



ARTICLES

May “We the People” Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution

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INTRODUCTION

In 1996 and 1998, voters in ten states attempted an extraordinary assertion of political will, an effort unprecedented in the second half of the twentieth century: they adopted popular initiatives instructing their congressional delegations to favor an amendment to the U.S. Constitution. Specifically, the initiatives instructed members of Congress to support a constitutional amendment that would limit the length of congressional terms.¹

The initiatives also took steps to inform the electorate as to which legislators followed their instructions. The initiatives required that the notation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be placed on election ballots next to the names of members of Congress who had chosen not to vote according to the detailed instructions stipulated in the initia-

¹ In November 1996 voters in nine states (Alaska, Arkansas, Colorado, Idaho, Maine, Missouri, Nebraska, Nevada, and South Dakota) approved "instruct-and-inform" measures that instructed their members of Congress and state legislators to support a congressional term limits amendment of twelve years in the Senate and six years in the House of Representatives. In June 1998 voters in California approved a similar instruct-and-inform law by popular initiative. The approval rates in the various states were as follows. Alaska: 54% for, 46% against. See Bruce Melzer & Rosemary Shinohara, *Alaskan Voters Urge Term Limits For Congress*, SACRAMENTO BEE, Nov. 7, 1996, at A10. Arkansas: 61% for, 39% against. See *Bryant Appeals to High Court on Term Limits*, COMMERCIAL APPEAL, Dec. 7, 1996, at B2. California: 53% for, 47% against. See Jim Specht, *Despite Main Proponent of Prop 225 Warning Against It, Voters Approve Measure*, GANNETT NEWS SERVICE, June 4, 1998, available in 1998 WL 5628434 (describing result as "pretty impressive," given that primary sponsoring organization had thrown in the towel after Arkansas Supreme Court declared that state's measure unconstitutional). Colorado: 54% for, 46% against. See Jonathan Ferry, *Term Limits Election Results* (last modified Feb. 21, 1998) <<http://www.teleport.com/~prf/d/election96.shtml>> (on file with author). Idaho: 56% for, 44% against. See Thomas Clouse, *State Voters Pick Plan for Congressional Term Limits*, IDAHO STATESMAN, Nov. 6, 1996, at 6A. Maine: 59% for, 41% against. See *Rights and Limits*, BANGOR (Maine) DAILY NEWS, Jan. 11, 1997, available in 1997 WL 4755920. Missouri: 58% for, 42% against. See Tom Jackman, *Lawsuit Opposes Labeling Term Limit Foes*, KAN. CITY STAR, Dec. 12, 1996, at C4. Nebraska: 58% for, 42% against. See Paul Hammel, *Term Limits Is Only Ballot Issue to Win*, OMAHA WORLD-HERALD, Nov. 6, 1996, at 2N. Nevada: 53% for, 47% against. See Sean Whaley, *Voters Favoring Term Limits for Politicians*, LAS VEGAS REV.-J., Nov. 6, 1996, at 1B. South Dakota: 68% for, 32% against. See Ferry, *supra*.

Also in November 1996, voters in five states (Montana, North Dakota, Oregon, Washington, and Wyoming) rejected instruct-and-inform measures. The rejection rates were as follows. Montana: 45% for, 55% against. See Ferry, *supra*. North Dakota: 47% for, 53% against. See *id.* Oregon: 45% for, 55% against. See *Oregon Ballot Measures*, PORTLAND OREGONIAN, Nov. 6, 1996, at C5. Washington: 45% for, 55% against. See Scott Hewitt, *Locke Elected Governor by a Landslide*, SEATTLE SKANNER, Nov. 6, 1996, at A1. Wyoming: 54% for, 46% against. See THE ASSOCIATED PRESS POLITICAL SERVICE, Nov. 8, 1996, available in 1996 WL 5415108 (reporting that measure failed to win majority greater than 50% of all ballots cast on that election day, including electoral races, as required by Wyoming state law).

tives.² The initiatives included similar provisions instructing state legislators to apply for a constitutional convention under Article V and attaching the same ballot label to the names of those representatives who refused.³ Finally, the initiatives stipulated that the ballot notation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" was to be placed next to the names of appropriate non-incumbent candidates for Congress.⁴ Plainly, these instruct-and-inform laws endeavored to place representatives under strict marching orders from their constituents.

It was a novel approach to an intractable problem. The proposed imposition of term limits on members of Congress has long enjoyed overwhelming public support, typically attracting the ap-

² For example, Colorado's Amendment XII required the following:

(5) DESIGNATION PROCESS.

- (a) The Colorado secretary of state shall determine these ballot designations. The ballot designation shall appear unless clear and convincing evidence establishes that the candidate has honored voter instructions or signed the pledge in this subsection (4). Challenges to designation or lack of designation shall be filed with the Colorado supreme court within 5 days of the determination and shall be decided within 21 days after filing. Determinations shall be made public 30 days or more before the Colorado secretary of state certifies the ballot.
- (b) Non-compliance with voter instruction is demonstrated by any of the following actions with respect to the application or ratification by state legislators, and in case of members of Congress referring the Congressional Term Limits Amendment for ratification, if the legislator:
 - (i) fails to vote in favor when brought to a vote;
 - (ii) fails to second if it lacks one;
 - (iii) fails to vote in favor of all votes bringing the measure before any committee in which he or she serves;
 - (iv) fails to propose or otherwise bring to a vote of the full legislative body, if necessary;
 - (v) fails to vote against any attempt to delay, table or otherwise prevent a vote by the full legislative body or committee;
 - (vi) fails in any way to ensure that all votes are recorded and made available to the public;
 - (vii) fails to vote against any change, addition or modification; or
 - (viii) fails to vote against any amendment with longer limits than the Congressional Term Limits Amendment.

Morrisey v. State, 951 P.2d 911, 919 (Colo. 1998).

³ See, e.g., *Gralike v. Cook*, 996 F. Supp. 917, 919-20 (W.D. Mo. 1998) (construing Missouri's Article VIII Amendment), *aff'd*, 191 F.3d 911 (8th Cir. 1999).

⁴ See *id.* at 920.

proval of seventy to eighty percent of respondents in polls.⁵ Yet efforts to propose a congressional term limits amendment in Congress have continually run up against a solid wall of opposition in both Houses of Congress and in both parties.⁶ The Supreme Court's ruling in *U.S. Term Limits, Inc. v. Thornton*, finding state-imposed term limits on members of Congress impermissible because such limits added to the fixed and exclusive qualifications for office established by the Constitution,⁷ forced proponents of term limits to alter their strategy.

With the option of state-imposed term limits on members of Congress foreclosed, the only remaining route of reform lay through Congress itself.⁸ However, term limits proponents faced a

⁵ Prior to 1990, the congressional term limits issue was not yet on the public's radar screen and consequently was not often a subject of national debate. See *Limiting Terms of Office for Members of the U.S. Senate and U. S House of Representatives Before the Subcomm. On the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1977) (statement of Bill Frenzel, Brookings Institution scholar), available in 1997 WL 8218564. Since 1990, polls have consistently shown overwhelming majorities of the public supporting term limits. An April, 1990 Gallup poll showed 70% in favor of term limits. See Gordon J. Humphrey, *Put a Limit on Congressional Terms*, USA TODAY, Apr. 5, 1990, at A12. A 1993 survey by the Hart and Teeter Research Companies found that 76% of the public favored limits on the number of terms served by senators and members of Congress. See Pub. Opinion Online, Jan. 23, 1993, available in LEXIS, Public Opinion Location Library (displaying results of Nov. 15, 1993 survey). An October 1994 NBC News/Wall Street Journal poll showed 80% in favor of term limits for members of Congress. See NBC Nightly News, *Clinton's Approval Ratings Up* (NBC News broadcast, Oct. 19, 1994). A November 1996 Gallup poll showed 74% of the public in favor of congressional term limits. See *Elections Clearly Conservative*, FLA. TIMES-UNION, Nov. 8, 1996, at A20. And in May 1998, 75% of the public supported term limits for Congress. See *New Life to Term Limits*, INDIANAPOLIS STAR, May 26, 1998, at A6.

⁶ Term limit measures have continually faced opposition in both houses of Congress. Prior to 1995 more than 150 bills on term limits were introduced, but only one reached a floor vote. That vote took place in the Senate in 1947, and the proposal was defeated 82-1. See Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 71, 1973-74 (1994). In 1995, the House finally voted on the proposal of a term limits amendment and rejected it by a vote of 227-204, well short of the required two-thirds majority. The amendment was supported by 189 Republicans and 38 Democrats. It was opposed by 40 Republicans, 163 Democrats, and one independent. See Kenneth J. Cooper, *House Rejects Measures to Require Term Limits*, WASH. POST, Mar. 30, 1995, at A1. In 1997, the House reconsidered the issue. It fell short of the two-thirds majority once again, in a 217-211 vote. The amendment was supported by 180 Republicans and 37 Democrats. It was opposed by 45 Republicans, 165 Democrats, and one independent. See *House Dooms Term-Limits Amendment This Session*, BALTIMORE SUN, Feb. 13, 1997, at A6. The Senate did not vote on either the 1995 proposal or the 1997 proposal.

⁷ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-38 (1995).

⁸ Of course, theoretically it would be possible to call a constitutional convention, the other proposal mechanism described in Article V of the Constitution, and obviate the need for congressional proposal. However, given the fact that there have been nearly four hundred state applications to Congress to call a convention, without any success to date, this route seems a virtually certain dead end. See Kobach, *supra* note 6, at 2001.

formidable and unusual obstacle: their reform challenged the inherent interests of sitting members of Congress.⁹ The congressional proposal of a term limits amendment, if it were ever to occur, would require those in office to voluntarily relinquish their own political power. Most members of Congress become quite attached to their seats: the average tenure in the House of Representatives is ten years.¹⁰ Many speak vaguely about the merits of term limits to appease voters at home while obstructing the proposal of such an amendment back in the halls of Congress. In February 1997, representatives obscured their opposition to congressional term limits by voting on several variations of the amendment, allowing them to vote in favor of at least one, secure in the knowledge that none would pass.¹¹

In the face of this congressional resistance, proponents of term limits resorted to constituent instructions. This centuries-old device held the potential to reconnect representatives' voting behavior to the preferences of their constituents. The modern popular initiative offered a useful mechanism by which a representative's entire constituency could authoritatively deliver specific instructions. Paired with ballot notations to inform voters as to which representatives ignored their instructions, the instruct-and-inform initiatives promised to cut the Gordian knot of congressional self-interest.

⁹ Proponents of the Seventeenth and the Nineteenth Amendments (the popular election of senators and woman suffrage, respectively) faced the same obstacle. *See generally id.* at 2002 (describing similarities between these earlier movements and term limits movement, and discussing difficulty of amending Constitution in face of such entrenched congressional interests).

¹⁰ The number of years served by members of the House ranges from one year to 49 years, with the average tenure being 10 years. *See* Stuart D. Allen & Amelia S. Hopkins, *The Textile, Apparel, and Footwear Act of 1990: Determinants of Congressional Voting*, PUB. FIN. Q., Sept. 1, 1997, at 542.

¹¹ "Everybody in the U.S. House got a chance to vote 'yes' on term limits Wednesday, while comfortably aware that the measure wouldn't pass." *Having It Both Ways*, DES MOINES REGISTER, Feb. 15, 1997, at A8. Members were offered 11 variations of term limits amendments to vote on, giving them the opportunity to tell their constituents that they voted for term limits, though they knew that no one proposal would receive a two-thirds majority. *See id.*; *see also* Tamara Lytle, *Broken Term Limit, Broken Promise?*, ORLANDO SENTINEL, June 28, 1999, at A1 (noting that supposed advocates of term limits divided support among different versions of bill so no version had enough support to pass). In an interesting twist, some members from states without instruct-and-inform laws used the laws themselves as an excuse to vote against term limits. *See* 143 CONG. REC. E243-44 (daily ed. Feb. 12, 1997) (statement of Rep. Linda Smith) (stating her support for term limits, but refusing to vote for any bill proposed by members who represent states that have passed "scarlet letter" initiatives because of their undesirability).

Predictably, in the wake of the November 1996 victories, legislators opposed to term limits immediately challenged this unorthodox use of direct democracy in both state and federal courts. And one by one, the instruct-and-inform laws fell. The Arkansas Supreme Court ruled first, actually two weeks prior to the popular vote, holding that Arkansas's Amendment 9, if passed, would violate Article V of the U.S. Constitution by constraining the amendment deliberations of members of Congress and by effectively transferring to the people the power to propose constitutional amendments.¹² The same reasoning prompted courts in Oklahoma,¹³ Maine,¹⁴ Nebraska,¹⁵ Colorado,¹⁶ Missouri,¹⁷ and South Da-

¹² See *Donovan v. Priest*, 931 S.W.2d 119, 128 (Ark. 1996), *cert. denied sub nom. Arkansas v. Donovan*, 519 U.S. 1149 (1997). The Arkansas Supreme Court also held that the issue was justiciable under the state's constitution, noting that the Arkansas citizenry's power to launch initiatives had to operate "within constitutional limits." *Id.* at 120 (quoting *Dust v. Riviere*, 638 S.W.2d 663, 665 (Ark. 1982)). However, the issue went to a popular vote in spite of the court's holding, due to the fact that the U.S. Supreme Court stayed the Arkansas Supreme Court's ruling three days before the election and directed that the vote on the term limits proposal be counted. See *Bryant Appeals to High Court on Term Limits*, COMMERCIAL APPEAL, Dec. 7, 1996, at B2.

¹³ See *In re Initiative Petition No. 364*, 930 P.2d 186, 191-92 (Okla. 1996) (holding that initiative violated Article V of U.S. Constitution by restricting deliberations of state legislature in deciding whether to call for federal constitutional convention). Moreover, the Oklahoma court held that the terms of the proposal exceeded the initiative power granted by the Oklahoma constitution. See *id.* at 196.

¹⁴ See *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 59-63 (D. Me. 1997) (holding that initiative violated Article V of U.S. Constitution by impermissibly coercing state and federal elected officials to support term limits amendment to Constitution).

¹⁵ See *Duggan v. Moore*, No. 97-CV3074 (D. Neb. May 14, 1997) (order granting preliminary injunction) (concluding that ballot labels were coercive and therefore violative of Article V of U.S. Constitution, and that instructions inhibit free speech of legislators, thereby infringing upon their First Amendment rights). The Eighth Circuit affirmed the lower court's judgment, holding that both the ballot labels and instructions were impermissible under Article V. See *Miller v. Moore*, 169 F.3d 1119, 1123-26 (8th Cir. 1999). However, the Eighth Circuit also affirmed the district court's decision upholding the section of the law that established as the "official position of the citizens and State of Nebraska" that its elected officials should enact the specified term limits amendment. *Id.* at 1126.

¹⁶ See *Morrissey v. State*, 951 P.2d 911, 915-16 (Colo. 1998) (holding that initiative violated Article V of U.S. Constitution by directing elected officials to amend the Constitution). The court reasoned that the power to amend the Constitution rested exclusively with state and federal legislatures. See *id.* By removing representatives' discretion, the initiative violated the Guarantee Clause of Article IV, Section 4 of the Constitution and thereby abrogated the representative form of government. See *id.* at 916.

¹⁷ See *Gralike v. Cook*, 996 F. Supp. 917, 921-22 (W.D. Mo. 1998), *aff'd*, 191 F.3d 911 (8th Cir. 1999). The court struck down the initiative for the following reasons: (1) it impermissibly created additional qualifications for holding congressional office by handicapping a class of candidates opposed to term limits; (2) it unconstitutionally burdened candidates' First Amendment rights to speak freely on the issue of term limits, and; (3) it violated Article V of U.S. Constitution by interfering with elected officials' independent

kota¹⁸ to follow suit and invalidate their states' instruct-and-inform laws on Article V grounds, while citing the accumulating precedents.¹⁹ In Alaska, the Attorney General exercised his statutory authority to review the constitutionality of the instruct-and-inform law and declined to implement the ballot notation portion of the law.²⁰ Only in Nevada did the initiative go unchallenged. Thus far, only the Supreme Court of Idaho has upheld the instructions against an Article V challenge, although it deemed the ballot labels unconstitutional on other grounds.²¹

judgment in proposing constitutional amendments. *See id.* at 920-21. This holding was upheld in *Gralike v. Cook*, 191 F.3d 911, 925-26 (8th Cir. 1999).

¹⁸ *See Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1095-96 (D.S.D. 1998). The court held that the initiative violated the following five provisions of the U.S. Constitution: (1) Article V by binding Congressional office holders to speak and vote in a particular way when amending the Constitution; (2) Article I, Section 6 of Constitution by questioning members of Congress about their positions at a place other than either House of Congress; (3) congressional candidates' First Amendment free speech rights; (4) candidates' Fourteenth Amendment right to equal access to ballot, and; (5) due process requirements of Fifth and Fourteenth Amendments. *See id.* at 1092-97.

¹⁹ Although this Article focuses on the Article V challenge to the instruct-and-inform laws, it bears mentioning that the laws have also been challenged on First Amendment grounds. Although the First Amendment question is beyond the scope of this Article, it should be noted that the historical evidence presented herein seriously undermines this First Amendment challenge. In proposing the First Amendment, Congress presumably did not intend to eliminate the tradition of constituent instructions, a tradition that would persist until the early 1900s. Yet, in order to accept the view that the First Amendment prohibits voter guidance of legislative deliberations, one must infer this problematic intent. A more limited First Amendment challenge sees no constitutional infirmity in instructions, standing alone, but holds that the addition of ballot notations makes the instructions too coercive to withstand First Amendment scrutiny. Here again, however, the historical evidence suggests otherwise. Although eighteenth-century instructions were not enforced by ballot labels, they were enforced by something just as coercive, if not more so: a political culture that demanded resignation as the price for disobedience to instructions.

²⁰ 1998 Op. Alaska Att'y Gen. No. 2 (1998) (under authority of AS 44.62.060(b) and AS 44.62.125) (disapproving ballot notations). According to the Alaska attorney general, the ballot notations violated Article V of U.S. Constitution because they: (1) attempt to create an unconstitutional third way of proposing constitutional amendments, via popular vote; (2) violate the free speech provisions of Alaska constitution; (3) violate Article I, Section 6 of U.S. Constitution by effectively questioning members of Congress for speech and debate in either house, and; (4) impermissibly create additional qualifications for congressional office.

²¹ *See Simpson v. Cenarrusa*, 944 P.2d 1372, 1374-77 (Idaho 1997). The Idaho court held that the ballot notation portion of the instruct-and-inform law violated the Speech and Debate Clauses of the U.S. Constitution and of the Idaho Constitution by questioning representatives for speech and debate in either house. *See id.* at 1374-75. The court also held that the pledge provision regarding non-incumbent candidates was unconstitutional on First Amendment grounds, concluding that it effectively would have compelled candidates to speak in favor of term limits. *See id.* at 1375-76. The court severed the ballot notation and pledge portion of the initiative from the instruction portion, which it upheld. *See id.* at 1376-77.

The near unanimity of these judicial interpretations of Article V is striking. This rapidly reached judicial consensus might lead the casual observer to conclude that instruct-and-inform laws present an obvious and explicit violation of the text of Article V. However, as this Article attempts to demonstrate, this is hardly the case. The monotony of the decisions only obscures their fallacy. They rest upon a strained "spirit of Article V" argument that lacks express support in the constitutional text. Under this view, Article V prohibits citizens from constraining or influencing the amendment deliberations of their elected representatives in Congress and in state legislatures. The courts endorsing this interpretation of Article V have assumed that their view accurately reflects the design of the Framers of the Constitution. Yet the argument is entirely ahistorical; none of the courts addressing the issue have made any serious effort to engage in an historical analysis of the Framers' intentions, expectations, or experiences. Had the courts done so, they almost certainly would have reached a different conclusion. The Framers not only expected constituents to instruct members of Congress to favor particular amendments to the Constitution in the future, they experienced it themselves prior to, during, and after the drafting of the Constitution.

In Part I of this Article, I describe the conception of Article V asserted in the decisions striking down the instruct-and-inform laws. These judicial opinions present an exceedingly narrow view of the permissible deliberative environment for constitutional amendments. I then recount the courts' claims that they reflect the understanding of the Framers of Article V and describe the scant historical evidence offered to support this assertion. I conclude Part I by analyzing the case law marshaled by the courts in support of their constricted understanding of Article V.

In Part II, I offer a concise history of constituent instructions in America, with particular attention devoted to the role that constituent instructions played in constitutional deliberations. Part II presents this history in a series of episodes and chronological segments: prior to 1776, in the movement that led to the Declaration of Independence, between 1776 and 1787, in the calling of the 1787 Constitutional Convention, at the Convention, during the ratification debates, in the proposal of the Bill of Rights, from the 1790s to the end of the nineteenth century, and prior to the adoption of the Twenty-first Amendment, which ended Prohibition. I

also offer statements from various Framers and contemporary defenders of the Constitution who specifically articulated their expectation that constituent instructions would constrain the process of constitutional amendment under Article V.

Finally, in Part III, I conclude that the Framers' understanding of Article V clearly permitted the sort of popular guidance of constitutional deliberations manifest in the instruct-and-inform laws. Sadly, the courts that have addressed the issue thus far have rushed to judgment without exploring this history, resulting in a series of misguided decisions. In correcting the erroneous assumptions that underpin these decisions, it is my hope that a more historically accurate understanding of Article V will emerge.

I. RECENT JUDICIAL INTERPRETATION OF ARTICLE V

A. *The Adornment of Article V with Extratextual Requirements*

The judicial holdings finding that the instruct-and-inform laws violate Article V of the U.S. Constitution all begin by assuming the rather decisive premise that Article V does more than simply delineate the relevant voting bodies and the numerical hurdles that must be cleared for the proposal and ratification of a constitutional amendment. The holdings presuppose that Article V also stipulates *how* members of Congress and state legislatures must deliberate when considering an amendment. That is, Article V specifies the type of decision-making environment that must exist and the permissible pressures that may influence the votes of legislators.

