resembled eighteenth-century Federalists in asserting more nationalistic conceptions of We the People than their opponents. They also sought to give new meaning to the idea of popular sovereignty by making it far more inclusionary than anything contemplated by the eighteenth century.[501]

They contend that there has been a tacit approval of all of these revolutionary changes by the votes of the people in subsequent national elections.[502] However, this attempt at equivalency fails on at least two levels. First, the Constitution was approved by ratification conventions directly elected by the people.[503] These elections provide the moral justification for the claim that the Constitution was adopted by the consent of the governed. Moreover, no state was bound by the new Constitution until the people of that state actually consented. The actual consent of the governed was obtained.

The judicial revolution praised by Ackerman and Katyal has no such parallel reflecting the consent of the governed. In fact, just the opposite is true. The direct votes of the people are often overturned by judicial rulings as was the case in *Lucas v. Forty-Fourth General Assembly of Colorado*.[504] Judges cannot consent for the people. Subsequent elections for Congress or the White House and the passage of time do not constitute the consent of the governed for judicial revisionist rulings. Thomas Paine, who understood a few things about revolutions and moral consent said:

> All power exercised over a nation must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed

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500. *See* Ackerman & Katyal, *supra* note 14, at 568–73.

501. *Id.* at 570–71.

502. *See id.* at 571–72.

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

504. 377 U.S. 713 (1964).

> power is usurpation. Time does not alter the nature and quality of either.[505]

The parallel fails. First, the Constitution was lawfully adopted. Second, the Constitution was approved by the direct vote of the people before anyone was obligated by it. Nothing in this history provides a parallel to establish an aura of legal or moral legitimacy for judges who wish to exercise the self-created prerogative to regularly rewrite the Constitution starting the first Monday of every October.

IV. CONCLUSION

When we raise our hands to swear allegiance to the Constitution and promise to defend it against all enemies foreign or domestic, we can do so with a clean conscience. The Constitutional Convention was called by the states. The delegates obeyed the instructions from their respective legislatures as to the scope of their authority. The new method for ratification was a separate act of the Constitutional Convention that was approved by a unanimous Congress and all thirteen legislatures. The consent of the governed was obtained by having special elections for delegates to every state ratifying convention. No state was bound to obey the Constitution until its people gave their consent. Moral legitimacy and legal propriety were in competition at times. But in the end, the Framers found a way to satisfy both interests.

The Constitution of the United States was validly and legally adopted.

505. THOMAS PAINE, THE RIGHTS OF MAN, *reprinted in* 2 THE WRITINGS OF THOMAS PAINE, at 265, 428 (Moncure Daniel Conway ed., 1894).