This is a rather remarkable assumption, given the succinct wording of Article V. Article V tersely specifies the voting bodies and numerical hurdles involved in the proposal and ratification of an amendment to the U.S. Constitution. In relevant part, it states the following:

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

thereof, as the one or the other Mode of Ratification may be proposed by the Congress²²

The text of Article V does not describe any necessary deliberative conditions, nor does it prohibit efforts to influence representatives' voting. Nonetheless, the courts have assumed without comment that Article V does more than merely specify the voting bodies and the number of votes needed to amend the Constitution; they have concluded that it also contains an invisible subtext defining appropriate constitutional deliberations.

The courts' assumption is doubly remarkable in light of the fact that the records of the Framers' deliberations on Article V contain no hint whatsoever of this purported subtext. The recorded debates of the 1787 Convention in Philadelphia offer no suggestion that the Framers sought through Article V to delimit permissible decision-making environments for amending the Constitution. Rather, delegates to the Philadelphia Convention were almost entirely concerned with the questions of: (1) whether any provision for amending the Constitution was necessary, (2) whether Congress or proposing conventions should have the power to propose amendments, and (3) how large a majority should be required to propose and to ratify.²³

Thus, the initial weakness of these judicial holdings lies in the fact that they rush to insert into Article V an unstated requirement that deliberations be free of constraint, when neither the text nor the records of the 1787 Convention offer any clear basis for doing so. The extrapolation that Article V somehow demands unhindered, maximally free deliberation is difficult to justify. The text of Article V merely presents a set of numerical voting hurdles that the stipulated representative bodies must surmount if an amendment is to be considered valid. It is arguably no more than a positivist rule of recognition for determining when an amendment of the Constitution has taken place.

²² U.S. CONST. art. V.

²³ See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 121-22, 202-03, 231, 476 (Max Farrand ed., 1966) [hereinafter CONVENTION RECORDS]; 2 CONVENTION RECORDS, *supra*, at 87, 133, 136, 152, 159, 174, 188, 467-68, 557-61, 602, 629-31, 662; 3 CONVENTION RECORDS, *supra*, at 120-21, 126, 357, 367, 400, 630; SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 191-92, 270 (James H. Hutson ed., 1987). See generally CHARLES WARREN, THE MAKING OF THE CONSTITUTION 672-81 (Barnes & Noble 1967) (1937) (describing Framers' deliberations regarding Article V); Kobach, *supra* note 6, at 1999-2001 (same).

Provided that the ultimate decision to propose an amendment lies in the hands of Congress (or a proposing convention), the decision to ratify lies in the hands of the state legislatures (or ratifying conventions), and the requisite majorities are achieved, then the demands of Article V would seem to be satisfied. Nothing in the text proscribes citizens from attempting to influence what is ultimately attributed to “We the People.” Nor may this be inferred from underlying the structure of Article V. To be sure, the structure of Article V is based on representative decision-making and on the premise that supermajorities must be achieved at both the national and state level.²⁴ Indeed, the U.S. Supreme Court has in the past extrapolated from this structure the conclusion that ratification must occur through a vote of the representative assemblies stipulated in Article V, and by those assemblies only.²⁵ It is quite another matter, however, to divine that the “spirit” of Article V also bars the people of a state from pressing their representatives to favor a particular amendment. In reaching this conclusion, the courts that struck down the instruct-and-inform laws arguably crossed the line between interpreting Article V and embellishing upon it.

The courts effectively interpreted Article V so as to insert into the text the words “all deliberations on the proposal or ratification of amendments shall be free from significant popular pressure or constraint.” This contention is remarkable because the text alone in no way invites courts to scrutinize the deliberativeness of, and constituent constraints upon, legislative debates during the lengthy political machinations that precede the proposal and ratification of a constitutional amendment.

B. The Assertion of an Extremely Narrow View of Article V Deliberations

The judicial elevation of a supposed subtext of Article V into an explicit constitutional requirement is problematic. Even more questionable is the radically narrow characterization of the amendment process that the courts propounded. The decisions holding that the instruct-and-inform laws violate Article V rest upon an exceedingly cramped and unnuanced view of the Article

²⁴ See Kobach, *supra* note 6, at 1984-99.

²⁵ See *Hawke v. Smith*, 253 U.S. 221, 226-27 (1920); see also *infra* Part I.D (discussing *Hawke*).

— one that countenances *no* popular role in amending the Constitution. Meaningful popular influence on the deliberations of members of Congress and state legislatures is prohibited. This message echoes throughout the decisions invalidating the instruct-and-inform laws.

The Arkansas Supreme Court led off, holding that Arkansas's Amendment 9 would violate Article V because it "would virtually tie the hands of the individual members of the General Assembly such that they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue."²⁶ Oklahoma's high court repeated the same theory a few weeks later: "Legislators must be free to deliberate and vote their own considered judgment"²⁷ The Oklahoma court carried this assumption further by supposing that where legislators do not deliberate freely, the people have usurped the power to amend the Constitution.²⁸

As the decisions accumulated, the courts became bolder in their assertion of this unwritten "spirit" of Article V. The United States District Court for the District of Maine declared: "Article V does not permit the people of a state to coerce their elected officers into acting in a specific way regarding proposal and ratification of amendments to the Constitution. A citizen's role is outside the Article V process."²⁹ Or, in even stronger terms, Congress and the state legislatures must "deliberate and act upon potential amendments to the Constitution, unencumbered by *any* influences from the people who elected their lawmakers."³⁰

The Colorado Supreme Court reiterated the supposed anti-coercion component of Article V: the instruct-and-inform law would "violate[] Article V by coercing legislators to amend the United States Constitution."³¹ The Colorado court even went so far as to label this unwritten proviso a "strict requirement":

²⁶ *Donovan v. Priest*, 931 S.W.2d 119, 128 (Ark. 1996), *cert. denied sub nom. Arkansas v. Donovan*, 519 U.S. 1149 (1997).

²⁷ *In re Initiative Petition No. 364*, 930 P.2d 186, 192 (Okla. 1996).

²⁸ The court stated: "The law is plain that the application for a convention must come from the Legislature acting freely without restriction or limitation, not from the people through exercise of their initiative power." *Id.* at 191.

²⁹ *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 59 (D. Me. 1997).

³⁰ *Id.* at 57 (emphasis added).

³¹ *Morrissey v. State*, 951 P.2d 911, 916 (Colo. 1998).

[W]e agree with the great majority of cases which prohibit citizens from directing or coercing their elected representatives into exercising their Article V powers. The implicit assumption woven through the decisions of other courts that have struck down term limits provisions similar to Amendment 12 is that these provisions undermine representative government. Such intrusions into the legislative realm circumvent the strict requirements of Article V and disturb the balance of our representative system.³²

The United States District Court for the Western District of Missouri cited with approval the Arkansas and Maine decisions, taking it as settled law that Article V requires legislators to cast votes based only on their “own independent judgment.”³³ Missouri’s instruct-and-inform law, the court concluded, “violates Article V because it interferes with the independent judgment of state legislators or convention delegates that is contemplated by Article V.”³⁴

The U.S. District Court for the District of South Dakota elaborated at some length on its conception of how congressional deliberations are supposed to proceed:

Congressional officeholders must not, and cannot, be bound to speak and vote in one particular way on the important issue of congressional term limits. Each officeholder must have the discretion to consider changing circumstances and to revise his or her own thinking on the term limits issue, even if that means that the officeholder ultimately takes a different position than the one he or she firmly supported prior to the election.³⁵

According to the court, the state’s instruct-and-inform law was unconstitutional because it brought to bear “undue influence on South Dakota’s congressional candidates.”³⁶

A panel of the U.S. Court of Appeals for the Eighth Circuit agreed with the Nebraska district court that the combination of constituent instructions and ballot notations was unconstitutional, concluding that, “They undermine representative government by permitting the people to control and direct the Article V powers of

³² *Id.* at 915-16

³³ *Gralike v. Cook*, 996 F. Supp. 901, 914-16 (W.D. Mo. 1998), *aff’d*, 191 F.3d 911 (8th Cir. 1999).

³⁴ *Id.* at 916.

³⁵ *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1095 (D.S.D. 1998).

³⁶ *Id.* at 1094.

Nebraska's legislators in a very specific, detailed manner."³⁷ The Eighth Circuit panel then expressed misgivings about a dangerous idea that might be planted in voters' heads: "The ballot label . . . , moreover, reinforces the erroneous impression among voters that the people in fact have the right to 'instruct' and control their legislators in this way."³⁸ However, the court upheld section 1 of the initiative,³⁹ which "established[ed] as the official position of the citizens and State of Nebraska that our elected officials should enact by constitutional amendment congressional term limits"⁴⁰

Six months later, another panel of the Eighth Circuit struck down Missouri's instruct-and-inform law in its entirety.⁴¹ Proclaiming that "Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions,"⁴² the court concluded that "[v]oter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V."⁴³

By the time that the Supreme Court of California addressed the issue in 1999, the weight of the preceding decisions striking down the instruct-and-inform laws was enormous. Citing these earlier cases and repeating the same conception of Article V,⁴⁴ the California court summarized: "[W]e agree with the numerous out-of-state decisions that have addressed similar initiative measures, and conclude that the challenged proposition is unconstitutional."⁴⁵ Because the law "directly instructs, and indirectly attempts to coerce, California's congressional and state legislators,"⁴⁶ the court held that it violated Article V.

³⁷ Miller v. Moore, 169 F.3d 1119, 1124 (8th Cir. 1999).

³⁸ *Id.*

³⁹ *See id.* at 1126.

⁴⁰ NEB. CONST. art 18, § 1.

⁴¹ *See Gralike v. Cook*, 191 F.3d 911, 924-25 (8th Cir. 1999). The court also held the ballot notations to violate the First Amendment and the Speech and Debate Clauses of the United States Constitution (Art. 1, § 6, cl. 1); and the court held the entire instruct-and-inform law to violate the Qualifications Clauses of the United States Constitution. *See id.* at 916-24. Judge Hansen dissented from the majority's holding that the instructions absent the ballot notations would be unconstitutional. *See id.* at 926-28.

⁴² *Id.* at 924-25.

⁴³ *Id.* at 925.

⁴⁴ *See Bramberg v. Jones*, 20 Cal. 4th 1045, 1060-62, 978 P.2d 1240, 1250-51 (1999).

⁴⁵ *Id.* at 1048, 978 P.2d at 1241.

⁴⁶ *Id.*, 978 P.2d at 1242.

Thus was constructed in an astonishingly short time the now-considerable edifice of case law endorsing this unconstrained-deliberation subtext of Article V. As each court that struck down an instruct-and-inform law held, Article V does more than merely establish voting hurdles in designated representative bodies. It sets forth the appropriate deliberative *environment* in which constitutional questions must be decided — an environment unconstrained by popular sentiment in any substantial way.

C. *The Claim of Adherence to the Framers' Understanding*

But on what foundation did the courts erect this legal structure? Certainly not on the basis of a searching historical analysis of the statements and experiences of the Framers. Indeed, only two courts attempted to marshal *any* historical support for their decisions, and both barely scratched the surface. The first was the United States District Court for the District of Maine. It simply noted that in *Federalist 39*, James Madison argued that the mechanism for amending the Constitution is both national and federal in character.⁴⁷ These comments were part of Madison's larger discussion of the balance between national and federal characteristics in the proposed system of government.⁴⁸ Madison's statements in *Federalist 39* did not even tangentially touch upon the expected tenor of deliberations during the amendment process.

The court then pointed out that in *Federalist 43* Madison wrote that the amendment process "guards . . . against that extreme facility, which would render the Constitution too mutable."⁴⁹ The court omitted the other half of the sentence, in which Madison also stated that the amendment process "guards equally against . . . that extreme difficulty which might perpetuate its discovered faults."⁵⁰ Plainly, it is difficult to draw from Madison's writings in *Federalist 43* the conclusion that he advocated insulating constitutional deliberations from popular pressure because he wanted the Constitution to be especially difficult to amend. This brief, out-of-context look at *The Federalist Papers* is all that the Maine federal district court offered in the way of historical inquiry.

⁴⁷ See *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 55-56 (D. Me. 1997).

⁴⁸ See *THE FEDERALIST NO. 39*, at 194-95 (James Madison) (Garry Wills ed., 1982).

⁴⁹ *Gwadosky*, 966 F. Supp. at 56 n.6 (quoting *THE FEDERALIST NO. 43*, at 296 (James Madison) (Wesleyan Univ. Press 1961)).

⁵⁰ *THE FEDERALIST NO. 43*, at 223 (James Madison) (Garry Wills ed., 1982).

The Eighth Circuit panel that reviewed Nebraska's instruct-and-inform law made a similarly superficial effort at historical investigation two years later. In the one short paragraph that it devoted to the "examination of the constitutional history," the court noted that, in 1789, the First Congress declined to put right-to-instruct language in the proposed First Amendment.⁵¹ Without presenting any of the congressional debate surrounding that decision, the court facilely concluded that the First Congress must have regarded constituent instructions as undesirable and inimical to representative government.⁵² In fact, as I explain below in Part II.G, the 1789 decision not to include an explicit right-to-instruct in the First Amendment was motivated in part by the belief that the long tradition of constituent instructions in America was sufficiently well-established, such that it needed no express constitutional protection.⁵³ The decision also stemmed from the realization that making the disobedience of instructions a constitutional violation would raise enigmatic problems as to the validity of statutes.⁵⁴ Notably, the members of Congress from five states were acting under express instructions when they made the decision.⁵⁵ None of this information found its way into the Eighth Circuit's paragraph of "constitutional history." The remainder of the courts assessing the instruct-and-inform laws did not even venture such a half-hearted attempt at historical analysis.

Yet virtually all of the courts striking down the instruct-and-inform laws purported to base their holdings on the Framers' vision of how Article V should work. The Arkansas Supreme Court claimed to express "the framers' sentiments that the amendatory process should be deliberate."⁵⁶ The Maine federal district court declared confidently that, "In drafting Article V, the Framers envisioned that the state legislators would be independent and autonomous when debating and voting on constitutional amendments."⁵⁷

⁵¹ See *Miller v. Moore*, 169 F.3d 1119, 1124 (8th Cir. 1999).

⁵² See *id.*

⁵³ See discussion *infra* Part II.G.

⁵⁴ See *infra* notes 274-79 and accompanying text.

⁵⁵ See discussion *infra* Part II.A.

⁵⁶ *Donovan v. Priest*, 931 S.W.2d 119, 126 (Ark. 1996), *cert. denied sub nom. Arkansas v. Donovan*, 519 U.S. 1149 (1997).

⁵⁷ *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 58 (D. Me. 1997).

Perhaps the most brazen in its declarations regarding the Framers' intent was the U.S. District Court for the District of South Dakota. Citing only the holding of the Maine court in support of its view, the court presented the following assessment of the Framers' intent:

The Framers intended for the amendment process "to be a deliberate and often difficult task," and the Framers did not provide for a direct role of the citizens in proposing and ratifying constitutional amendments. The citizens' role is to elect competent state and congressional legislators who may, in turn, amend the Constitution in accordance with the methods described in Article V.⁵⁸

Therefore, concluded the court, if South Dakota's representatives act under the "undue influence" of their instruct-and-inform law, "the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost."⁵⁹ Unfortunately, the court provided no analysis of what the Framers actually said regarding constituent instructions and Article V. Had the court done so, it likely would have reached the opposite conclusion.⁶⁰

The courts striking down the instruct-and-inform laws based their claims of adherence to the Framers' intent not on historical materials or analysis, but simply on the unsubstantiated assertions of earlier judicial opinions. The first courts to strike down the instruct-and-inform laws relied in particular upon the California Supreme Court's holding in *AFL-CIO v. Eu*⁶¹ and the Montana Supreme Court's holding in *State ex rel. Harper v. Waltermire*.⁶² In *Eu*, the California Supreme Court considered the constitutionality of a proposed voter initiative that would have compelled state legislators, on penalty of a loss of salary, to apply to Congress to call a constitutional convention for the purpose of proposing a balanced budget amendment.⁶³ The initiative would have withheld all payments, compensation, expenses, and benefits from legislators until

⁵⁸ *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1092 (D.S.D. 1998) (citations omitted) (quoting *Gwadosky*, 966 F. Supp. at 55-56).

⁵⁹ *Id.* at 1094.

⁶⁰ *See infra* Part II.E.

⁶¹ *See* 36 Cal. 3d 687, 694, 686 P.2d 609, 613 (1984).

⁶² *See* 691 P.2d 826, 828 (Mont. 1984).

⁶³ *See Eu*, 36 Cal. 3d at 691, 686 P.2d at 611.

they capitulated and voted to apply for a convention.⁶⁴ The California court deemed this tactic to be so coercive as to effectively remove all discretion from the legislators. As the court concluded: "Article V . . . envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise."⁶⁵ The court held the proposed initiative to be contrary to Article V, and also held that it violated the state constitution because it was a resolution, not a "statute," and therefore was incapable of adoption via initiative.⁶⁶

The use of this holding to bolster the assertion that the Framers of Article V intended to prevent voters from instructing legislators and informing voters accordingly is problematic for three reasons. First, the financial coercion involved in the withholding of a paycheck is qualitatively and quantitatively different from that in an instruct-and-inform law. Informing citizens of how a legislator votes is considerably less coercive than denying a paycheck until the legislator votes the desired way. This is particularly true for those legislators who lack any additional source of income. Second, the California court specifically stated that the *electoral process* was the appropriate avenue for citizens to influence the decisions of their representatives. The instruct-and-inform laws are based precisely on that premise; they use the electoral process to keep representatives responsive to their instructions, and they attempt to make the process more efficient by informing voters of their representative's voting behavior. Third, the California court engaged in no significant historical inquiry into what the Framers actually expected or said regarding constitutional deliberations. The court merely scrutinized the use of the word "legislatures" in Article V in light of its use in other parts of the Constitution and past judicial precedent.⁶⁷ The court concluded that "the framers of the Constitution chose to give the voters no *direct* role in the amending process."⁶⁸ This modest conclusion is certainly correct and, indeed, obvious from the constitutional text. But for courts reviewing the

⁶⁴ See *id.* at 693, 686 P.2d at 612.

⁶⁵ *Id.* at 694, 686 P.2d at 613.

⁶⁶ See *id.* at 707-15, 686 P.2d at 622-28.

⁶⁷ See *id.* at 699-707, 686 P.2d at 617-22.

⁶⁸ *Id.* at 706, 686 P.2d at 621 (emphasis added).

instruct-and-inform laws to infer that the Framers also countenanced no *indirect* role through the use of constituent instructions stretches such a modest conclusion to untenable lengths.

In *State ex rel. Harper v. Waltermire*, the Montana Supreme Court considered a proposed initiative that was virtually the same as that in California.⁶⁹ It directed the Montana legislature to apply to Congress to call a constitutional convention, and after ninety days if the legislators had not succumbed, it would have suspended their pay. To this punishment it added an additional jab: the legislature would be forced to remain in session with no recess longer than three days. As the court surmised, it amounted to a “threat of confinement and no pay.”⁷⁰ The court invalidated the proposed initiative on Article V grounds, as well as on state constitutional grounds.⁷¹ This holding is similarly problematic as authority for the proposition that the Framers would have regarded the instruct-and-inform laws to be prohibited under Article V. Confinement without pay is fundamentally different from instructions and ballot notations as a means of inducing legislative compliance. And like the *Eu* decision, *Waltermire* offered no historical analysis of the Framers’ intent regarding Article V.

D. *The Hawke, Leser, and Swackhamer Precedents*

Many of the courts that struck down the instruct-and-inform laws sought justification in the Supreme Court precedent of *Hawke v. Smith*.⁷² In that case, the Court considered whether Article V permitted the State of Ohio to make the ratification of proposed amendments to the U.S. Constitution subject to voter approval in statewide referendums.⁷³ In 1918, voters in Ohio adopted a provision in the Ohio Constitution extending the referendum power to the ratification of federal constitutional amendments.⁷⁴ Similar laws existed in twenty-one other states at the time.⁷⁵ In 1919, the Senate and House of Representatives of Ohio adopted a resolution ratifying what was to become the Eighteenth Amendment and in-

⁶⁹ See *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 830 (Mont. 1984).

⁷⁰ *Id.* at 829.

⁷¹ See *id.* at 828-31.

⁷² See 253 U.S. 221 (1920).

⁷³ See *id.* at 225.

⁷⁴ See *id.*

⁷⁵ CARRIE C. CATT & NETTIE R. SHULER, *WOMAN SUFFRAGE AND POLITICS* 366 (1926).

stituting Prohibition. A few weeks later, the secretary of state of the United States proclaimed the ratification of the amendment and named Ohio among the thirty-six states that had voted to ratify.⁷⁶ However, in a 1920 referendum, before the Supreme Court announced its decision, the people of Ohio narrowly rejected their legislature's decision to ratify.⁷⁷ The Ohio Constitution had given citizens final, direct authority to ratify the amendment. It fell to the Court to determine whether this popular veto was within the constraints of Article V.

The Court began with the premise that a state's power to ratify a constitutional amendment is defined by the U.S. Constitution and is not subject to unilateral alteration by legislative or judicial bodies at the state level.⁷⁸ The Court then turned to the question of what the Framers of the Constitution meant in requiring ratification by "legislatures." Concluding that the Constitution refers to action by the representative bodies of the several states in those provisions where it calls for action by state legislatures, the Court reasoned that taking the same action by referendum vote would not accord with the constitutional text.⁷⁹ Therefore, Ohio could not constitutionally substitute a binding popular vote on ratification for ratification by the state's legislature.

Plainly, the *Hawke* decision is not dispositive on the question of the constitutionality of the instruct-and-inform laws. Where the Ohio procedure attempted to fully transfer the ratification power to the people through a direct popular vote on the amendment, the instruct-and-inform laws left the final ratification decision in the hands of the legislators.⁸⁰ Moreover, the Court in *Hawke* never implied that an instructed legislature would not constitute a legislature within the meaning of Article V. The same may be said of the Court's holding in *Leser v. Garnett*, two years later, in which the Court reiterated its view that the ratification power is not subject to alteration by the people of a state.⁸¹ In that case, the Court re-

⁷⁶ See *Hawke*, 253 U.S. at 225.

⁷⁷ See CATT & SHULER, *supra* note 75, at 414. The margin in the popular vote was fewer than 500 votes. See *id.*

⁷⁸ See *Hawke*, 253 U.S. at 227.

⁷⁹ See *id.* at 227-28.

⁸⁰ Another distinction is the fact that the Ohio procedure concerned the ratification of amendments, whereas the instruct-and-inform laws concerned primarily the proposal of amendments. However, this distinction is arguably without consequence, given the fact that Article V refers to "Legislatures" in both the proposing context and the ratifying context.

⁸¹ See *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

jected the claim that a state legislature lacked the power to ratify the Nineteenth Amendment if the amendment would be invalid under the state's constitution.⁸²

In spite of the tenuous value of these decisions as precedents in the instruct-and-inform laws cases, the courts that struck down the instruct-and-inform laws relied heavily on *Hawke* and *Leser*.⁸³ The use of these precedents to invalidate the laws occurred in spite of the fact that in 1978 in *Kimble v. Swackhamer*,⁸⁴ Justice Rehnquist, acting as circuit justice, had revisited the holdings in *Hawke* and *Leser* and reached the conclusion that Article V did not bar the people from guiding the amendment process. *Kimble* asked whether the citizens of Nevada could hold an "advisory" referendum on the Equal Rights Amendment to guide their state legislators in deciding whether to ratify the Amendment.⁸⁵ The core issue was whether the people of a state could pass judgment on an amendment and, in so doing, provide direction as to how their representatives should vote. Justice Rehnquist explicitly rejected any reading of *Hawke* and *Leser* that required the insulation of ratifying legislatures from the popular expression of opinion on such issues, stating that he "would be most disinclined to read either *Hawke*, *supra*, or *Leser*, or Art. V as ruling out communication between the members of the legislature and their constituents."⁸⁶ The massive pressure on Nevada legislators to obey the will of the people expressed in the referendum did not violate the spirit of Article V, because "ratification [would] still depend on the vote of the Nevada legislature."⁸⁷ Similarly, as long as the ultimate decision to vote for the proposal of a term limits amendment lies in the hands of a state's members of Congress, Article V in no way prohibits the people of that state from encouraging them to do so.

The *Kimble* holding placed a sizable obstacle in the path of courts seeking to strike down the instruct-and-inform laws on Article V grounds. The Oklahoma Supreme Court attempted to distinguish *Kimble* by stressing the nonbinding nature of the referendum at

⁸² See *id.*

⁸³ See, e.g., *Gralike v. Cook*, 996 F. Supp. 901, 915-16 (W.D. Mo. 1998), *aff'd*, 191 F.3d 911 (8th Cir. 1999); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 56-57 (D. Me. 1997); *Morrissey v. State*, 951 P.2d 911, 914 (Colo. 1998).

⁸⁴ See 439 U.S. 1385 (Rehnquist, Circuit Justice 1978).

⁸⁵ See *id.* at 1385.

⁸⁶ *Id.* at 1387-88 (citations omitted).

⁸⁷ *Id.* at 1387.

issue. As the Oklahoma court portrayed it, the popular vote in Nevada was "purely advisory; the Legislature was able to vote for or against ratification or refrain from voting at all, without regard to the advisory vote."⁸⁸ The federal district court in Maine echoed and amplified this suggestion: "The Nevada legislature . . . remained free to act on the proposed amendment in any way it felt prudent. It was free to be influenced by or completely ignore the citizens' preference on the proposed amendment."⁸⁹ Other courts took the same approach, dismissing the Nevada referendum in *Kimble* as "purely advisory,"⁹⁰ or "merely advisory."⁹¹

These characterizations were, of course, misleading. Although the referendum on ratifying the Equal Rights Amendment was merely advisory *de jure*, it was binding *de facto*. The popular verdict had a pronounced impact on the Nevada legislature, making it politically impossible for most legislators to vote in favor of ratification. Nevada voters had rejected the Equal Rights Amendment overwhelmingly in the referendum, with sixty-seven percent opposed. Not surprisingly, Nevada legislators were unwilling to support it in the face of this popular verdict; both the Senate and the Assembly declined to even bring the amendment to a floor vote.⁹²

The likely persuasive effect of the instruct-and-inform laws on representatives would be similar to that of Nevada's referendum. In the wake of Nevada's unequivocal popular verdict on the ERA, it was virtually impossible for state representatives to ignore the *vox populi*. The instruct-and-inform laws would utilize direct democracy in the same way to present legislators with clear instructions regarding the term limits issue. While the vote of the people would not legally bind representatives to vote accordingly, it would offer a strong inducement to do so. One might argue that the instruct-and-inform laws would be more coercive than the Nevada ERA referendum with respect to legislative voting behavior. However, during the months when the instruct-and-inform laws were presumed to be in effect, their coercive power over legislators was far from absolute; not all members of Congress affected by the laws

⁸⁸ *In re Initiative Petition No. 364*, 930 P.2d 186, 192 (Okla. 1996).

⁸⁹ *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 57 (D. Me. 1997).

⁹⁰ *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1093 (D.S.D. 1998); *Bramberg v. Jones*, 20 Cal. 4th 1045, 1059, 978 P.2d 1240, 1249 (1999).

⁹¹ *Miller v. Moore*, 169 F.3d 1119, 1124 (8th Cir. 1999).

⁹² *See Nev. Bill Hist.*, 60th Sess. (1979).

felt compelled to obey their constituents' instructions.⁹³ The coerciveness of any referendum, be it advisory, an instruction, or otherwise, depends on a variety of factors.⁹⁴ The mere characterization of a referendum as "advisory" does not necessarily make it easy for legislators to ignore.

At their core, the instruct-and-inform laws embody communication between constituents and representatives — communication designed to express the preferences of the former and influence the voting of the latter. Similar communication was at issue in *Kimble*. Justice Rehnquist expressly upheld such communicative acts.⁹⁵ Rehnquist declined to construe these precedents as a blanket rejection of "citizen participation in the amendatory process."⁹⁶

⁹³ For example, Representative Jo Ann Emerson of Missouri declared on the floor of the House that she intended to depart from her constituents' instructions. Although she supported the imposition of term limits on members of Congress, including the six-year House limit specified by the instruct-and-inform laws, she decided to disregard the instructions' requirement that she vote against all measures proposing a limit of more than six years in the House:

I will vote in favor of each and every serious term limit amendment brought before the House this week. If that means I invoke a misleading scarlet letter, then so be it. Those of us charged with the responsibility of dealing with the legislative agenda of the people on a practical basis are duty-bound to deliver what is feasible, and that includes term limits that stand a chance of passing Congress.

143 CONG. REC. E277 (daily ed. Feb 13, 1997) (statement of Rep. Emerson). Evidently, she believed that at election time she would be able to justify and explain to voters her disregarding of the instructions.

Another member of the House, Bill McCollum of Florida, chided U.S. Term Limits, Inc., the national sponsor of the instruct-and-inform laws, for being "so intent upon getting their way or no other way that in the end they gridlock this body and we never reach the goal ultimately of getting to term limits." 143 CONG. REC. H417, H418 (daily ed. Feb. 11, 1997) (statement of Rep. McCullom). McCullom pointed out that the six-year limit could not garner the support of two-thirds of Congress and that the purist tactics of U.S. Term Limits had therefore jeopardized the more moderate (and more achievable) proposals of eight- or twelve-year limits. Accordingly, McCullom urged his House colleagues from the nine states that passed instruct-and-inform laws to "take the risk and the chance of facing up to these bullies," and vote for the twelve-year limit. *Id.* at H420.

⁹⁴ For example, a landslide result expresses the will of the voters more convincingly than does a 51% majority. Thus, it is not unreasonable to suppose that a legislator in a state that approved an instruct-and-inform law by a slim majority would be more willing to disregard the will of the electorate than a legislator faced with a 70% majority in a so-called advisory referendum. Another factor is the ability of the issue to grab and hold the attention of voters and the media. A hotly contested referendum on an incendiary issue like gun control or affirmative action is more likely to compel legislative action a year after the fact than is a low-profile ballot issue that receives relatively little media attention.

⁹⁵ See *Kimble v. Swackhamer*, 439 U.S. 1385, 1387-88 (Rehnquist, Circuit Justice 1978).

⁹⁶ *Id.* at 1387.

Consequently, the courts' efforts to extend the *Hawke* and *Leser* precedents to prohibit instruct-and-inform laws stand on shaky ground.

Particularly puzzling in light of *Kimble* is the insistence of the Eighth Circuit, the South Dakota District Court, and the California Supreme Court that the instruct-and-inform laws would be unconstitutional even if the "inform" provisions were severed.⁹⁷ That is, even if the ballot notations were struck from the measures, leaving only constituent instructions without formal consequences for disobedience, the courts would nonetheless find the remainder unconstitutional. The U.S. District Court for the District of South Dakota offered only the vague explanation that its conclusion in this regard was "based upon its own analysis, and upon the analysis of all the other cases cited in this opinion."⁹⁸ The California Supreme Court presented its reasoning: "By purporting to impose a statutory obligation upon such legislators to act in a particular manner with regard to the amendment process, these provisions clearly interfere with the operation of the procedure for amending the federal Constitution as contemplated and authorized by Article V."⁹⁹ However, this "statutory obligation" would be merely hortatory in the wake of a judicial decision stating that the Constitution countenances no formal consequences for disobedience. Moreover, neither court explained why an instruction without formal consequences was significantly different from the advisory referendum upheld in *Kimble*. For what was the *Kimble* referendum other than an instruction from Nevada voters on whether to ratify the ERA?

The Eighth Circuit recognized that it would have to distinguish *Kimble* in order to hold the instructions unconstitutional even in the absence of the ballot notations. The court offered two distinc-

⁹⁷ See *Gralike v. Cook*, 191 F.3d 911, 926 n.12 (8th Cir. 1999) (different panel addressing issue for second time); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1094-95 (D.S.D. 1998); *Bramberg v. Jones*, 20 Cal. 4th 1045, 1063-64 n.19, 978 P.2d 1240, 1252 n.19 (1999).

In contrast, the Idaho Supreme Court applied Idaho's severability provision and held that the instruction, standing alone, amounted to a "non-binding, advisory initiative" and was therefore permissible under Article V. See *Simpson v. Cenarrussa*, 944 P.2d 1372, 1376 (Idaho 1997). Similarly, the first panel of the Eighth Circuit to address the issue held that the section of the initiative establishing the "official position of the citizens and State of Nebraska" was "exactly the sort of advisory, nonbinding communication between the people and their representatives that is permissible." *Miller v. Moore*, 169 F.3d 1119, 1126 (8th Cir. 1999).

⁹⁸ *Hazeltine*, 3 F. Supp. 2d at 1094.

⁹⁹ *Bramberg*, 20 Cal. 4th at 1063 n.19, 978 P.2d at 1252 n.19.

tions. First, the referendum in *Kimble* was initiated by the Nevada Legislature.¹⁰⁰ Second, it was accompanied by the statement that “the result of the voting on this question does not place any legal requirement on the legislature or any of its members.”¹⁰¹ Both distinctions are problematic. The first is inconsistent with the court’s view that “the people are not to play a direct role in the Article V amendment process.”¹⁰² If Article V shuts the people out, then legislators do not possess the power to invite them in by calling a referendum. The second distinction is bizarrely formalistic, holding that the mere recital of a boilerplate phrase overcomes any Article V challenges.¹⁰³ The states that adopted the instruct-and-inform laws could have added the phrase without in any way changing the operation of the laws. Thus, it was only the failure to say the magic words that rendered the instructions unconstitutional. Finally, the court’s conception of Article V utterly ignored the fact that unmitigated instructions routinely directed the process of constitutional amendment in the Framers’ era, as described in Part II of this Article.

In summary, the decisions striking down the instruct-and-inform laws were based on an ahistorical and sciolistic understanding of Article V. In actuality, historical evidence suggests strongly that the Framers expected the proposal and ratification of constitutional amendments to be constrained by constituent instructions. Given this record, it is likely that the Framers would not have regarded instruct-and-inform laws of 1996 and 1998 to be out of keeping with their own experiences and expectations. Representatives were to faithfully express the preferences and instructions of their constituents in Congress while filtering out popular sentiments motivated by passion, factional self-interest, or local prejudice.¹⁰⁴ As

¹⁰⁰ See *Gralike*, 191 F.3d at 926 n.12.

¹⁰¹ *Id.* (quotation omitted).

¹⁰² *Id.*

¹⁰³ See *id.* “If the Missouri Amendment contained similar language, we would agree with Judge Hansen that it is not coercive.” *Id.*

¹⁰⁴ See THE FEDERALIST No. 10, at 45-47 (James Madison) (Garry Wills ed., 1982). Plainly, the popular call for congressional term limits is not motivated by passion, factional self-interest, or local prejudice. Regardless of one’s view of the merits term limits, one cannot plausibly degrade the arguments of term limits supporters by saying that they are the product of passion rather than reason. Because term limits proponents would apply their reform nationally, it is equally difficult to characterize their cause as one designed to advance a particular faction or local region.

James Madison envisioned, the "public voice pronounced by the representatives of the people" would govern the new republic.¹⁰⁵

II. THE HISTORICAL USE OF CONSTITUENT INSTRUCTIONS

As indicated in Part I, recent judicial characterizations of the Framers' intentions regarding Article V have been largely devoid of serious historical analysis or scrutiny of the Framers' statements and experience. Not surprisingly, these characterizations have been inaccurate. Domino-like, they have cited one another and little else for support. Such ahistorical adjudication does a profound disservice to the Constitution, as the false depiction of the Framers' intent is repeated by other courts and gains the weight of accumulated precedent. I attempt to correct these judicial misconceptions below. I also seek to tell an all-but-forgotten story of how constituent instructions shaped the founding of the American Republic.

A. *Constituent Instructions Prior to 1776*

Instructions were a prominent feature on the American political landscape long before independence. The tradition of instructing legislators was originally imported from Britain.¹⁰⁶ In the Parlia-

¹⁰⁵ *Id.* at 47. This is not to say that the Framers as a whole were confident that popular sentiment would favor just or desirable amendments to the Constitution. Indeed individual Framers expressed considerable mistrust of the masses, who might at times be driven by passion rather than reason. See Kobach, *supra* note 6, at 1985-88. The Framers' solution was to interpose a filter of representation between the people and constitutional choices. Madison described this filtering role of representatives in general terms in *The Federalist Papers*. Madison envisioned that under a representative scheme of government, the delegation of authority to elected representatives would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best determine the true interests of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial consideration." THE FEDERALIST No. 10, at 46-47 (James Madison) (Garry Wills ed., 1982). Madison returned to the subject in FEDERALIST NO. 63, when he predicted that public sentiment might at times be "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men." Such situations required "the interference of some temperate and respectable body of citizens." THE FEDERALIST No. 63, at 320 (James Madison) (Garry Wills ed., 1982). Under the Madisonian vision, elected representatives would refine and relay the preferences of their constituents, not be insulated from such preferences. Indeed, none of the Framers recorded any statements suggesting that representatives in Congress should be shielded from popular sentiment. Rather, it is fair to say that those Federalists who spoke on the subject regarded *indirect* popular involvement in the amendment process via constituent instructions as entirely appropriate. See *infra* Part II.E.

¹⁰⁶ As Marc Kruman has noted, the theory and practice of instructing representatives originated in Saxon England during the transition from assemblies in which freeholders

ment of the seventeenth century and earlier, members routinely voted under instructions from their constituents. An “agency” theory of representation held sway. Under this view, Parliament “gathered as agents to declare the will of their principals.”¹⁰⁷ For example, in 1681, the freemen of the City of London instructed their four representatives in Parliament not to approve any money grants until and unless security against Popery was obtained.¹⁰⁸ And in 1733 most of the parliamentary boroughs instructed their members to vote against the unpopular Excise Bill advanced by Prime Minister Robert Walpole.¹⁰⁹

In America, instructions were used in virtually all of the colonies, although they were most prevalent in the colonies of New England.¹¹⁰ Such instructions, consisting of “directions drawn up by a body of constituents to their particular representatives,” ordered the representatives to take specified positions on issues of concern.¹¹¹ Depending on which representatives were being instructed, the instructions might come from voters assembled in town meetings, voters in county meetings, or state legislatures. In Massachusetts, for example, towns would meet routinely to issue instructions to their deputies in the colonial assembly, the General Court.¹¹² The earliest surviving records of instructions from the town of Boston to its deputies in the General Court date to 1652.¹¹³ In forty-five different years between 1661 and 1780, Boston issued instructions to its deputies. The instructions in any one year cov-

gathered and voted directly to representative assemblies, in which freeholders could retain a virtual presence through the use of instructions. See MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 76 (1997).

¹⁰⁷ ROBERT LUCE, *LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT* 434 (1930).

¹⁰⁸ See *id.* at 435.

¹⁰⁹ See *id.* at 436. Although the agency theory predominated parliamentary thought in the seventeenth century, a competing “trusteeship” conception of representation gained adherents in eighteenth-century Britain. This theory saw members as entitled to vote in the interest of Britain generally according to the dictates of conscience, regardless of the sentiments of their particular constituents. See *id.* at 435-39. This theory’s best known proponent was, of course, Edmund Burke, who laid out his theory of representation in his famous “Speech to the Electors of Bristol” in 1774. See *id.* at 439-41.

¹¹⁰ See *id.* at 448-54. See generally Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 *NEW ENG. L. REV.* 355 (1991) (providing comprehensive overview of historical and current use of instructions in Massachusetts).

¹¹¹ See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 189 (1969).

¹¹² See *id.* at 189-90.

¹¹³ See LUCE, *supra* note 107, at 448.

ered up to a dozen topics. The subjects encompassed the entire panoply of legislative activity, including education, morality, political conduct, agriculture, manufacturing, commerce, fisheries, taxation, debt, military affairs, slavery, and constitutional questions pertaining to Britain and the other colonies.¹¹⁴

This mixing of the economic and the constitutional was exemplified by the City of Boston's instructions of 1764 to its four representatives, drawn up by a committee of Samuel Adams, Richard Dana, Joseph Green, Nathaniel Bethune, and John Ruddock. Along with other economic directives, the committee charged the representatives to pursue a restrictive fiscal policy.¹¹⁵ In the same instructions, the committee pressed for constitutional reform to discourage representatives who accepted offices from the crown from continuing to serve.¹¹⁶

By the 1760s, the tradition of instructions had become deeply entrenched in the political life of the colonies. In Massachusetts, the power of constituents to instruct their representatives was deemed a "sacred and unalienable" right under the common law.¹¹⁷ In some instances, such as that described above, a committee of a town's freeholders would frame the instructions. In other instances, instructions would be issued by popular vote in a town meeting.¹¹⁸ Constituents did not instruct their deputies on all subjects, only those of particular importance.¹¹⁹ For example, in 1768 the town of New London, Connecticut, instructed its representatives in the colonial assembly to maintain its union with the other

¹¹⁴ *Id.* (citing Robert Paine, Jr., *Massachusetts' Historic Attitude in Regard to Representative Government*, ARENA, July, 1907).

¹¹⁵ See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* app. (1764), reprinted in 1 *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776*, at 408, 472 (Bernard Bailyn ed., 1965) (reproducing Boston's instructions to its representatives).

¹¹⁶ The committee proclaimed:

[W]e particularly recommend it to you to use your endeavors to have a law passed whereby the seats of such gentlemen as shall accept of posts of profit from the crown or the governor while they are members of the House, shall be vacated, agreeable to an act of the British Parliament, till their constituents shall have the opportunity of re-electing them, if they please, or of returning others in their room.

Id.

¹¹⁷ See LUCE, *supra* note 107, at 449.

¹¹⁸ See *id.* at 449-50.

¹¹⁹ See *id.* at 449.

American colonies.¹²⁰ In the same year Windham, Connecticut, instructed its representatives to press for the establishment of a general congress of the English colonies in North America.¹²¹

Regardless of the subject matter, when constituents delivered instructions they expected their representatives to follow their orders without deviation. In 1773, the Boston committee reiterated to its deputies the obligatory nature of such instructions: "It is our unalienable right to communicate to you our sentiments, and when we shall judge it necessary or convenient, to give you our instructions on any special matter, and we expect you will hold yourselves at all times bound to attend to and to observe them."¹²²

In the southern and middle colonies, the structure of local government necessitated a different mechanism for the issuance of instructions. Organized on a county, rather than a town, basis and lacking the institution of the regular town meeting, these colonies were less well-equipped for the frequent instruction of representatives in the colonial assemblies.¹²³ Nonetheless, the practice did exist, with instructions typically coming from the assembled freemen of a county.¹²⁴ Instructions were employed sporadically, whenever constituents felt a compelling need to press their views upon their representatives.¹²⁵ However, some middle and southern colonies regularized the practice by providing for constituent instructions at the time that representatives were chosen. For example, in 1676, the Concessions and Agreements of West New Jersey formally established the instruction of representatives. Proprietors and freeholders, at the time that they selected their deputies, were to give them "their instructions at large, to represent their grievances, or for the improvement of the province."¹²⁶

As in the New England colonies, voters intended their instructions to be compulsory, not discretionary. The Orange County, North Carolina, instructions of 1773 reiterated this understanding, stating that the county's representatives were expected to "speak

¹²⁰ See *id.* at 451.

¹²¹ *Id.*

¹²² See *id.* at 449.

¹²³ See *id.* at 452.

¹²⁴ See, e.g., Records of Hanover (Virginia) Meeting of Freeholders (Feb. 20, 1775), reprinted in 1 AMERICAN ARCHIVES, FOURTH SERIES 1248-49 (Peter Force ed., 1837) [hereinafter 1 AMERICAN ARCHIVES].

¹²⁵ See WOOD, *supra* note 111, at 189-90.

¹²⁶ LUCE, *supra* note 107, at 452.

our Sense in every case when we shall expressly declare it, or when you can by any other means discover it."¹²⁷ By the 1760s, the tradition of instructions had become deeply entrenched in the political life of the colonies.

The instructions carried de facto binding force. In most colonies, no formal legal mechanism compelled the representative to obey his instructions. Nonetheless, as Daniel Dulany wrote, "their persuasive influence in most cases may be, for a representative who should act against the explicit recommendation of his constituents would most deservedly forfeit their regard and all pretension to their future confidence."¹²⁸ Dulany's famous *Considerations* pamphlet was widely read in the mother country: Prime Minister William Pitt cited it in the House of Commons "as a textbook of American rights."¹²⁹ The freeholders of Augusta County, Virginia, used terms that underscored their assumption that their instructions would possess binding force. They "most solemnly require[d]" and "positively command[ed]" their representatives regarding various questions.¹³⁰ Such statements reflected the political scruples of the age; it was virtually unthinkable for a representative to disregard his instructions. The only acceptable choices were to obey one's instructions or to resign from office.

In the years immediately preceding the War of Independence, instructions came to be used ever more frequently on the weighty constitutional questions of the period. For example, the town of Plymouth, New Hampshire, reflecting on "the momentous affairs that are now pending between Great Britain and her Colonies, and the imminent danger that threatens them," instructed its representatives in the colony's General Assembly to "discountenance every act of oppression."¹³¹ The freeholders of the town were also concerned about procedures that obfuscated government decision making, charging their representative to "endeavour to have the House open, that those out of doors may be acquainted with the

¹²⁷ Instructions to the Representatives from Orange County (1773), *quoted in* WOOD, *supra* note 111, at 190.

¹²⁸ Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue, by Act of Parliament* (1765), in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, *supra* note 115, at 598, 608.

¹²⁹ 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, *supra* note 115, at 599.

¹³⁰ See WOOD, *supra* note 111, at 191-92.

¹³¹ Records of Plymouth (New Hampshire) Town Meeting (Feb. 17, 1775), *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 124, at 1245-46.

debates of their members, the practice of secrecy heretofore used, tending much to the disquiet of numbers of their constituents.”¹³²

In early 1774, the British Parliament responded to the Boston Tea Party by, among other things, closing the port of Boston to all sea trade, authorizing the quartering of British troops in Massachusetts’ towns, and attempting to squelch the rebellious sentiment being expressed in Massachusetts town meetings.¹³³ What particularly irked Parliament about these meetings was the practice of issuing bellicose instructions (in the form of “resolves”) to representatives in the Massachusetts colonial assembly. Parliament’s Act “for the better regulating the government of the province of the Massachusetts Bay in New England” prohibited all town meetings other than the annual meetings unless the governor issued written permission.¹³⁴ It limited the subject matter of such meetings to the election of representatives unless the governor gave leave to discuss other stipulated issues. The Act offered the following justification: “a great abuse has been made of the power of calling such meetings, and the inhabitants have, contrary to the design of their institution, been misled to treat upon matters of the most general concern, and to pass many dangerous and unwarrantable resolves.”¹³⁵ Such Massachusetts resolves would eventually lead to the battles at Lexington and Bunker Hill.¹³⁶

These British affronts to colonial rights prompted the calling of the first Continental Congress, which convened in September 1774.¹³⁷ Virtually all of the delegates to the Congress were bound by instructions from their respective states in order, as the Virginia assembly put it, “[t]hat they may be better informed of our sentiments, touching the conduct we wish them to observe on this important occasion.”¹³⁸ The most momentous action taken by the First Continental Congress was the ordering of a boycott of all British goods imported into the colonies.¹³⁹ Constituent instructions guided the deliberations that led to this decision. For example,

¹³² *Id.* at 1246.

¹³³ See CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 100-01 (1944).

¹³⁴ See LUCE, *supra* note 107, at 450-51.

¹³⁵ *Id.* at 451.

¹³⁶ See *id.*

¹³⁷ See BEARD & BEARD, *supra* note 133, at 102.

¹³⁸ LUCE, *supra* note 107, at 451.

¹³⁹ See BEARD & BEARD, *supra* note 133, at 103.

North Carolina held a Provincial Convention of deputies representing the towns of the colony. The convention appointed delegates to the Continental Congress and instructed them: "That therefore until we obtain an explicit declaration and acknowledgment of our rights, we agree to stop all imports from Great Britain after the first day of January, 1775; and that will not export any of our commodities to Great Britain after the first day of October, 1775."¹⁴⁰ Similar conventions occurred in virtually all of the other colonies.

New York also instructed its delegates to vote in favor of a boycott. However, these instructions did not come from the colonial assembly; they came directly from the people. The instructions were approved in a public meeting on July 6, 1774. Convening in "the Fields" by public advertisement, the assembled citizens voted in favor of the following resolution:

That the Deputies who shall represent this Colony in the Congress of American Deputies, to be held at Philadelphia, about the first of September next, are hereby instructed, empowered, and directed to engage with a majority of the principal Colonies, to agree for this city upon a non-importation from Great Britain, of all goods, wares and merchandises, until the Act for blocking up the harbour of Boston be repealed, and American grievances be redressed¹⁴¹

Other colonies issued instructions that gave their delegates more discretion in deciding which course of action to pursue. For example, although the General Assembly of Rhode Island did not specifically instruct its delegates to the Continental Congress to favor a boycott of British goods, it did direct them to call for regular, annual meetings of the Congress "to consider of proper means for the preservation of the rights and liberties of all the Colonies."¹⁴²

¹⁴⁰ The Journal of the Proceedings of the First Provincial Convention of North Carolina (Aug. 24, 1774), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 737.

¹⁴¹ Proceedings in the Fields (July 6, 1774), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 312.

¹⁴² Rhode Island Resolutions (June 13, 1774), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 417. Similarly, delegates from the counties of South Carolina met in Charleston on July 6-8, 1774, and voted against specifically instructing their deputies to the Continental Congress on the matter of how to respond to the closure of the Port of Boston. See Extract of a Letter Received in New York (July 8, 1774), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 525. Instead, they voted for language giving their deputies "full power

In virtually all of the colonies, constituent instructions were occurring on two levels. In addition to the instructions issuing from the colonial assemblies to the Continental Congress, towns or counties were instructing their deputies in the colonial assemblies. For example, in February 1775, the freeholders of Augusta County, Virginia, instructed their representatives in the Virginia Convention to propose bounties to encourage the manufacture of steel, wool cards, paper and gunpowder and to favor the provision of ammunition supplies for the colony's militia.¹⁴³ They also instructed their representatives to comply with the recommendation of the First Continental Congress that delegates to a second Congress be appointed to meet on May 10, 1775, unless Great Britain responded to the grievances of the colonies.¹⁴⁴ On occasion, the freemen of a county might directly address their colony's delegates to the Continental Congress in order to express their sentiments on matters of great concern; however, in such cases they did not use the terms "instruct" or "instruction."¹⁴⁵ Binding "instructions" could only issue from the whole of a constituency, manifest either in a popular assembly or in a representative body.

Constituents might word their instructions either positively or negatively. That is, instead of instructing their representative to do something, they sometimes instructed their representative *not* to do something. For example, the freeholders of Boston charged their representatives to the Massachusetts Assembly in Concord as follows: "we do hereby instruct you, that in all your doings, as members of the House of Representatives . . . you do no act which can possibly be construed into an acknowledgment of the validity of the Act of the British Parliament for altering the Government of the Province of Massachusetts Bay."¹⁴⁶

and authority . . . to concert, agree to, and effectually prosecute such legal measures, (by which we for ourselves and them, most solemnly engage to abide) as in the opinion of the said Deputies . . . shall be most likely to obtain a repeal of the said Acts, and a redress of those grievances." South Carolina Resolutions (July 8, 1774), *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 124, at 526.

¹⁴³ See Records of Augusta County (Virginia) Meeting (Feb. 22, 1775), *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 124, at 1254.

¹⁴⁴ See *id.*

¹⁴⁵ See, e.g., Address of the Freeholders and Inhabitants of the County of Botetourt (Virginia), *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 124, at 1255.

¹⁴⁶ Instructions to Delegates in the Provincial Congress (Sept. 21, 1774), *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 124, at 798.

At the Second Continental Congress, constituent instructions continued to shape the agenda and voting of the delegates. The colonies instructed their representatives in Congress on issues ranging from the conduct of war against the British forces, to the insistence that religious matters in the colonies not be regulated by the mother country,¹⁴⁷ to regulation of the tea trade.¹⁴⁸ And once again, many of the instructions to delegates at the Second Continental Congress flowed from the town or county level to the colonial assemblies and then to the Continental Congress.¹⁴⁹

A great number of the instructions to delegates at the Continental Congress were of a constitutional nature. That is, they concerned the structure of government in the emerging nation-state. For example, the New Jersey House of Representatives expressed alarm that a motion was made at the First Continental Congress to give larger colonies more votes than smaller colonies. "[C]onceiving such motion to be of dangerous consequence," the New Jersey House instructed the colony's delegates to "not to agree to a measure of that kind, unless it should be agreed at the same time that no vote to be taken on such principles, shall, in future, be obligatory on any Colonies whose Delegates do not consent thereto."¹⁵⁰ The Maryland Convention instructed its delegates "to move for . . . a resolve of Congress, that no person who holds any military command in the Continental, or any Provincial regular forces, or marine service, nor any person who holds or enjoys any office of profit under the Continental Congress . . . be eligible to sit in Congress."¹⁵¹ Although the Continental Congress declined to pass this proposal, raising the question induced delegate John Adams to relinquish his recently obtained position as Chief Justice of the Massachusetts Supreme Court.¹⁵² In Pennsylvania, the ponderous issue of the slave trade was already finding its way into con-

¹⁴⁷ See, e.g., Instructions of the Assembly of Rhode Island to Their Delegates in the Continental Congress (May 4, 1776), reprinted in 6 AMERICAN ARCHIVES, FOURTH SERIES 1669 (Peter Force ed., 1846) [hereinafter 6 AMERICAN ARCHIVES].

¹⁴⁸ See Records of the Maryland Convention (Dec. 23, 1775), reprinted in 4 AMERICAN ARCHIVES, FOURTH SERIES 723 (Peter Force ed., 1843) [hereinafter 4 AMERICAN ARCHIVES].

¹⁴⁹ See, e.g., Meeting of the Freeholders of Richmond County, Virginia (Dec. 5, 1774), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 1021.

¹⁵⁰ Assembly of New Jersey (Jan. 11, 1775), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 1124.

¹⁵¹ 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 127 (Feb. 9, 1776) (Worthington C. Ford ed., 1906).

¹⁵² See *id.* at 125-27 (quoting from John Adams's autobiography).

stituent instructions. The Pennsylvania Convention resolved to encourage the counties to instruct their representatives in the Pennsylvania General Assembly to prohibit the future importation of slaves into the colony.¹⁵³

The instructions device was ideally suited to the political institutions of the nascent American nation-state. The various colonies, poised on the edge of independence, were not unlike independent sovereignties negotiating a treaty of mutual defense.¹⁵⁴ Their respective delegates to the Continental Congress were expected to guard provincial interests carefully and were accordingly directed to pursue a limited range of objectives in the same fashion that an envoy or diplomat might be authorized to agree to certain treaty arrangements but not to others.¹⁵⁵ The gravity of the issues confronting the Continental Congress fostered the frequent use of instructions to authorize such momentous decision-making.¹⁵⁶

¹⁵³ See Proceedings of the Convention for the Province of Pennsylvania (Jan. 23-28, 1775), reprinted in 1 AMERICAN ARCHIVES, *supra* note 124, at 1170.

¹⁵⁴ Prior to independence, instructions to delegates at the Continental Congress were, in this respect, quite different from the modern instruct-and-inform laws. Delegates were selected and instructed by their respective colonial assemblies, and the Continental Congress possessed no sovereign authority to do any more than what the various colonies would agree to. In contrast, today's members of Congress are popularly elected and instructed, and Congress possesses constitutional authority to act without first gaining the consent of the states. However, the preindependence instructions from town and country meetings to colonial assemblymen were very similar to the modern variant.

¹⁵⁵ This understanding was evident in the May 4, 1776, instructions from the Rhode Island General Assembly to its delegates to the Second Continental Congress:

Whereas this Assembly, reposing special trust and confidence in your abilities and integrity, have appointed you . . . Delegates to represent this Colony in General Congress; you are, therefore, hereby empowered to join with the Delegates of the other United Colonies, in Congress, at *Philadelphia* You are also authorized and empowered to consult and advise with the Delegates of the said Colonies in Congress upon the most proper measures for promoting and confirming the strictest union and confederation between the said United Colonies, for exerting their whole strength and force to annoy the common enemy, and to secure the said Colonies their rights and liberties”

Instructions of the Assembly of Rhode-Island to Their Delegates in the Continental Congress (May 4, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 1669. The instruction proceeded to list additional general objectives to be sought “in conjunction with the Delegates from the said United Colonies,” granting discretion to the delegates while implicitly retaining the right to issue further orders. *See id.*

¹⁵⁶ Indeed, the instructions voted by the town meeting of Portsmouth, New Hampshire, on December 25, 1775, for their delegates to the provincial congress expressly noted the gravity of the issues:

Not all delegates to the Continental Congress were happy to be so thoroughly bound by their instructions. On March 4, 1776, a resolution was introduced, but not passed, that would have asked the assemblies and conventions of the colonies to suspend their instructions temporarily. Noting that "the present state of America, and the cruel efforts of our enemies, render the most perfect and cordial union of the Colonies, and the utmost exertions of their strength, necessary for the preservation and establishment of their liberties," the resolution proposed:

That it be recommended to the several Assemblies and conventions of these United Colonies, who have limited the powers of their delegates in this Congress, by any express instruction, that they repeal or suspend those instructions for a certain time, that this Congress may have power, without any unnecessary obstruction or embarrassment, to concert, direct, and order such further measures as may seem to them necessary for the defence and preservation, support and establishment of right and liberty in these Colonies.¹⁵⁷

This resolution is illustrative not only of the frustration felt by some delegates with their lack of independent discretion, but also of the perceived binding power of constituent instructions at the time. Evidently, simply ignoring any instructions that posed an "obstruction" to congressional objectives was not an option. Only a formal repeal or suspension of instructions could free delegates from their constraints.¹⁵⁸

Gentlemen: As the approaching session of the Congress will be attended with the consideration of matters of more importance than ever came before any body of men in this Colony, your constituents desire your strict attention to these their instructions, supposing your motives in accepting our choice of you to be those, alone, of promoting the publick good.

Instructions to the Representatives of Portsmouth, New-Hampshire (December 25, 1775), *reprinted in* 4 AMERICAN ARCHIVES, *supra* note 148, at 459. Among other things, these instructions disavowed any commitment to independence, called for the enforcement of debts, and urged the fortification of the port of Piscataqua. *See id.*

¹⁵⁷ 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1074 (Mar. 4, 1776) (Worthington C. Ford ed., 1906).

¹⁵⁸ Georgia's delegates, in contrast, did not have to worry about strictly following their instructions. The geographic remoteness of Georgia prompted the colony's assembly to take a different approach. They passed a resolution that explicitly "declin[ed] giving any particular instructions," because of the reality that the political and military climate could

B. *Constituent Instructions and the Declaration of Independence*

The importance of constituent instructions in the nation's birth is perhaps best demonstrated by the fact that the Declaration of Independence itself was the product of instructions. The cry for independence was articulated via the issuance of constituent instructions from individual towns and colonies. In this way, sentiment in favor of the break with Great Britain emanated upward from the local and colonial level, rather than downward from the Continental Congress.¹⁵⁹ The cause of independence was not taken up eagerly or quickly. In April 1776, a year after warfare had erupted at Lexington and Concord, independence was still widely perceived to be an unsatisfactory alternative to reconciliation with the mother country.¹⁶⁰ As one colonial observer put it in early April 1776, "among the ends which the Colonies . . . had in view when they began the present contest, independence held no place; and . . . the New-England Governments, if they had it in view at all, considered it as a remote and contingent object."¹⁶¹ Many colonists continued to regard independence with suspicion: "even now, when our lives and properties are the sport and prey of every tender's motley crew that can catch them, many of our brethren shudder at the name of Independence."¹⁶² Arguably, in such an environment, independence could not have been imposed from above by the Continental Congress; instructions from below were necessary to demonstrate the shift in sentiment and the popular legitimacy of the cause.

North Carolina acted first. On April 12, 1776, the Provincial Congress of North Carolina, taking into account "the usurpations and violences attempted and committed by the King and Parliament of *Britain* against *America*,"¹⁶³ passed the following instruction:

change dramatically during the time that it would take for reports to reach Georgia and for instructions to reach Philadelphia. See Instructions to Archibald Bulluck et al. (May 20, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 1674. Perhaps the most revealing aspect of this noninstruction was the fact that the Georgia assembly felt compelled to explain why it was *not* issuing any specific instructions.

¹⁵⁹ See BEARD & BEARD, *supra* note 133, at 106.

¹⁶⁰ See *id.* at 104-06 (summarizing first year of military conflict and gradual acceptance of idea of independence).

¹⁶¹ Letter from A.B. to Mr. Alexander Purdie (April 12, 1776), reprinted in 5 AMERICAN ARCHIVES, FOURTH SERIES 860 (Peter Force ed., 1844) [hereinafter 5 AMERICAN ARCHIVES].

¹⁶² *Id.*

¹⁶³ Independence in North Carolina (April 12, 1776), reprinted in 5 AMERICAN ARCHIVES, *supra* note 161, at 859.

Resolved, That the Delegates for this Colony in the Continental Congress be empowered to concur with the Delegates of the other Colonies in declaring Independency, and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and Laws for this Colony¹⁶⁴

Although the resolve was worded permissively with the colony's delegates "empowered," rather than affirmatively commanded to pursue independence, the extensive list of grievances preceding the instruction made clear North Carolina's intent that its delegates should vote for independence as soon as the concurrence of the other colonies could be secured.¹⁶⁵

Towns and counties in other colonies soon began pushing their colonial assemblies to follow suit and instruct their delegates in the Continental Congress to favor independence. The message from Charlotte County, Virginia, was unequivocal. Excoriating the British government for "repeatedly pretending to hold out the olive-branch of peace in such a way as teacheth us that they are determined to persist in their hellish designs, and that nothing is intended for us but the most abject slavery,"¹⁶⁶ the county committee charged its representative "to use your best endeavours that the Delegates which are sent to the General Congress be instructed immediately to cast off the *British* yoke, and to enter into a commercial alliance with any nation or nations friendly to our cause."¹⁶⁷ In James City County, Virginia, a majority of the freeholders assembled and voted to instruct their delegates "(provided no just and honourable terms are offered by the King,) to exert your utmost abilities, in the next Convention, towards dissolving the connection between *America* and *Great Britain*, totally, finally, and irrevocably."¹⁶⁸ The freeholders of Buckingham County, Virginia, also instructed their delegates to push for a declaration of independence, noting that only after reconciliation with Britain was

¹⁶⁴ *Id.* at 860.

¹⁶⁵ *See id.* at 859-60.

¹⁶⁶ Instructions to Delegates for Charlotte County, Virginia (April 23, 1776), *reprinted in* 5 AMERICAN ARCHIVES, *supra* note 161, at 1034.

¹⁶⁷ *Id.* at 1035.

¹⁶⁸ Instructions to Delegates for James City County, Virginia (April 24, 1776), *reprinted in* 5 AMERICAN ARCHIVES, *supra* note 161, at 1047.

officially rejected would foreign nations be willing to espouse the American cause.¹⁶⁹

Delegates at the General Convention of Virginia carried out these instructions and others bearing the same charge on May 15, 1776. The convention voted unanimously to instruct its delegates in the Continental Congress “to propose to that respectable body to declare the United Colonies free and independent States; absolved from all allegiance to, or dependance [sic] upon, the Crown or Parliament of *Great Britain*”¹⁷⁰ The Virginia Convention added a proviso similar to that stated by North Carolina: the colony would assent to decisions of the United Colonies, provided that “the power of forming Government for, and the regulations of the internal concerns of each Colony, be left to the respective Colonial Legislatures.”¹⁷¹ On the same day, May 15, the New York Convention instructed its delegates in the Continental Congress to propose a declaration of independence with the same proviso.¹⁷²

In May and June of 1776, instructions on the subject began to multiply rapidly. Some were solicited from towns by colonial assemblies, others were issued without any prompting. In Massachusetts, for example, the General Court resolved on May 10 that the inhabitants of each town in the colony should meet to instruct their representatives in the General Court whether or not to support independence.¹⁷³ The Town of Boston responded at length,

¹⁶⁹ See Address and Instructions of the Freeholders of Buckingham County, Virginia (May 6, 1776), reprinted in 5 AMERICAN ARCHIVES, *supra* note 161, at 1208.

¹⁷⁰ Records of the Virginia Convention (May 15, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 1524. Seven days later, the Virginia Convention communicated its intention to take such a decision to its colleagues in Maryland. See Virginia Convention to Maryland Convention (May 22, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 461.

¹⁷¹ Records of the Virginia Convention (May 15, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 1524.

¹⁷² The New York Convention instructed its delegates in the Continental Congress “to propose to that respectable body to declare the United Colonies free and independent States, absolved from all allegiance to, or dependance [sic] upon, the Crown and Parliament of *Great Britain*.” Records of the New York Provincial Congress (May 15, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 1364. The Convention directed its delegates to consent to the formation of a confederation of the colonies, “provided that the power of forming Government for, and the regulation of the internal concerns of each Colony, be left to the respective Colonial Legislatures.” *Id.*

¹⁷³ See Records of the Massachusetts House of Representatives (May 10, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 420. This call for instructions was particularly significant in the development of American political institutions. Up until this point, direct democracy in the American colonies was of the “ideal” or “pure” form — direct, face-to-face discussion of issues and voting by eligible citizens in New England town meeting. This ac-

declaring reconciliation with the King, his ministry, and Parliament "to be as dangerous as it is absurd."¹⁷⁴ Boston accordingly instructed its representatives to "cheerfully support" independence, provided that the other colonies were willing to stand with Massachusetts.¹⁷⁵ The inhabitants of the town of Malden were more metaphorical in their instructions to their representative, Ezra Sargent:

The time was, sir, when we loved the King and the people of *Great Britain* with an affection truly filial. We felt ourselves interested in their glory. We shared in their joys and sorrows

These were our sentiments toward *Great Britain* while she continued to act the part of a parent state. We felt ourselves happy in our connection with her, nor wished it to be dissolved; but our sentiments are altered. It is now the ardent wish of our souls that *America* may become a free and independent State.¹⁷⁶

Although the instructions from most Massachusetts towns were less prolix, their content was unambiguous. For example, the inhabitants of Stockbridge, Massachusetts, instructed their representative simply that "should the great and important question of the Independency of the United Colonies of *Great Britain* be discussed . . . he give his vote for the affirmative."¹⁷⁷ Town after town issued similar instructions to representatives in the Massachusetts assembly during May and June of 1776.¹⁷⁸ Such instructions ultimately com-

tion by the Massachusetts House of Representatives, along with the response by Massachusetts town meetings, involved the setting of a question at a central seat of government, followed by the voting on that question at various remote locations and the eventual compilation of all the results at the seat of government. As such, it was a hybrid form resembling the modern referendum or ballot issue.

¹⁷⁴ Instructions of the Town of Boston to Their Representatives (May 23, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 557.

¹⁷⁵ See *id.*

¹⁷⁶ Meeting of the Inhabitants of the Town of Malden (May 27, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 602.

¹⁷⁷ Instructions from the Town of Stockbridge, Massachusetts (May, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 649.

¹⁷⁸ See, e.g., Vote of Watertown, Massachusetts, on Independence (May 20, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 532; Vote of Walpole, Massachusetts (May 20, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 533; Vote of Medway, Massachusetts (May 22, 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 533; Instructions from the Town of Pittsfield, Massachusetts (May 1776), reprinted in 6 AMERICAN ARCHIVES, *supra* note 147, at 649. Many Massachusetts towns issued instructions in response to the colonial assembly's call for a declaration of sentiments. See, e.g., Instructions to Nathan Cushing, Esq., Representative of the Town of Scituate (June 4, 1776), reprinted in 6

pelled the colonial assembly to favor independence and to instruct Massachusetts' delegates to the Continental Congress accordingly. Similar developments took place in Delaware in May 1776. A group of radicals led by Caesar and Thomas Rodney achieved the instruction of representatives in the Delaware Assembly to favor independence.¹⁷⁹ The Assembly, in turn, instructed Delaware's delegates to the Continental Congress.

By early June, the demand for independence had spread so widely that it had become impossible to discount. In the Continental Congress, the delegates of four colonies were already under instructions to declare independence,¹⁸⁰ and it was clear that Massachusetts would soon add its delegates to the list. On June 7, Richard Henry Lee of Virginia moved in the Continental Congress for a declaration of independence. Wary of premature action, however, the Congress declined to pass the resolution. Nevertheless, the Congress authorized the appointment of a committee to draft a declaration of independence.¹⁸¹ Meanwhile, sentiment in favor of separation from Britain strengthened. This sentiment eventually found expression in instructions coming from four more colonies that had not yet cast their lot favor of independence.¹⁸²

On June 14, 1776, the General Assembly of Connecticut resolved, "That the Delegates of this Colony in General Congress be, and they are hereby, instructed to propose to that respectable body to declare the United *American* Colonies free and independent

AMERICAN ARCHIVES, *supra* note 147, at 699; Instructions from Wrentham, Norfolk County (June 5, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 699; Instructions from Hanover, Plymouth County (June 6, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 700; Instructions from Leverett, Hampshire County (June 18, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 703; Instructions from Gageborough, Bristol County (June 19, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 703; Instructions from Topsfield, Essex County (June 21, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 703-04; Instructions from Southampton, Hampshire County (June 21, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 704. These instructions issued in response to the request of the colonial assembly were not unlike a colony-wide referendum, in which each town delivered the collective vote of its inhabitants. Indeed, after independence, Massachusetts used town meetings as a vehicle for collecting the votes of its citizens in state-wide referendums.

¹⁷⁹ See WOOD, *supra* note 111, at 189.

¹⁸⁰ These delegates were from North Carolina, Virginia, New York, and Delaware.

¹⁸¹ See BEARD & BEARD, *supra* note 133, at 106.

¹⁸² These colonies were Connecticut, Pennsylvania, Maryland, and New Jersey.

States, absolved from all allegiance to the King of *Great Britain*."¹⁸³ In Pennsylvania and Maryland the instruction process involved an extra step: both colonies had previously instructed their delegates in the Continental Congress to vote *against* any declaration of independence. Thus, it was necessary to rescind the previous instructions before issuing new instructions in favor of independence. In both colonies this change of heart was precipitated by instructions from the local level to representatives in the colonial assemblies.¹⁸⁴ On June 14, 1776, the Pennsylvania Assembly formally withdrew its prior instructions, explaining that "[t]he situation of publick affairs is since so greatly altered, that we now think ourselves justifiable in removing the restrictions laid upon you by those instructions."¹⁸⁵ Thereafter, Pennsylvania's delegates were free to vote at their discretion, provided that the "sole and exclusive right of regulating" Pennsylvania be reserved to the people of the colony.¹⁸⁶

In Maryland, it took longer to reverse the colony's anti-independence stance. In January 1776, the Maryland Convention had instructed its delegates in the Continental Congress not to assent to any proposition declaring the colonies independent, unless four of the eight delegates thought it "absolutely necessary for the preservation of the liberties of the *United Colonies*."¹⁸⁷ If a majority of the colonies voted to declare independence against the wishes of the Maryland delegates, then they were to call a Convention of the colony to consider the proposition.¹⁸⁸ By May, the political climate in the colonies had shifted considerably in favor of independence. Nonetheless, the Maryland Convention refused to change tack. Insisting that "a reunion with Great Britain on constitutional principles would most effectually secure the rights and

¹⁸³ Records of the Connecticut Assembly (June 14, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 868.

¹⁸⁴ *See, e.g.*, Petition of the Freemen and Inhabitants of the County of Cumberland (Pennsylvania), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 851; Meeting of Associates, Anne Arundel County, Maryland, *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1018; Instructions to the Delegates of Charles County, Maryland, *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1019; Instructions to the Delegates of Talbot County, Maryland, *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1020.

¹⁸⁵ Records of the Pennsylvania Assembly (June 14, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 862.

¹⁸⁶ *See id.* at 863.

¹⁸⁷ Instructions to Maryland Delegates in Congress (January 11, 1776), *reprinted in* 4 AMERICAN ARCHIVES, *supra* note 148, at 654.

¹⁸⁸ *See id.*

liberties, and increase the strength and promote the happiness of the whole Empire,” the convention unanimously voted that its delegates should regard themselves as “bound and directed to govern themselves by the Instructions given to them by this Convention, in its session of *December* last, in the same manner as if the said Instructions were particularly repeated.”¹⁸⁹

This position did not sit well with Marylanders outside of Annapolis for long. In June, the freemen of various Maryland counties instructed their delegates at the Maryland Convention to favor independence and to in turn instruct Maryland’s delegates in the Continental Congress to act with a majority of the other colonies to declare independence. In so doing, the freemen of Anne Arundel County, reiterated their “unquestionable” right to instruct:

We, the freemen of *Anne Arundel* County, taking into serious consideration the present alarming situation of this Province, have determined to exercise our unquestionable right of instructing our Delegates in Convention. No apology is necessary; neither is any, we presume, expected from us. From the very nature of the trust, and the relation subsisting between constituent and representative, the former is entitled to express his sentiments, and to instruct the latter upon all points that may come under his consideration as representative.¹⁹⁰

The tone and phrasing of this statement indicate that the instructions were understood to be more than mere requests or declarations of sentiments. Instructions were to be obeyed. Were instructions not viewed as binding, the consideration of the propriety of apology would have been entirely out of place.

On June 28, 1776, the Maryland Convention obliged. Voting unanimously to remove its instructions of December 1775, the Convention issued what might be called *permissive but conditional* instructions. Rather than simply instructing its representatives at the Continental Congress to declare independence, the Maryland Convention “authorized and empowered” a majority, or at least three, of them to join with a majority of the colonies and declare

¹⁸⁹ Records of Maryland Convention (May 21, 1776), *reprinted in* 5 AMERICAN ARCHIVES, *supra* note 161, at 1589.

¹⁹⁰ Instructions of Anne Arundel County, Maryland (June 26, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1092.

the United Colonies "free and independent States."¹⁹¹ Consenting to hold itself bound by resolutions of a majority of the United Colonies, the Convention also added the proviso that "[t]he sole and exclusive right of regulating the internal Government and Police of this Colony be reserved to the people thereof."¹⁹² This case demonstrated well the possibility of using constituent instructions not only to control the substance of representatives' votes, but also to impose procedural conditions regarding the number of delegates that would have to concur.

Six days earlier, the New Jersey Provincial Congress had issued permissive, but not conditional, instructions to its delegates. New Jersey had positively directed its delegates "to join with the Delegates of the other Colonies in Continental Congress, in the most vigorous measures for supporting the just rights and liberties of America," but the ultimate decision to vote for independence was left to their discretion. The instructions empowered them to declare independence "if you shall judge it necessary and expedient for this purpose."¹⁹³ The instructions also authorized them to enter into a confederation for union and common defense, and to make treaties with foreign nations, provided of course that "whatever plan of Confederacy you enter into, the regulating the internal police of this Province is to be reserved to the Colony Legislature."¹⁹⁴

As the ultimate step of declaring independence became more and more imminent at the end of June, the New York delegates decided that it would be prudent to check with the Convention of New York to determine if its earlier instructions of May 15 still expressed the will of the colony. The prior set of instructions bound the delegates to favor independence and the creation of a continental confederation. However, the delegation was uncertain as to whether the old instructions applied under new circumstances. Accordingly, they asked for additional instructions to authorize further action on their part:

¹⁹¹ Records of the Maryland Convention (June 28, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1491.

¹⁹² *Id.*

¹⁹³ Records of the New Jersey Provincial Congress (June 22, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1628.

¹⁹⁴ *Id.* at 1629.

Your Delegates here expect that the question of Independence will very shortly be agitated in Congress. Some of us consider ourselves as bound by our instructions not to vote on that question, and all wish to have your sentiments thereon. The matter will admit of no delay. We have, therefore, sent an express, who will wait your orders.¹⁹⁵

This case of representatives asking for further direction from their constituents illustrates not only the obligatory nature of instructions on the cusp of American independence, but also the presumption that such a momentous decision ought *not* to be taken in the absence of clear instructions.

Accordingly, representatives in the Continental Congress regarded themselves to be firmly bound by such instructions. Not only did they take the affirmative step of asking for further instructions when their charge was unclear, as in the case of New York, they also read aloud before the Continental Congress the instructions that would bind them. For example, on April 24, 1776, the South Carolina delegates presented and read the credentials of their appointment and their instructions that had been voted by the South Carolina Convention a month earlier.¹⁹⁶ Delegates from the other colonies followed the same practice.¹⁹⁷

The conclusion is inescapable that the Declaration of Independence was the direct product of constituent instructions. The instructions began at the town and county level, working upward to the Continental Congress. Surviving records indicate that the delegates from at least nine of the thirteen colonies were so instructed.¹⁹⁸ Except where permissive language was used, representatives at both the colonial and continental level regarded themselves as firmly bound by their instructions. And the instructions were sometimes complex; procedural conditions and substantive provisos were not unusual. This series of events therefore offers

¹⁹⁵ Letter to New York Provincial Congress (June 8, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1391.

¹⁹⁶ See Records of the Continental Congress (April 24, 1776), *reprinted in* 5 AMERICAN ARCHIVES, *supra* note 161, at 1687-88.

¹⁹⁷ For example, on July 1, 1776, the New Jersey delegates produced and read the credentials of their appointment, along with their charge from the New Jersey Provincial Congress. See Records of the Continental Congress (June 28, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1725.

¹⁹⁸ These nine states were Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, North Carolina, Pennsylvania, and Virginia. See discussion *supra* Part II.B.

considerable support for the view that the founding generation regarded it as entirely appropriate for constituents to bind their representatives on constitutional matters. Indeed, not only did they deem it appropriate, they judged it vitally necessary. Consequently, the seminal constitutional act of the nation was governed by constitutional instructions.

C. *Constituent Instructions from Independence to 1787*

After independence, the frequent use of instructions in the conduct of public affairs continued, both at the state level and at the national level in the Continental Congress and the Congress of the Articles of Confederation.¹⁹⁹ The expectation that constituent instructions were binding upon representatives remained well-entrenched in American political culture. As the *Continental Journal* of Boston put it in 1778, "no member will venture to counteract the declared sentiments of his constituents; as, besides its being a breach of trust, it would infallibly ruin his interest among them."²⁰⁰ In its initial postindependence instructions of July 1776, the Pennsylvania Convention began by restating this understanding to its congressional delegates:

Gentlemen: This Convention, confiding in your wisdom and virtue, has, by the authority of the people, chosen and appointed you to represent the free State of *Pennsylvania* in the Congress of the *United States of America*, . . . and this Convention apprehend it to be a duty which they owe the publick to give you the following general directions for your conduct, confident that you will at all times pay the utmost attention to the instructions of your constituents.²⁰¹

Delegate actions contrary to their instructions would have been deemed *ultra vires*. For example, when in January 1777 the Continental Congress determined that New York's instructions did not empower its sole delegate to vote on fiscal matters before the Congress, the President of the Congress was directed to write to the

¹⁹⁹ The Articles of Confederation were adopted on November 15, 1777. See 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 907 (Nov. 15, 1777) (Worthington C. Ford ed., 1907). Prior to their adoption, the Continental Congress continued to meet.

²⁰⁰ WOOD, *supra* note 111, at 192 (quoting BOSTON CONTINENTAL J., Oct. 15, 1778).

²⁰¹ Records of the Pennsylvania Convention (July 26, 1776), reprinted in 2 AMERICAN ARCHIVES, FIFTH SERIES 11 (Peter Force ed., 1851) [hereinafter 2 AMERICAN ARCHIVES].

state of New York to request a fully authorized delegation.²⁰² If instructions were expected to issue from a state legislature, the delegates of that state would likely seek to postpone any vote in Congress until their instructions arrived.²⁰³

Further demonstrating the binding power of instructions was the congressional response to the Vermont loyalists in 1782. Loyalists in Vermont controlled what government authority existed in the territory. They had stripped various rebels of their possessions and had banished them from Vermont.²⁰⁴ In Congress, “it was agreed on all sides that it was indispensable to the safety of the U.S. that a traitorous intercourse between the inhabitants of Vermont & the Enemy should be suppressed.”²⁰⁵ Nevertheless, the delegates of New Jersey informed Congress in November that they were bound by August instructions from their state legislature and consequently they “could not vote for any act which might oppose force to the Authority of Vermont.”²⁰⁶ The New Jersey delegates held firm to their instructions in spite of the patriotic sentiment that drove the vast majority of the Congress to vote the other way. As the Journals of the Continental Congress recorded: “the only States in Congress which stood by Vermont were Rhode Island, which is supposed to be interested in lands in [Vermont], and [New] Jersey whose Delegates were under instructions on the subject.”²⁰⁷

²⁰² See 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 61 (Jan. 24, 1777) (Worthington C. Ford ed., 1907).

²⁰³ See, e.g., Report on the Cession of Virginia (June 10, 1783), reprinted in 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 74-75 (Jonathan Elliot ed., 2d ed., New York, Burt Franklin 1888) [hereinafter ELLIOT'S DEBATES] (indicating that Delaware delegates sought to postpone vote on cession of Virginia).

²⁰⁴ 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 858 (Dec. 3, 1782) (Worthington C. Ford ed., 1914)

²⁰⁵ *Id.* at 856 (Nov. 27, 1782).

²⁰⁶ *Id.* at 857 (Nov. 27, 1782).

²⁰⁷ *Id.* at 859 (Dec. 3, 1782). Another episode that provided an interesting window into a representative's perceived duty to follow instructions occurred in early 1783, when American ministers to Britain disobeyed their instructions from Congress and signed a preliminary peace agreement with Britain without informing America's ally, France. See BEARD & BEARD, *supra* note 133, at 112; 5 ELLIOT'S DEBATES, *supra* note 203, at 74-75 (Mar. 24, 1783). The conclusion of the separate peace would foster considerable mistrust in France. In defense of the American ministers' initiative, John Rutledge of South Carolina insisted that they had acted rightly, and that ministers should disobey their instructions whenever the public good required them to do so. See *id.* at 75. This comment prompted a sharp rebuke by John Francis Mercer of Virginia, who pointed to the “dangerous tendency of the doctrine” espoused by Rutledge. *Id.* Mercer likened the instruction of ministers to the instruction of representatives and reminded his colleagues that the latter had binding force. See *id.* (“[T]he delegates of Virginia having been unanimously instructed not to conclude or discuss any treaty of peace but in confidence and in concert with his Most Christian Majesty

In the months immediately following the Declaration of Independence, the fledgling nation operated in a constitutional vacuum, at both the state and the national level. This void had to be filled quickly and systematically. Not surprisingly, virtually all of the states used constituent instructions in fashioning their new constitutional arrangements. During the war, each state drafted and adopted a state constitution. In most cases, the representatives who drafted the constitutions were bound by detailed instructions from their constituents. Indeed, the people of Portsmouth, New Hampshire insisted in July 1776 that constitutional deliberations *must* be constrained by instructions. Moreover, they directed their representatives to seek instructions regarding issues on which the people had not yet spoken. In their instructions, they stated "that [neither] they nor any other Representative in the future shall consent to any alteration, innovation or abridgment of the Constitutional form that may be adopted without first consulting their constituents in a matter of so much importance to their Safety."²⁰⁸

In the drafting of the state constitutions, as had been the case during the colonial period, instructions were treated as compulsory, not discretionary. If a delegate disagreed so strongly with his instructions that he could not bring himself to follow them, the political mores of the day demanded resignation before disobedience. This was demonstrated vividly during the framing of the Maryland Constitution in 1776, when delegates Charles Carroll, Samuel Chase, and Brice Worthington found their constituents' instructions to be "extremely against their inclinations."²⁰⁹ All three felt compelled to resign rather than disregard their instructions.²¹⁰

The instruction of representatives had been treated as a natural law or common law right during the colonial period and was viewed in the same way in most states after independence. However, some of the states elected to safeguard the right by explicitly

[Louis XVI], he conceived himself as much bound, as he was of himself inclined, to disapprove every other mode of proceeding . . .") Although criticism of the concept of binding instructions might be heard intermittently in one state or another, the instructions themselves continued to operate with powerful binding force. *See, e.g.*, WOOD, *supra* note 111, at 193-94 (noting debate in South Carolina newspapers in 1783-1784 regarding desirability of binding instructions).

²⁰⁸ LUCE, *supra* note 107, at 451 (quoting 8 NEW HAMPSHIRE STATE PAPERS 301).

²⁰⁹ PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND 222, 228 (1836), *quoted in* WOOD, *supra* note 111, at 191.

²¹⁰ *See id.*; LUCE, *supra* note 107, at 453; *see also* KRUMAN, *supra* note 106, at 77-79 (providing illuminating account of incident).

etching it into their new state constitutions. The pivotal role that instructions had played in the Declaration of Independence further strengthened the view that instructions were so fundamental to representative government that the right to instruct should be protected in state bills of rights.²¹¹ Virginia was the first state to adopt a bill of rights, doing so on June 12, 1776.²¹² Although the Virginia declaration did not expressly use the word “instruct,” it noted obliquely, “That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them.”²¹³ Similarly, the Maryland Constitution proclaimed two months later, “[t]hat all persons invested with the Legislative or Executive powers of Government are Trustees of the Public, and as such, accountable for their conduct.”²¹⁴ Such late-eighteenth-century statements referring to trusteeship and accountability generally connoted the right of constituents to instruct.²¹⁵ As the freemen of Arundel County, Maryland, put it in 1776, the right to instruct inhered in “the very nature of the trust, and the relation subsisting between constituent and representative.”²¹⁶

Pennsylvania was the first state to use the word “instruct” in its constitution, declaring in September 1776, “[t]hat the people have a right to assemble together to consult for their common good, to instruct their representatives and to apply to the Legislature for redress of grievances by address, petition, or remonstrance.”²¹⁷ North Carolina, Vermont, Massachusetts, and New Hampshire all followed by placing similar language in their constitutions.²¹⁸

Constituent instructions also continued to play a decisive role in shaping constitutional change at the national level. In September 1776, freemen in Connecticut addressed the constitutional matter of how delegates to the national Congress should be chosen. They

²¹¹ See LUCE, *supra* note 107, at 452.

²¹² *See id.*

²¹³ VA. CONST. art. I, § 2.

²¹⁴ MD. CONST. dec. of rights., art. 6.

²¹⁵ See LUCE, *supra* note 107, at 453.

²¹⁶ Instructions of Anne Arundel County, Maryland (June 26, 1776), *reprinted in* 6 AMERICAN ARCHIVES, *supra* note 147, at 1092.

²¹⁷ PA. CONST. of 1776, art. I, § 20.

²¹⁸ See LUCE, *supra* note 107, at 453-54. Pennsylvania, for reasons that are unclear, dropped this language from its 1790 Constitution. *See id.* at 454.

objected to the continuing practice of having the state assemblies appoint delegates, preferring election by the people instead.²¹⁹

Accordingly, they enjoined their representatives in the Connecticut General Assembly "to use your utmost influence that the Assembly do order and direct that such election . . . be annually made by the freeholders, or freemen at large, and not by their Representatives in the General Assembly."²²⁰ Although this early effort to introduce popular elections at the national level came to naught, the movement would prevail in 1787.

The Articles of Confederation, which formally bound the states together in a single republic, were the first national constitutional structure erected after independence. However, the Articles did not emerge overnight. The drafting and ratification process took nearly five years to complete. The states utilized constituent instructions in shaping the Articles from the very start, even in calling for the Articles in the first place. For example, the Pennsylvania Convention charged its delegates to strengthen "by every means in your power, the present happy union of these States," and to favor the creation of a "perpetual Confederation."²²¹ Work had begun on the Articles on June 11, 1776, when the Continental Congress appointed a committee to draft a plan for a confederation of the states. Chiefly the handiwork of John Dickinson, the Articles were reported to Congress and debated and revised on several occasions.²²² Congress eventually approved the Articles on November

²¹⁹ See Instructions to Their Representatives, Voted by the Freemen of a Town in Connecticut, at Their Annual Meeting in September 1776, *reprinted in* 2 AMERICAN ARCHIVES, *supra* note 201, at 113-14.

The power of electing Representatives, who, with others, are entrusted with power to declare war and make peace, to form alliances with foreign nations, and to make laws for an extensive empire, (we conceive,) can be lodged nowhere in so safe hands as that of the whole body of freeholders in a State. Bribery and corruption, intrigue and undue influence, is much more easily practised upon a few than many; although we have the highest value for our own General Assembly, whose members have heretofore been governed and directed by the most laudable of principles, the love of their country's welfare, yet we are not sure that in all future times, the same attention will be paid to the true interests of their constituents

Id.

²²⁰ *Id.* at 114.

²²¹ Minutes of the Proceedings of the Convention of the State of Pennsylvania (July 26, 1776), *reprinted in* 2 AMERICAN ARCHIVES, *supra* note 201, at 11.

²²² See 1 DOCUMENTS OF AMERICAN HISTORY 111 (Henry Steele Commager ed., 1958).

15, 1777, sending them to the states for review and ratification.²²³ As of July 1778, nine states had ratified the Articles;²²⁴ and by late 1779, all of the states except Maryland had done so.²²⁵

Maryland held out until March 1, 1781, maintaining that the terms of the proposed confederation would do nothing to prevent certain states, Virginia in particular, from “ambitiously grasping at territories” to the detriment of the other states.²²⁶ The Maryland legislature employed constituent instructions to spell out its objection before the Continental Congress and to propose amendments to the Articles. The instructions also constrained the voting of the Maryland delegates in Congress: “[We] do instruct you not to agree to the confederation, unless an article or articles be added thereto in conformity with our declaration: should we succeed in obtaining such article or articles, then you are hereby fully empowered to accede to the confederation.”²²⁷ After Maryland finally reconsidered its position and agreed to ratify, Congress assembled under the terms of the Articles.²²⁸

During the ratification period, a number of states that had already ratified sought amendments to the nascent constitution. The state legislatures used instructions to compel their delegates to propose the amendments. For example, on June 23, 1778, delegates from Massachusetts, Rhode Island, and Connecticut produced their instructions and proposed eight different constitutional amendments on subjects ranging from the apportionment of taxes paid by each state to the number of votes needed to exercise congressional powers.²²⁹ None of the amendments passed.²³⁰ Nevertheless, it was clear that constituent instructions would play a pivotal role in the amending process under the Articles. After the Articles were ratified, this proved to be the case. In 1784, a proposal surfaced to amend the Eighth Article of Confederation to provide for a more rapid means of apportioning and discharging

²²³ See BEARD & BEARD, *supra* note 133, at 118.

²²⁴ See 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 680-81 (July 10, 1778) (Worthington C. Ford ed., 1908).

²²⁵ See 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 222, at 111.

²²⁶ See 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 619-22 (May 21, 1779) (Worthington C. Ford ed., 1909).

²²⁷ *Id.* at 622.

²²⁸ See BEARD & BEARD, *supra* note 133, at 118.

²²⁹ 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 638-40 (June 23, 1778) (Worthington C. Ford ed., 1908).

²³⁰ See *id.*

the nation's debts in the wake of the war. The legislature of Virginia instructed its representatives to favor such an amendment. The Virginia delegation did so, presenting their instructions before the assembled Congress.²³¹

One successful amendment to the structure of government arose not as a formal amendment to the Articles, but as a resolution of Congress. On May 23, 1785, the representatives of Massachusetts read to Congress their instructions, which directed them "to endeavour to procure a resolution of Congress, enacting that no member of Congress shall be appointed to any office under the states during the term for which he shall have been elected."²³² In accordance with their instructions, the Massachusetts delegates moved such a resolution immediately thereafter; and it passed.²³³ Impelled by a single instruction, the Confederate Congress for the first time enacted at the national level what would later become part of Article I, Section 6, of the Constitution.²³⁴

Although the Articles of Confederation contained no explicit provisions regarding the right to instruct delegates on either constitutional matters or routine statutory matters, the right was assumed by state legislatures. Such an assumption was natural, given the long history of constituent instructions in America and the fact that state legislators were themselves routinely instructed by their constituents. Some states legislatures declared their presumptive right to instruct in the letter of credentials that accompanied their Congressmen and would be read aloud before Congress. For example, North Carolina authorized its representatives "to have, hold, exercise, and enjoy all the power" belonging to the delegation, "conforming to such Instructions you may receive from time to time from our General Assembly."²³⁵ The instruction of representatives in the Confederation Congress was a common practice.²³⁶

²³¹ See 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 589-91 (June 16, 1784) (Worthington C. Ford ed., 1928).

²³² *Id.* at 388 (May 23, 1785) (Worthington C. Ford ed., 1933).

²³³ See *id.* at 388-89.

²³⁴ "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

²³⁵ 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 645-46 (Nov. 29, 1784) (Worthington C. Ford ed., 1928); see Letter of Credentials from General Assembly of North Carolina to Its Delegate, William Cummings, *reprinted in* 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 565 (July 21, 1785) (Worthington C. Ford ed., 1933).

²³⁶ See, e.g., 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 355-56 (June 27, 1782) (Worthington C. Ford ed., 1914) (instructing Connecticut delegates regarding resolution of lands dispute between Connecticut and Pennsylvania); 24 JOURNALS OF THE

Indeed, two men who would later play the role of “Publius” in defending the Constitution in the *Federalist Papers* — John Jay and James Madison — were instructed on numerous occasions by the State of Virginia.²³⁷ And Massachusetts regularly instructed such notable members of the founding generation as John Hancock, Samuel Adams, and Elbridge Gerry.²³⁸ Madison plainly regarded constituent instructions as an intrinsic part of Congress’s operations. This was evident in his arguments against a particular voting rule in April 1787, less than a month before the Constitutional Convention was to begin, when he warned that the rule in question could operate to defeat the carrying out of constituent instructions.²³⁹

It is important to note that instructions were not necessarily seen as a limitation on the power of representatives. In some instances, constituents perceived themselves to be *enhancing* the bargaining power and credibility of their representatives. As the Maryland General Assembly explained to its Congressmen when the state refused to assent to the Articles of Confederation:

[T]o add greater . . . weight to your proceeding in Congress, and to take away all suspicion that the opinions you there deliver, and the votes you give, may be the mere opinions of individuals, and not resulting from your knowledge of the sense and deliberate

CONTINENTAL CONGRESS 1774-1789, at 139 (Feb. 18, 1783) (Worthington C. Ford ed., 1922) (instructing Connecticut delegates regarding payment of military and civil officers); *id.* at 145-46 (Feb. 25, 1783) (instructing of Rhode Island delegates regarding payment of military officers); 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 280-82 (Apr. 24, 1784) (Worthington C. Ford ed., 1928) (instructing Pennsylvania delegates regarding appointment of judges to resolve lands dispute between Connecticut and Pennsylvania); *id.* at 283-84 (Apr. 24, 1784) (instructing New York delegates regarding resolution of land disputes); *id.* at 332 (May 3, 1784) (instructing South Carolina delegates regarding compensation from Spain for services performed by frigate *South Carolina*); 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 379-81 (May 13, 1784) (Worthington C. Ford ed., 1928) (instructing New York delegates regarding garrisoning of forts); 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 350-51 (July 22, 1788) (Worthington C. Ford ed., 1937) (instructing Pennsylvania delegates regarding suppression of insurrection).

²³⁷ See LUCE, *supra* note 107, at 455-56.

²³⁸ See, e.g., 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 276-77 (Mar. 22, 1780) (Worthington C. Ford ed., 1910).

²³⁹ See 5 ELLIOT’S DEBATES, *supra* note 203, at 104 (April 25, 1787). The rule against which Madison argued was that which prohibited the raising of a question previously voted on, unless at least an equal number of states were present when the question was revived. See *id.* at 103-04.

judgment of the state you represent, we think it our duty to instruct you as followeth on the subject of the confederation²⁴⁰

Such instructions made it clear that the representative was speaking not just for himself, but also for his entire state. When treated as binding, the instructions also strengthened the hand of the representative in the sense that his position was stamped "non-negotiable." The instructions effectively notified all other representatives that he could not be cajoled into moderating his stand.²⁴¹ Accordingly, it was a common practice for representatives to produce and read their instructions aloud before the Congress prior to discussing the subject on which they were instructed.²⁴² In addition, instructions might be reiterated to fellow members of Congress at the time of a vote.²⁴³ In this way, a representative who agreed with his instructions might regard them not as shackles, but as an effective and empowering weapon in congressional deliberations.

D. *Constituent Instructions and the Framing of the Constitution in 1787*

In early 1787, constituent instructions again changed the course of American history. The members of Congress from New York had been instructed by their legislature to propose that Congress call a new constitutional convention subsequent to the Annapolis convention of 1786, one that would have the sanction of Congress.²⁴⁴ On February 21, 1787 they carried out their instructions and moved that a new convention be called.²⁴⁵ After "some little discussion" and an initial vote against the motion, it passed.²⁴⁶ Sev-

²⁴⁰ 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 619 (May 21, 1779) (Worthington C. Ford ed., 1909).

²⁴¹ On the other hand, in some negotiations, the ability to compromise might be more useful than the unyielding armor of an instructed position. For example, if other representatives viewed the position of the instructed representative as too extreme or unpalatable, then they would have little incentive to move in the direction of the instructed representative, because such compromises could produce no moderation in return.

²⁴² See, e.g., 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 938 n.1 (Sept. 5, 1781) (Worthington C. Ford ed., 1912) (describing instructions to Georgia delegates to promote trial of General Robert Howe).

²⁴³ See, e.g., 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 107-08 (Feb. 4, 1783) (Worthington C. Ford ed., 1922).

²⁴⁴ See 5 ELLIOT'S DEBATES, *supra* note 203, at 96 (Feb. 21, 1787).

²⁴⁵ See *id.* As part of the same motion, they also proposed that the committee report on the Annapolis convention be postponed. *Id.*

²⁴⁶ See *id.*

eral other states had also instructed their representatives to press for a convention to propose revisions to the ailing Articles of Confederation. This mounting pressure on Congress to call a convention had succeeded in producing the Philadelphia convention.

In authorizing the convention by Resolution, Congress acknowledged the pivotal role that instructions had played in prompting congressional action: “[S]everal of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution”²⁴⁷ With these words, the Confederation Congress documented the now all-but-forgotten fact that constituent instructions were directly and largely responsible for the calling of the Philadelphia convention. Indeed, Congress might not have acted to call the convention in the absence of such instructions. As Madison observed at the time, “if Congress interposed in the matter at all, it would be well for them to do it at the instance of a state, rather than spontaneously.”²⁴⁸

To summarize, instructions from constituents to their representatives were already a common feature on the American political landscape by the time that the Philadelphia Convention of 1787 commenced. Indeed, instructions had been instrumental in declaring American independence from Britain, establishing the Articles of Confederation, and calling the Philadelphia Convention. These facts suggest strongly that the convention delegates at Philadelphia did not intend to prohibit the explicit instruction of elected representatives in the Article V amendment process.

Yet perhaps the most compelling evidence of the Framers’ expectations is that some of the Framers themselves operated under instructions when they drafted Article V. The delegates who came to Philadelphia from Delaware acted under explicit instructions from their state legislature. In February 1787, the Delaware legislature commissioned George Read, Gunning Bedford, John Dickinson, Richard Bassett, and Jacob Broom to represent the state in Philadelphia. The same act also instructed the delegates. Their instructions forbade them from altering the Fifth Article of the Articles of Confederation, which provided that each state had a single, equal vote in Congress.²⁴⁹

²⁴⁷ 3 CONVENTION RECORDS, *supra* note 23, at 13-14.

²⁴⁸ 5 ELLIOT’S DEBATES, *supra* note 203, at 97 (Feb. 21, 1787).

²⁴⁹ See 3 CONVENTION RECORDS, *supra* note 23, at 574-75.

It is difficult to overstate the importance of the Delaware instructions. The convention records taken by James Madison and Robert Yates both make special note of the Delaware instructions, which were read to the assembled convention, along with the credentials of all of the delegates, on the first day of business.²⁵⁰ This early positioning had a marked impact on the final shape of the Constitution that emerged. The Delaware delegates' entrenchment on the view that all states, large or small, should have an equal vote in Congress fueled the smaller states' resistance to proportional representation and was, thus, critical to the emergence of the compromise providing for equal representation in the Senate.²⁵¹

Instructions not only constrained several of the Framers of the Constitution in Philadelphia, they also constrained the ratifiers in the state conventions. Many delegates to the state ratifying conventions were bound by strict instructions from their constituents. This was perhaps most evident at the Maryland ratifying convention. When one of the delegates who opposed the Constitution attempted to propose several amendments to it, he was interrupted by thirteen delegates who declared

that they were elected and INSTRUCTED by the people they represented, to ratify the proposed constitution, and that as speedily as possible, and to do no other act; that after the ratification their power ceased, and they did not consider themselves as authorised by their constituents to consider any ammendments [sic].²⁵²

This body of pro-Constitution delegates adhered rigidly to their instructions, and in the face of arguments against the Constitution "remained inflexibly silent."²⁵³ Eventually, the instructed delegates called the question of whether the proposed plan of federal government should be ratified. The convention voted in favor of ratification, sixty-three to eleven.²⁵⁴ The pro-Constitution delegates

²⁵⁰ See 1 *id.* at 4, 6.

²⁵¹ Of course, this compromise might have occurred even if Delaware had not formally instructed its delegates. The smaller states had an obvious and compelling incentive to resist proportional representation. Nonetheless, it is likely that the instruction of the Delaware delegates significantly enhanced the bargaining position of the smaller states.

²⁵² Records of the Maryland Ratifying Convention (April 21-26, 1788), available in DOCUMENTS FROM THE CONTINENTAL CONGRESS AND CONSTITUTIONAL CONVENTION, 1774-1789 (Library of Congress collection) (visited Nov. 16, 1999) <<http://memory.loc.gov/ammem/bdsds/bdsdhome.html>> (on file with author).

²⁵³ *Id.*

²⁵⁴ See *id.*

had strategically employed their instructions to brush aside their opposition at the Convention. In the process, they apparently squelched deliberation on the document. In any case, it is clear that the lopsided success of the ratification effort in Maryland was partially due to the use of constituent instructions.

In other states, delegates had been instructed to oppose the Constitution. For example, the delegate from Wilkes at the North Carolina ratifying convention, Mr. Lenoir, was instructed by his constituents and spoke accordingly:

My constituents instructed me to oppose the adoption of this Constitution. The principle reasons are as follow: The right of representation is not fairly and explicitly preserved to the people, it being easy to evade that privilege as provided in this system, and the terms of election being too long.²⁵⁵

He then proceeded to list numerous other reasons why his constituents charged him to vote against ratification of the proposed Constitution.²⁵⁶

Plainly constituent instructions played a pivotal role in both the framing and ratification of the Constitution. The relevance of these instructions to the constitutionality of the instruct-and-inform laws is considerable. The argument that the Framers and ratifiers of the Constitution intended that no instructions would be permitted to constrain constitutional deliberations rings rather hollow in light of the fact that many Framers and ratifiers were themselves so constrained.

E. The Recorded Expectations of the Framers: Future Constitutional Deliberations Would Be Constrained by Instructions

Undertaking the constitutional deliberations of 1787 with some delegates under charge of instruction was not seen as problematic or improper by the Framers. Indeed, several voiced their expectation that it would, and should, happen routinely in the future. Most of these statements came after the convention concluded, during the ratification debates in the states. During the convention, little was said about the role that instructions would play un-

²⁵⁵ Mr. Lenoir, Statement before the Convention of the State of North Carolina (July 30, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 203, at 202.

²⁵⁶ See *id.*

der the new Constitution. From the lack of debate on this point, one may reasonably conclude that the Framers simply assumed that constituents would continue to instruct representatives in the future, as they had done so often in the past. This conclusion is supported by an oblique reference to constituent instructions during the debates of June 21. On that date, delegates were discussing the question of how representatives in the two houses of the national legislature would be elected. The delegates of South Carolina had moved that the state legislatures should determine the mode of election.²⁵⁷ James Wilson and James Madison opposed the motion, arguing that the resulting election of members of Congress by state legislatures would produce members who would jealously guard state government powers and would work against the interests of the national government. Presumably, the states would ensure this rigorous advocacy through instructions: "[I]f the Legislatures [appoint] they will instruct"²⁵⁸ Clearly, the continuing presence of constituent instructions was assumed. Little else was said on the subject during the convention.

However, numerous post-Convention writings by various Framers addressed the issue of constituent instructions directly. Most of these statements occurred during the ratification debates that followed the convention. Perhaps the most illustrative explanation of the role that instructions would play in the amendment process under the new Constitution came from John Dickinson of Delaware. Dickinson defended the Article V amendment process in *The Letters of Fabius*, a series of writings published in a Delaware newspaper in 1788. After summarizing the hurdles set up by Article V, he wrote the following description:

Thus, by a gradual progress, we may from time to time *introduce every improvement in our constitution*, that shall be suitable to our situation. For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations respectively required by them, and *to enjoin*

²⁵⁷ See 1 CONVENTION RECORDS, *supra* note 23, at 367.

²⁵⁸ *Id.*

*their representatives, to employ every proper method to obtain a ratification.*²⁵⁹

In this context, the term “enjoin” was used synonymously with the term “instruct.” A state would “enjoin” its representatives via instructions. The use of this term reflected just how powerful the binding force of constituent instructions could be at the time of the framing.

Rufus King, who had been a Massachusetts delegate to the Philadelphia Convention, emphasized the de facto binding force of instructions in order to assuage the fears of wavering delegates at the Massachusetts ratifying convention. He insisted that members of the new Congress would not be able to disregard their constituents’ instructions:

The State Legislatures, if they find their delegates erring, can and will instruct them. Will not this be a check? When they hear the voice of the people solemnly dictating to them their duty, they will be bold men indeed to act contrary to it. These will not be instructions sent them in a private letter, which can be put in their pockets; they will be public instructions, which all the country will see; and they will be hardy men indeed to violate them.²⁶⁰

King’s statement is a particularly relevant to the instruct-and-inform laws. He stressed that the *public* nature of the instructions, combined with the disrepute into which any disobedient representative would fall, gave the instructions their binding force. And he spoke approvingly of the public shame that would attach to any errant representative. Disobedience of such instructions was not only dishonorable, it was political suicide. Given the political mores of the period, this dishonor was no less an electoral penalty than the appending of the notation “DISREGARDED VOTERS’ INSTRUCTIONS” under a candidate’s name on election ballots today. Thus, it is unlikely that King, Dickinson and the other Framers and ratifiers of the Constitution would have objected to the use of ballot notations to inform voters whether or not their

²⁵⁹ JOHN DICKINSON, THE LETTERS: VII-IX (1797), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788, at 496 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (second emphasis added).

²⁶⁰ Rufus King, Statement Before the Massachusetts Convention (1788), *quoted in* LUCE, *supra* note 107, at 459.

representatives had heeded their instructions. Indeed, it was essential that constituents' instructions and their representatives' responses be an interchange that "all the country will see." The public opprobrium that attached to the disobedience of instruction was what guaranteed the instructions' effectiveness.

Among the other Framers who assured skeptics of the Constitution that the people and the states could use instructions to press for amendments was Alexander Hamilton. Hamilton was attempting to assuage New York ratifiers who felt that the size of the Congress was too small. He made clear his expectation that, when such constitutional amendments were needed, instructions would be given and members of Congress would be bound to follow them. As he stated before the New York ratifying convention: "If the general voice of the people be for an increase [in the number of members of Congress], it undoubtedly must take place. They have it in their power to instruct their representatives; and the state legislatures, which appoint the senators, may enjoin it also upon them."²⁶¹ Here again, the term "enjoin" was used synonymously with the term "instruct." It is noteworthy that Hamilton expected instructions to be issued to both senators and House members.

Hamilton's fellow *Federalist Papers* author, John Jay, was similarly confident that instructions would provide a frequent and convenient mechanism for the guidance of Congress. Jay assumed that the Senate, in particular, would be so directed:

The Senate is to be composed of men appointed by the state legislatures: they will certainly choose those who are most distinguished for their general knowledge. I presume they will also instruct them, that there will be a constant correspondence supported between the senators and the state executives, who will be able, from time to time, to afford them all that particular information which particular circumstances may require.²⁶²

Jay's expectation that senators would be bound by instructions routinely was shared by many the Framers and ratifiers of the Constitution. Prior to the adoption of the Seventeenth Amendment, sena-

²⁶¹ Alexander Hamilton, Statement Before the New York Ratifying Convention (June 21, 1788), in 2 ELLIOT'S DEBATES, *supra* note 203, at 252.

²⁶² John Jay, Statement before the New York Ratifying Convention (June 23, 1788), in 2 ELLIOT'S DEBATES, *supra* note 203, at 283.

tors were selected by state legislatures; therefore they could be instructed easily and frequently by their constituents.²⁶³

Noah Webster foresaw the frequent instruction of senators as a natural occurrence under the proposed Constitution. In defending the structure of the proposed Senate during the Pennsylvania ratification debates, he said this of senators: “As they act *under the direction of the several legislatures*, two men may as fully and completely represent a state, as twenty”²⁶⁴ The “direction of the several legislatures” to which he referred was, of course, the issuance of instructions to senators by the legislatures of their respective states. This direction had often occurred in the Congress under the Articles of Confederation, in which each state was represented equally and delegates were selected by the respective state legislatures. In the Virginia ratifying convention, James Monroe assured skeptics that the state would be able to control its senators via instructions; senators had a “duty to obey their directions.”²⁶⁵

Other Federalist defenders of the proposed Constitution insisted that certain specific reforms desired by opponents of the Constitution could eventually be secured via the use of instructions. For example, Tench Coxe used this argument when he published essays in defense of the Constitution during the Pennsylvania ratification debates. In answering critics who charged that the right to trial by jury would not be secure under the Constitution, Coxe insisted that congressional regulation of the new federal courts would be shaped by “[t]he known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large”²⁶⁶ Coxe’s prediction was accurate — instructions were indeed used subsequently to shore up the jury right via the Sixth and Seventh

²⁶³ Although the instruction of a U.S. senator by his constituents (his state’s legislature) could be achieved quite easily, the instruction of a U.S. representative would be more problematic. It was difficult logistically to assemble the entire constituency of a representative in any one place so that they could vote on instructions. Consequently, instructions at the federal level in the young Republic became a virtually exclusive feature of the Senate. See *infra* Part II.H.

²⁶⁴ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788, *supra* note 259, at 383 (emphasis added).

²⁶⁵ James Madison, Statement Before Virginia’s Ratifying Convention (June 13, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 203, at 334.

²⁶⁶ TENCH COXE, AN AMERICAN CITIZEN: AN EXAMINATION OF THE CONSTITUTION OF THE UNITED STATES, ESSAY NO. IV (1788), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788, *supra* note 259, at 472.

Amendments, as described below. In this way, numerous defenders of the Constitution promised wavering ratifiers and anti-Federalist skeptics that constituent instructions would continue to shape the process of constitutional amendment under Article V. The people would not have a direct role in the process of constitutional amendment, but they would continue to play the indirect role via constituent instructions that they had played for decades.

F. The Use of Constituent Instructions to Constrain Deliberation on the Earliest Amendments to the Constitution

The Framers and ratifiers of the Constitution plainly expected that members of Congress would periodically be instructed by their constituents to vote for desired constitutional amendments. Not only did they explicitly state this conviction, they also experienced it themselves: after ratification, many of the Framers won election to the new Congress, and their states instructed them to seek the proposal of a Bill of Rights. This was part of an explicit quid pro quo, whereby the conventions of reluctant states would agree to ratify the new Constitution in exchange for congressional proposal of a Bill of Rights and other amendments. The deal, which first took shape at the Massachusetts ratifying convention, was secured by instructions that constrained numerous members of the First Congress.

The ratifying conventions of four states, Massachusetts, South Carolina, New York, and Rhode Island, inserted such instructions prominently in their ratification messages to Congress. Other states, such as New Hampshire, instructed their members of Congress in subsequent legislative acts. Consider the instructions issued by the Massachusetts convention:

[T]he Convention do, in the name and in behalf of the people of this commonwealth, *enjoin it upon their representatives in Congress, at all times; until the alterations and provisions aforesaid have been considered, agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.*²⁶⁷

²⁶⁷ Ratification Message of Massachusetts (Feb. 7, 1788), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 203, at 323 (emphasis added).

As under the Articles of Confederation, there was no mistaking the de facto binding power of such instructions. They exerted a powerful coercive effect upon members of the First Congress. As Massachusetts Representative Elbridge Gerry, who had been a delegate at the 1787 Convention, stated before Congress on July 21, 1789:

The members from Massachusetts were particularly instructed to press the amendments recommended by the convention of that State at all times, until they had been maturely considered by Congress; the same duties were made incumbent on the members from some other States; consequently, any attempt to smother the business, or prevent a full investigation, must be nugatory²⁶⁸

Plainly, such instructions played a critical role in pressing Congress to propose the Bill of Rights. If any episode involving the proposal of constitutional amendments demonstrates most clearly how the Framers envisioned that Article V would work, then this is it. This amendment process occurred immediately after the adoption of the Constitution, and most of the Framers took part in it, either as members of Congress or as members of their state ratifying conventions.

The instructions issued by the South Carolina convention were more succinct. After listing the state's desired alterations to the Constitution, the ratification message stated the following: "*Resolved*, That it be a standing instruction to all such delegates as may hereafter be elected to represent this state in the general government, to exert their utmost abilities and influence to effect an alteration of the Constitution, conformably to the foregoing resolutions." See Ratification Message of South Carolina (May 23, 1788) (emphasis in original), reprinted in 1 ELLIOT'S DEBATES, *supra* note 203, at 325.

The instructions issued by the New York ratifying convention added an extra twist. Not only were New York's representatives in the Congress enjoined to support the stipulated constitutional amendments, they were also instructed to conform their own legislative voting to the terms of the desired amendments in the interim:

And the Convention do, in the name and behalf of the people of the state of New York, enjoin it upon their representatives in Congress to exert all their influence, and use all reasonable means, to obtain a ratification of the following amendments to the said Constitution, in the manner prescribed therein; and in all laws to be passed by the Congress, in the mean time, to conform to the spirit of the said amendments, as far as the Constitution will admit.

Ratification Message of New York (July 26, 1788), reprinted in 1 ELLIOT'S DEBATES, *supra* note 203, at 329.

²⁶⁸ Statement of Elbridge Gerry (July 21, 1789), in 1 ANNALS OF CONG. 688 (Joseph Gales ed., 1789).

The state of Rhode Island followed the examples of Massachusetts, New York, and South Carolina when its convention belatedly ratified the Constitution two years later in 1790. Like the other states, it demanded a list of constitutional amendments and issued standing instructions to its representatives in Congress "to exert all their influence, and use all reasonable means, to obtain a ratification" of the suggested amendments.²⁶⁹ And along with New York, Rhode Island also issued an instruction to its representatives "in the mean time, to conform to the spirit of the said amendments, as far as the Constitution will admit."²⁷⁰ Notably, in a hortatory section preceding the specific amendments, the Rhode Island ratifying convention issued a statement that evokes an inescapable sense of *déjà vu* with respect to the modern instruct-and-inform laws. The Rhode Island delegates declared

that the members of the [legislative and executive branches of government] may be restrained from oppression, by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, returned into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the constitution of government and the laws shall direct.²⁷¹

In other words, Rhode Island obliquely urged a term limits (or "rotation") amendment in its ratification message and instructions to its representatives. Thus, not only were the courts that struck down the instruct-and-inform laws incorrect in assuming that instructions did not constrain constitutional amendment deliberations in the Framing era, the instructions of one state actually advocated term limits, the very reform urged by the instruct-and-inform laws two centuries later.

In all, seven states, Massachusetts, South Carolina, New York, Rhode Island, New Hampshire, Virginia, and North Carolina, required the proposal of amendments to the U.S. Constitution in

²⁶⁹ Ratification Message of Rhode Island (May 29, 1790), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 203, at 335.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 334.

their decision to ratify it.²⁷² The first five in this list explicitly instructed their members of Congress to press for the proposal of the desired amendments. The two others, Virginia and North Carolina, issued general statements from their ratifying conventions that called for amendments but did not explicitly instruct their congressional delegations.²⁷³

G. *The Constitutional Amendment that Wasn't*

When considering the package of amendments that was to become the Bill of Rights, the First Congress actually considered inserting an instructions provision into the Constitution. This was a response to fears expressed at the time of ratification that members of the new and more powerful Congress might abandon the prevailing political norm of obedience to instructions and start exercising their augmented powers without regard to the will of their constituents. As Patrick Henry railed before the Virginia ratifying convention in 1788:

At present you may appeal to the voice of the people, and send men to Congress positively instructed to obey your instructions. You can recall them if their system of policy be ruinous. But can you in this government recall your senators? Or can you instruct them? You cannot recall them. You may instruct them, and offer your opinions; but if they think them improper, they may disregard them. . . . Where, then, is the security?²⁷⁴

Henry urged that members of Congress who disregarded their instructions should be subject to recall, impeachment, or other forms of punishment.

The First Congress debated the proposal of a constitutional amendment that might have given such force to constituent in-

²⁷² See Statement of Mr. Van Buren (1826), in 4 ELLIOT'S DEBATES, *supra* note 203, at 489.

²⁷³ For example, on August 1, 1788, the North Carolina convention "recommend[ed] that, as early as possible, the following amendments to the said Constitution may be proposed for the consideration and adoption of the several states in the Union, in one of the modes prescribed by the 5th article thereof." Ratification Message of North Carolina (Aug. 1, 1788), in 4 ELLIOT'S DEBATES, *supra* note 203, at 248-49; see also Ratification Message of Virginia (June 26, 1788), reprinted in 1 ELLIOT'S DEBATES, *supra* note 203, at 327 (supporting ratification of Federal Constitution).

²⁷⁴ Patrick Henry, Statement Before the Virginia Ratifying Convention (June 13, 1788), in 3 ELLIOT'S DEBATES, *supra* note 203, at 355.

structions. Proposed by Representative Thomas Tucker of South Carolina on August 15, 1789, the instructions provision would have been inserted into the text of what eventually became the First Amendment. The proposed language declared the right of the people "to instruct their Representatives."²⁷⁵ As the ensuing debate demonstrated, there was some confusion about what effect this amendment would have. Instructions had long been prominent on the American political landscape, and many members of the First Congress were already operating under charge of instruction. Thus, it was unclear what the amendment was intended to accomplish.

Most Congressmen apparently believed that Tucker's amendment would have the effect of making instructions formally binding, such that a member's refusal to vote in accordance with his instructions would either invalidate his vote or invalidate the entire law being voted upon. As George Clymer of Pennsylvania insisted:

Do gentlemen foresee the extent of these words? If they have a constitutional right to instruct us, it infers that we are bound by those instructions; and as we ought not to decide constitutional questions by implication, I presume we shall be called upon to go further, and expressly declare the members of the Legislature bound by the instruction of their constituents.²⁷⁶

James Jackson of Georgia agreed: "If we establish this as a right, we shall be bound by those instructions"²⁷⁷ Jackson reasoned, therefore, that any member of Congress who votes against his instructions "commits a breach of the constitution."²⁷⁸ The precise consequences of such a breach were unclear, but Jackson did not want to travel down the path: "In short, it will give rise to such a variety of absurdities and inconsistencies, as no prudent Legislature would wish to involve themselves in."²⁷⁹

Thomas Stone of Maryland attempted to explore and define those absurdities. He believed that the proposed amendment would definitely add a formal binding effect to all instructions and that it would work in the following way: "I venture to assert, without

²⁷⁵ 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1789).

²⁷⁶ *Id.* at 763.

²⁷⁷ *Id.* at 764.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

diffidence, that any law passed by the Legislature would be of no force, if a majority of the members of this House were instructed to the contrary, provided the amendment became part of the constitution."²⁸⁰ Unwilling to support the amendment, he felt that such a provision making instructions *formally* and *constitutionally* binding would virtually transform the Republic into a direct democracy.²⁸¹

Most members of Congress preferred to stick with the status quo, under which instructions were satisfactorily enforced by informal norms. As Jackson had put it, "Let the people consult and give their opinions; let the representative judge of it; and if it is just, let him govern himself by it as a good member ought to do; but if it is otherwise, let him have it in his power to reject their advice."²⁸²

However, Edanus Burke of South Carolina was unpersuaded by the emerging consensus that an express constitutional affirmation of the people's right to instruct was unnecessary: "It has been asserted . . . that the people of America do not require this right."²⁸³ He pointed out that the constitutions of Massachusetts, Pennsylvania, and North Carolina "recognise, in express terms, the right of the people to give instruction to their representatives."²⁸⁴ This fact, in combination with the sentiments of the ratifying conventions on the subject, militated in favor of including the instructions right in the Constitution. If Congress did not respond to such popular demands, he argued, the resulting collection of amendments would be "little better than whyp-syllabub, frothy and full of wind, formed only to please the palate."²⁸⁵

Burke's rhetorical flourish failed to move his colleagues. The argument that it was unnecessary to make instructions constitutionally binding, and that doing so would be problematic in practice, was winning support in the chamber.²⁸⁶ The momentum on the floor was decidedly against the amendment. Although one

²⁸⁰ *Id.* at 767.

²⁸¹ *See id.* at 768.

²⁸² *Id.* at 764.

²⁸³ *Id.* at 773.

²⁸⁴ *Id.* at 774.

²⁸⁵ *Id.* For the curious, whyp-syllabub (or "whipped syllabub") is a dish made of milk or cream mixed with wine or cider. It was often sweetened or flavored.

²⁸⁶ At the outset of the floor debate, two members remarked in general terms about the desirability or undesirability of constituent instructions in a democracy. *Compare id.* at 761-62 (statement of Rep. Thomas Hartley of Pennsylvania) (opposing use of instructions), *with id.* at 762-63 (statement of Rep. John Page of Virginia) (favoring use of instructions). However, this more general line of discourse was not the focal point of debate, and it was not taken up in any significant way by others in the chamber.

proponent of the amendment, Thomas Sumter of South Carolina, suggested late in the debate that the amendment might not give any formal binding effect to constituent instructions and therefore should not be opposed on that ground,²⁸⁷ his interpretation was evidently not widely shared.²⁸⁸

James Madison opposed the amendment in either case. If, as most of his colleagues believed, the amendment would make instructions formally and constitutionally binding, then what would happen to a congressman who disregarded his instructions? "Suppose he refuses, will his vote be the less valid, or the community be disengaged from that obedience which is due to the laws of the Union?"²⁸⁹ On the other hand, Madison argued, if the proposed amendment merely stated the right of constituents to instruct their representatives, who were free to disregard such instructions at their peril, then it was unnecessary to insert the proposed text into the Constitution. The right to instruct was already provided for under the freedom of speech.²⁹⁰

In Madison's view, this ambiguity of meaning offered another salient reason to oppose Tucker's instruction provision. Such uncertain language would jeopardize the ratification of the entire amendment package. He pointed to "the difficulties arising from discussing and proposing abstract propositions, of which the judgment may not be convinced."²⁹¹ He favored keeping the list of amendments straightforward and easily understandable: "I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."²⁹² Madison repeated this argument once again at the end of the floor debate, just before the question was called.²⁹³ When the vote finally came, the proposed amendment was defeated, with ten in favor and forty-one opposed.²⁹⁴

Although a solid majority in the House of Representatives voted against inserting the proposed right-to-instruct language into what

²⁸⁷ See *id.* at 773-74.

²⁸⁸ See generally *id.* at 773-76 (displaying lack of support among representatives for Sumter's interpretation).

²⁸⁹ *Id.* at 767.

²⁹⁰ See *id.* at 766.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *id.* at 775.

²⁹⁴ See *id.* at 776.

would become the First Amendment, this vote was plainly not a rejection of the practice of constituent instructions. Madison's argument regarding the constitutional uncertainty that would attach to laws passed in disobedience to instructions evidently persuaded many of his House colleagues. Moreover, as the floor debate illustrated, most representatives viewed an explicit constitutional recognition of the right to instruct as superfluous.²⁹⁵ The tradition of constituent instructions was well established in the fledgling republic, and indeed many members of the First Congress were already operating under charge of instruction when considering the proposal of the Bill of Rights. The political scruples of the era were more than sufficient to enforce constituent instructions without venturing into the constitutional thicket of making disobedience a violation of the Constitution.

H. *Constituent Instructions in the Young Republic*

Constituent instructions continued to constrain the constitutional amendment process after the adoption of the first ten Amendments. Less than a month after the 1793 decision of the Supreme Court in *Chisolm v. Georgia*,²⁹⁶ the legislatures of Massachusetts and Virginia instructed their senators to seek a constitutional amendment denying federal courts jurisdiction over suits by citizens against states. Connecticut and North Carolina followed soon thereafter, and in January 1794, the resolution that would become the Eleventh Amendment in 1798 was introduced on the Senate floor.²⁹⁷ By March 4, 1794, it had attracted the necessary two-thirds support in Congress and was on its way to the states for ratification.²⁹⁸

²⁹⁵ Jay S. Bybee reaches the same conclusion in his analysis of the First Congress's debate on Tucker's proposal. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 523 (1997) ("In one sense, making the right of instruction formal in the Constitution would have been superfluous. The people did not lose any right to instruct their representatives. By not including the right in the First Amendment, the First Congress avoided the difficult question of enforcement.").

²⁹⁶ 2 U.S. (2 Dall.) 419 (1793).

²⁹⁷ See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 66 (1972); RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 56 (1993). The text of the Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

²⁹⁸ See BERNSTEIN & AGEL, *supra* note 297, at 56.

In the wake of the Jefferson-Burr contest for the Presidency in 1800-01, the legislature of New York instructed its senators to press for a revised system of electing Presidents.²⁹⁹ New Hampshire,³⁰⁰ Vermont, and Massachusetts³⁰¹ joined New York and instructed their senators to favor the electoral system reforms that would become the Twelfth Amendment, proposed by Congress in December 1803 and ratified in June 1804.³⁰²

Various unsuccessful constitutional amendments also were the subject of constituent instructions in the early nineteenth century. For example, in late 1807, Senator Edward Tiffin of Ohio moved for the proposal of an amendment that would have limited Article III judges to fixed terms of office and would have made the judges

²⁹⁹ See *id.* at 63.

³⁰⁰ See LUCE, *supra* note 107, at 462-63.

³⁰¹ See Bybee, *supra* note 295, at 565 nn.395-96 (1997).

³⁰² The Twelfth Amendment reads:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

removable by two-thirds of both houses of Congress.³⁰³ In January 1808, instructions on the subject from the Vermont legislature to Vermont's senators were read in the well of the Senate.³⁰⁴ In April 1808, Senator John Quincy Adams of Massachusetts spoke in favor of the same amendment, noting that he and his Senate colleague had been instructed by the Massachusetts legislature "to use their best endeavors to procure such an amendment to the constitution of the United States."³⁰⁵

In January 1818, Senator Macon of South Carolina, in accordance with instructions issued by the South Carolina legislature, proposed an amendment reforming the congressional electoral system.³⁰⁶ Specifically, the proposed amendment targeted gerrymandering and uneven district sizes. It required the drawing of contiguous congressional districts of equal size. It also stipulated that the voters of each congressional district would elect their own presidential elector.³⁰⁷ The proposed reform attracted the support

³⁰³ See 31 ANNALS OF CONG. 21-22 (Nov. 5, 1807). The proposed amendment was worded as follows:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices for — years, shall be removed by the President on the address of two-thirds of both Houses of Congress requesting the same, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Id. at 22.

³⁰⁴ See 31 ANNALS OF CONG. 99 (1808).

³⁰⁵ 1808 SENATE J. 265 (Apr. 12, 1808).

³⁰⁶ See 1817 *id.* at 131 (Jan. 20, 1817).

³⁰⁷ The wording of the proposed amendment was as follows:

That, for the purpose of choosing representatives in the Congress of the United States, each state, shall, by its legislature, be divided into a number of districts equal to the number of representatives to which said state may be entitled. The districts shall be formed of contiguous territory, and contain as nearly as may be, an equal number of inhabitants entitled by the constitution to be represented. In each district the qualified voters shall elect one representatives and no more. That for the purpose of appointing electors for the President and Vice President of the United States, in each district entitled to elect a representative in the Congress of the United States, the persons qualified to vote for representatives shall appoint one elector and no more. The additional two electors, to which each state is entitled, shall be appointed in such manner as the legislature thereof may direct. The electors when convened, shall have power in case any of them appointed as above prescribed, shall fail to attend for the purposes of their said appointment, on the day prescribed for giving their votes for President and Vice President of the United States, to appoint an-

of the legislatures of New York and New Hampshire, which in April and June, respectively, instructed their U.S. senators "to endeavor to obtain the said amendment to the constitution of the United States."³⁰⁸ The instructions included a request that the resolutions be laid before the Senate, a request that was carried out in November 1818.³⁰⁹ Although the amendment was never adopted, the episode demonstrated once again the central role of constituent instructions in the Article V amendment process.

The instruction of senators to propose or favor constitutional amendments occurred regularly during the antebellum period, on all manner of issues. In January 1818, frustrated with the lack of progress on the ratification of the congressional pay raise amendment,³¹⁰ the Tennessee legislature instructed its senators to "use their exertions to procure the passage of an amendment to the constitution of the United States, relative to the compensation of members of Congress."³¹¹ Two years later, in 1820, opponents of a national bank used constituent instructions to attempt to etch their view into the Constitution. The Indiana legislature instructed its senators to favor a constitutional amendment prohibiting the incorporation of a national bank.³¹²

other or others, to act in the place of him or them, so failing to attend. Neither the districts for choosing representatives, nor those for appointing electors, shall be altered in any state, until a census and apportionment of representatives under it, subsequent to the division of the states into districts shall be made. The division of states into districts, hereby provided for, shall take place immediately after this amendment shall be adopted; and afterwards, whenever a census and apportionment of representatives under it shall be made. The division of each state into districts, for the purposes both of choosing representatives and of appointing electors, shall be altered agreeable to the provisions of this amendment, and on no other occasion.

1818 *id.* at 28-29 (Nov. 16, 1818).

³⁰⁸ *Id.* at 28-30.

³⁰⁹ *See id.*

³¹⁰ This amendment, proposed alongside the first ten amendments to the Constitution, would eventually become the Twenty-Seventh Amendment, ratified in 1992. *See generally* Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the 27th Amendment*, 103 *YALE L.J.* 677 (1993) (describing amendment's 203-year-long path to ratification).

³¹¹ 1818 *SENATE J.* 129 (Feb. 2, 1818).

³¹² *See* 1820 *id.* at 120 (Jan. 26, 1820). The wording of the amendment, originating in Pennsylvania, was as follows:

Congress shall make no law to erect or incorporate any bank or other monied institution except within the District of Columbia; and every bank or other monied institution, which shall be established by the authority of

Even the incendiary constitutional question of slavery was the subject of constituent instructions. As early as 1819, the legislature of New York instructed its senators to oppose the admission into the union of any new state that did not prohibit slavery.³¹³ Instructions played a prominent role in directing congressional voting on slavery questions, both statutory and constitutional, until the Civil War.³¹⁴ In one of the more dramatic instruction episodes of the period, radical proslavery forces won control of the Missouri legislature and in 1848 instructed Missouri's U.S. senators to favor allowing slavery in *all* new states entering the union. Senator Atchison dutifully presented his instructions to the Senate. However, his colleague Thomas Benton, nearing the end of his fifth term in the Senate, could not bring himself to change course on this contentious issue.³¹⁵ Sensitive to the gravity of disobeying instructions, he attempted to gain permission from a higher authority than the Missouri legislature — the people of Missouri. Addressing a letter "To the People of Missouri" in May 1848, he asked that they confirm the instructions and, if they concurred, find a replacement senator to carry the instructions into effect. Taken at his word, Benton found himself defeated for reelection.³¹⁶

In the bicameral Congress after 1789, instructions at the national level became a virtually exclusive feature of the Senate. This was for a simple, practical reason; the constituency of a senator prior to the adoption of the Seventeenth Amendment was his state legislature, which assembled regularly and could instruct him as a matter of course.³¹⁷ In contrast, a member of the House was elected by the citizens of a large district. This was a new development in America; members of the Confederation Congress and the Continental Congresses had been elected by their respective state legislatures. The constituency of a House member was too large to assemble face-to-face in order to instruct him, and the use of referendums at

Congress, shall, together with its branches and offices of discount and deposit, be confined to the District of Columbia.

Id. Interestingly, the Indiana legislature used the term "request" rather than "instruct" and directed the resolution at both its senators and representatives. *See id.* This may reflect an intention that the direction be permissive, rather than mandatory.

³¹³ *See* 1820 *id.* at 26 (Nov. 23, 1820).

³¹⁴ *See* LUCE, *supra* note 107, at 472-74.

³¹⁵ *See id.* at 472.

³¹⁶ *See id.*

³¹⁷ *See* Bybee, *supra* note 295, at 518.

the state level had been confined largely to the adoption of state constitutions.³¹⁸ Thus, while the instruction of popularly elected representatives continued at the state level, where a representative's entire constituency might assemble in a single town or county meeting, it was unfeasible at the national level at the time.

Nevertheless, it was common practice for a state legislature to "request" the state's representatives to take action while "instructing" its senators to do so.³¹⁹ For example, in November 1808, Massachusetts, unhappy with the embargo laws that resulted in the interdiction of American ships bound for Britain, favored the repeal of the laws. The Massachusetts legislature resolved: "That the Senators of this Commonwealth in Congress be *instructed*, and the Representatives thereof *requested*, to use their most strenuous exertions to procure an immediate repeal of the various laws imposing an embargo on the ships and vessels of the United States"³²⁰ The reading of this particular instruction before the Senate prompted a brief debate on the propriety of inserting such instructions into the Journal of the Senate.³²¹ Although instructions would continue to appear in the official Senate record, the question would remain an open one well into the next decade.³²² In addition to distinguishing between constituent instructions and legisla-

³¹⁸ The first referendums on the adoption of state constitutions occurred in Massachusetts and New Hampshire. In Massachusetts, state legislators placed a newly-drafted state constitution before the people in 1778 (when it was defeated overwhelmingly) and 1780 (when a revised version passed). See KRIS W. KOBACH, *THE REFERENDUM: DIRECT DEMOCRACY IN SWITZERLAND* 236 (1993); Austin Ranney, *The United States of America, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 67, 68-69 (David Butler & Austin Ranney eds., 1978). Similarly, New Hampshire voters participated in constitutional referendums in 1779 and 1783. See *id.* at 69. As new states joined the union in the nineteenth century, it became common practice for voters to cast judgment on their state constitutions in referendums. See KOBACH, *supra*, at 235. The one eighteenth-century instance in which a state-level referendum was held on a matter other than the adoption of a state constitution occurred in Rhode Island in March 1788, when the Rhode Island General Assembly put the ratification of the U.S. Constitution to a popular vote. The voters of Rhode Island rejected it, 2708 to 237 (92% opposed). The voting took place at town meetings held throughout the state. Only two towns, Bristol and Little Compton, saw a majority voting in favor of the new federal constitution. See 10 *RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND* 271-75 (John R. Bartlett ed., Providence, Providence Press Co. 1865).

³¹⁹ See, e.g., 1818 SENATE J. 29 (Nov. 25, 1818) (discussing instructions and requests of legislatures of New York and New Hampshire); LUCE, *supra* note 107, at 461 (explaining that Massachusetts General Court "directed" senators while "requesting" compliance from representatives).

³²⁰ 32 ANNALS OF CONG. 130 (Nov. 25, 1808) (emphasis added).

³²¹ See *id.* at 127-28.

³²² See 1817 SENATE J. 215 (Feb. 10, 1817).

tive requests, Congress differentiated between constituent instructions and mere petitions. Petitions were described as such in congressional debates, were usually received from individuals, and were generally not treated as binding upon representatives.³²³

The binding power of constituent instructions remained substantial in the nineteenth century. "Two future Presidents — John Quincy Adams of Massachusetts (in 1807) and John Tyler of Virginia (in 1836) — resigned from the Senate when the instructions of their state legislatures conflicted with their personal views"³²⁴ Adams resigned in response to the anti-embargo instructions discussed above.³²⁵ Tyler refused to support a Senate resolution expunging the vote of censure against President Jackson from the Senate record.³²⁶ In resigning his seat, he wrote, "I now reaffirm the opinion at all times heretofore expressed by me, that instructions are mandatory, provided they do not require a violation of the Constitution or the commission of an act of moral turpitude."³²⁷ Tyler was not alone; six other senators declined to follow their states' instructions on the divisive issue and resigned.³²⁸

Commentary on the binding nature of instructions may be found scattered throughout the political writings of the Early Republic. Senator Maclay explained his duty to obey in 1791:

I declared I knew but two lines of conduct for legislators to move in — the one absolute volition, the other responsibility. The first was tyranny, the other inseparable from the idea of representation. Were we chosen with dictatorial powers, or were we sent

³²³ See, e.g., 1818 *id.* at 112 (Dec. 30, 1818) (discussing petition of Joseph Thorn requesting remission of duties paid in prosecution of claim); 1818 *id.* at 80 (Jan. 12, 1818) (discussing petitions of William Farris and Nathaniel Cutting); 1817 *id.* at 102-06 (Jan. 13, 1817) (mentioning petitions of Louis Charles Le Blanc requesting grant of land, William Otis requesting reimbursement for expenses incurred in execution of embargo, Flavil Sabin requesting relief in settlement of accounts, William Markward and other executive messengers requesting increased compensation, and members of Mississippi territorial legislature requesting admissions as state).

³²⁴ BERNSTEIN & AGEL, *supra* note 297, at 123.

³²⁵ See *id.* Despite the complaints of his constituents that an embargo would wreck the Massachusetts economy, Adams favored the Jefferson Administration's embargo on all trade with the warring nations of Europe. See *id.*

³²⁶ See *id.*

³²⁷ LUCE, *supra* note 107, at 469 (citing 50 NILES' REGISTER 25).

³²⁸ The other senators who resigned were Berrien of Georgia; Bedford Brown, Robert Strange, and Willie Mangum of North Carolina; Alexander Porter of Louisiana, and; Hugh White of Tennessee. See 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 1025-31 (1938); LUCE, *supra* note 107, at 468-70.

forward as servants of the public, to do their business? The latter, clearly, in my opinion. The first question, then, which presented itself was, were my constituents here, what would they do? The answer, if known, was the rule of the Representative.³²⁹

Forty years later, similar sentiments moved Senator John Rowan of Kentucky to vote in favor of the Tariff Bill of 1821, which he personally opposed, and to explain that "[h]e was not at liberty to substitute his individual opinion for that of his State."³³⁰ His example would be followed by future-President Martin Van Buren of New York and Senator Thomas Benton of Missouri, both of whom also personally opposed the bill.³³¹ One commentator in 1835, describing the predicament of Senator Peleg Sprague of Maine, reiterated the common understanding that, when confronted with instructions, a senator's choice was to obey or resign.³³² Sprague resigned.³³³ Although a few senators protested the use of instructions and disputed their binding authority, instances of disobedience to

³²⁹ LUCE, *supra* note 107, at 461-62.

³³⁰ *Id.* at 466 (citing THOMAS BENTON, 1 THIRTY YEARS VIEW 92)

³³¹ *See id.* (citing EDWARD M. SHEPARD, MARTIN VAN BUREN 123). Another future president who followed constituent instructions as a legislator earlier in his career was Abraham Lincoln. While running for re-election to the Illinois legislature in 1836, he pledged the following.

If elected, I shall consider the whole people of Sangamon my constituents, as well those that oppose as those that support me. While acting as their representative I shall be governed by their will on all subjects upon which I have the means of knowing what their will is, and upon all others I shall do what my own judgment teaches me will best advance their interests.

Id. at 471 (citing NICOLAY & HAY, 1 ABRAHAM LINCOLN 129). A year later, he followed his constituent's instructions and voted in favor of the state's ill-fated internal improvement law. *See id.*

³³² *See* LUCE, *supra* note 107, at 467 (quoting HARRIET MARTINEAU, 1 RETROSPECT OF WESTERN TRAVEL 143).

If the government of the State from which the Senator is sent changes its politics during his term, he may be annoyed by instructions to vote contrary to his principles, and, if he refuses, by a call to resign, on the ground of his representing the principles of the minority.

Id.

³³³ *See id.* at 468. Sprague attempted first to appeal to the people of Maine directly by standing for governor and asking that they vindicate his view. Losing the race, he resigned immediately thereafter. *See id.*

instructions without subsequent resignation were few and far between in the early decades of the Republic.³³⁴

The early state legislatures instructed their U.S. senators most often on matters of constitutional amendment. On such questions, instructions came from all corners of the Union. However, as noted above, routine statutory questions were also the subject of constituent instructions in the Congress of the early Republic.³³⁵ In this context, the states of New England issued the lion's share of instructions to U.S. senators.³³⁶ There were also instructions on procedural matters that were so fundamental as to be constitutional in nature. For example, in 1789, the Virginia legislature instructed its senators to vote in favor of opening the Senate's deliberations to the public as the House had already done. The legislatures of Maryland, New York, North Carolina, and South Carolina followed Virginia's lead and similarly instructed their senators between 1789 and 1792.³³⁷ In 1794, the Senate finally capitulated and opened its doors.³³⁸

The instruction of U.S. senators continued throughout the antebellum period. However, the records of the Senate suggest that the frequency of instructions began to decline gradually after 1840. Fewer and fewer instructions were being memorialized in the Senate record. By the beginning of the Civil War, the instruction of a U.S. senator by the state legislature occurred only infrequently in

³³⁴ See, e.g., *id.* at 463 (citing WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 272, which recounts Senator William Plumer's disobedience of New Hampshire legislature's instructions regarding Twelfth Amendment in 1803); see also 8 ANNALS OF CONG. 176 (1803) (statement of Sen. Tracy) (asserting that instructions were inappropriate on issues of constitutional amendment).

³³⁵ See, e.g., LUCE, *supra* note 107, at 472 (explaining that Senator Spencer Jarnagin of Kentucky followed legislature's instruction regarding Tariff Act of 1846 despite his personal opposition).

³³⁶ See, e.g., 1808 SENATE J. 37-38 (Nov. 25, 1808) (documenting that Massachusetts senators received instructions from legislature to repeal embargo on U.S. ships); 1817 *id.* 76-77 (Jan. 3, 1817) (documenting that Massachusetts commonwealth gave instructions regarding claims against United States).

³³⁷ See BERNSTEIN & AGEL, *supra* note 297, at 340 n.18 (explaining instructions adopted by Virginia legislature); Bybee, *supra* note 295, at 524-25. Although the Senate eventually adopted this reform, some of the instructed senators (from Maryland and Carolinas) initially resisted the directions of their states. See *id.*

³³⁸ See Bybee, *supra* note 295, at 525.

most states.³³⁹ In New England, however, the practice continued with regularity.³⁴⁰

At the same time that constituents were becoming less inclined to instruct, the political culture that had previously made the disobedience of constituent instructions virtually unthinkable was beginning to show some cracks. An early incident of disobedience occurred in 1811-12 on the contentious question of rechartering the Bank of the United States, when Virginia's senators refused to follow their state's instructions to vote against recharter. That refusal prompted a lengthy castigation of the senators by the Virginia legislature.³⁴¹ As the legislature declared: "If the right of the constituent to instruct the representative be denied, a law might be enacted, according to all the forms of the Constitution, and yet contrary to the express will of every man in the community, the individual representatives themselves only excepted."³⁴² The legislature resolved that no man who did not hold himself bound to obey his instructions should thereafter accept the appointment of U.S. senator from Virginia.³⁴³ The mover of the resolution was none other than John Tyler, the future President who would remain steadfast to the principle of obedience and resign from the U.S. Senate himself twenty-four years later when he could not in good conscience obey his state's instructions.³⁴⁴

Although the political norm of unswerving obedience to instructions had a scattering of critics in the antebellum period, it was not until after the Civil War that the norm began to erode substantially. On three occasions in the 1870s, senators disobeyed their instructions.³⁴⁵ The timing of this erosion suggest strongly that it coin-

³³⁹ See generally BERNSTEIN & AGEL, *supra* note 297, at 123 (discussing effects of Civil War).

³⁴⁰ See LUCE, *supra* note 107, at 476 (explaining that instruction of members of Massachusetts legislature by town meetings continued well into twentieth century). This undoubtedly heightened the proclivity of those legislators to use instructions to direct the voting of their U.S. senators.

³⁴¹ See 1812 Va. Acts 143.

³⁴² *Id.*

³⁴³ See *id.*

³⁴⁴ See LUCE, *supra* note 107, at 468-69.

³⁴⁵ In 1872, Senator Charles Sumner of Massachusetts disagreed with the Massachusetts legislature on the propriety of commemorating Civil War battles and thereby perpetuating the memory of the War. See *id.* at 486-88. In 1877, Senator Eaton of Connecticut disregarded his state's instructions and voted against the Electoral Commission Bill. See *id.* at 474. In 1878, Senator L.Q.C. Lamar of Mississippi disobeyed the instructions of the Mississippi legislature and voted against the act remonetizing silver. See *id.* at 474-75.

cided with, and was amplified by, contemporary Populist attacks on the institution of the Senate and the process of appointment by state legislatures.³⁴⁶ The process by which state legislatures selected senators was perceived by many to be intrinsically flawed: susceptible to corruption by wealthy interests, overly contentious, and ineffective at selecting the best officeholders.³⁴⁷ Senator Lindsay of Kentucky, when asked in 1898 by his state's legislature to resign after balking at his instructions, retorted with a message that clearly echoed the Populist theme of the day: "I do not exercise my senatorial duties subject to legislative supervision, nor hold my place at the legislative will. I represent, not merely a party or faction, but all the people of Kentucky."³⁴⁸

By the turn of the twentieth century, instructions were a rarity.³⁴⁹ The electoral basis of the Senate was under attack and would soon be reformed with the adoption of the Seventeenth Amendment. However, it would not be long before a new manifestation of the constituent instructions device would emerge.

I. Constituent Instructions and Ballot Issues in the Twentieth Century

After the adoption of the Seventeenth Amendment in 1913,³⁵⁰ it was no longer possible for state legislatures to issue constituent

³⁴⁶ See Kobach, *supra* note 6, at 1977 (providing account of Populists' criticisms of Senate).

³⁴⁷ See *id.*

³⁴⁸ 31 CONG. REC. 1433 (1898).

³⁴⁹ See LUCE, *supra* note 107, at 476 ("It is quite true that of late years there has been little attempt to instruct Representatives, whether State or Federal."); see also Bybee, *supra* note 295, at 527-28 (stating that practice of instructions significantly diminished after Civil War).

³⁵⁰ The Seventeenth Amendment reads:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

instructions to U.S. senators, as the legislators had ceased to be to the senators' sole constituents. This might have spelled the end of constituent instructions at the national level. Constituencies were simply too large to assemble and vote instructions directly. However, in many states an institutional innovation had emerged in that would permit citizens to instruct both senators and representatives in Congress: the popular initiative.³⁵¹

The Populist movement of the late nineteenth and early twentieth century had championed the adoption of the initiative device as a means of empowering ordinary citizens against giant corporations and corrupt politicians. With constitutional and statutory initiatives, citizens could place issues on the ballot by petition, approve measures directly, and thereby circumvent their state legislatures entirely. After the Populists faded from the scene, the Progressives took up the same cause.³⁵² The movement realized tremendous success: in 1898, South Dakota became the first state to adopt the popular initiative; and by 1918, voters in a total of twenty-two states had amended their state constitutions to include the initiative.³⁵³ Most of these states were west of the Mississippi River, but a few eastern states, such as Massachusetts with its long tradition of

U.S. CONST. amend. XVII. See generally Kobach, *supra* note 6, at 1976-80 (describing movement that led to adoption of Seventeenth Amendment).

In a final and ironic effort to stop the proposal of the Seventeenth Amendment, Senator Weldon Heyburn of Idaho refused to follow his instructions to support the amendment. He was unwilling to disenfranchise the body that had elected him. This was the last recorded instance of a senator disobeying instructions from his state legislature. See HAYNES, *supra* note 328, at 1030; Bybee, *supra* note 295, at 527-28.

³⁵¹ An interesting potential challenge to the use of a statewide initiative to instruct members of Congress concerns the scope of the constituency. Arguably, the people of an entire state voting in a referendum could legitimately instruct their U.S. senators, while being unable to legitimately instruct their U.S. representatives. This is due to the fact that the voting citizens of an entire state would include voters outside of a representative's district. Thus, the constituency would be too large. Of course, this would not be a problem in Alaska, Montana, or Wyoming, where the states' U.S. representative districts encompass the entire state.

³⁵² See KOBACH, *supra* note 318, at 236.

³⁵³ See Ranney, *supra*, note 318, at 69-72 (David Butler & Austin Ranney eds., 1978). Ranney lists the states: South Dakota (1898), Utah (1900), Oregon (1902), Oklahoma (1907), Maine (1908), Missouri (1908), Arkansas (1910), Colorado (1910), Arizona (1911), California (1911), Montana (1911), New Mexico (1911), Idaho (1912), Nebraska (1912), Nevada (1912), Ohio (1912), Washington (1912), Michigan (1913), North Dakota (1914), Kentucky (1915), Maryland (1915), and Massachusetts (1918). See *id.* at 70. Today, 24 states have either the constitutional initiative, the statutory initiative, or both. See *id.* See generally THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 43-54 (1989) (explaining adoption of initiative and referendum in states).

direct democracy, added their names to the list.³⁵⁴ The initiative device enabled popular majorities to circumvent unyielding legislatures and enact statutes or state constitutional amendments. It also cleared the way for the return of constituent instructions in amending the U.S. Constitution. Citizens could now collect signatures, place their instructions on the ballot, and authoritatively instruct their representatives in Congress.

It was not long before instructions reappeared in the Article V amendment process. In 1928 and 1932, in an episode similar to that of the instruct-and-inform laws, citizens reasserted their power to compel their representatives in Congress to set Article V into motion. Referendum voters in several states pressed Congress to repeal the prohibition amendment.³⁵⁵ As is explained below, this pressure occurred via instructions, petitions, and requests. Members of Congress did not protest that this voter involvement in the amendment process was impermissible under Article V. None complained that they were entitled to deliberate without constraint; rather, they treated the instructions as a binding command to amend the Constitution and voted accordingly.

Massachusetts, in keeping with its long tradition of constituent instructions,³⁵⁶ was the first state to revive the instructions device in the Article V context. Voters instructed their state representatives and senators, who in turn requested the president and Congress to amend the U.S. Constitution. In the November 1928 election, voters in thirty-six of the state's forty senatorial districts were presented with the following ballot question: "Shall the senator from this district be instructed to vote for a resolution requesting Congress to take action for the repeal of the Eighteenth Amendment to the Constitution of the United States, known as the prohibition

³⁵⁴ See CRONIN, *supra* note 353, at 53.

³⁵⁵ See LUCE, *supra* note 107, at 476-77. The Prohibition Amendment to the U.S. Constitution stated the following: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend XVIII, § 1.

³⁵⁶ Compare Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 362-72, 393-94 (1991) (discussing this tradition and calling citizens of Massachusetts to renew it), with Margaret E. Monsell, "Stars in the Constellation of the Commonwealth": *Massachusetts Towns and the Constitutional Right of Instruction*, 29 NEW ENG. L. REV. 285, 287 (1995) (arguing, contrary to Bresler, that Massachusetts tradition of instructions was less expression of direct democracy than expression of town sovereignty).

amendment?"³⁵⁷ A majority of voters approved the proposition in all but two of the Senate districts.³⁵⁸ Taking all districts combined, the popular vote was sixty-three percent in favor of repealing prohibition.³⁵⁹ With this single dramatic act, constituent instructions reappeared in the process of constitutional amendment.³⁶⁰

In November 1932, the voters of three states — Connecticut, Wyoming, and Louisiana — followed the Massachusetts example. However, they did not utilize traditional instructions issued only to their respective congressional delegations. Connecticut voters adopted, by a seven-to-one margin, a proposal petitioning Congress to propose a repeal amendment for submission to the States.³⁶¹ In Wyoming, voters chose by a two-to-one margin to send a "memorial" to Congress calling for the repeal of federal prohibition.³⁶² The state legislature placed on the ballot the question, "Shall the Eighteenth Amendment to the Constitution of the United States prohibiting the manufacture and sale of intoxicating liquors for beverage purposes be repealed?" and directed that the results be transmitted to Congress by the Wyoming Secretary of State.³⁶³ In Louisiana, voters requested that Congress call a national constitutional convention to propose the repeal of the prohibition Amendment.³⁶⁴ These resounding directives from voters in three states added the force of the vox populi to the crusade to repeal the Eighteenth Amendment.³⁶⁵

³⁵⁷ 1929 Mass. Acts 544-51 (tallying votes of senatorial districts). Voters were presented with a similar ballot issue regarding the instruction of their representatives in the Massachusetts House. *See id.* at 552.

³⁵⁸ *See id.* at 544-54; LUCE, *supra* note 107, at 476-77.

³⁵⁹ The total number of votes in favor was 707,352; the total opposed was 422,655. *See* LUCE, *supra* note 107, at 476-77.

³⁶⁰ It should be noted that the use of instructions in this instance directed the voting of state legislators, who in turn acted in accordance with their instructions and requested action from Congress *as a whole*, rather than simply instructing their own state's members of Congress.

³⁶¹ *See Wets Clinch Margin for Repeal in House*, N.Y. TIMES, Nov. 10, 1932, at 9.

³⁶² *See Id.*

³⁶³ H.R.J. Res. 4, 21st Leg., 1st Reg. Sess. (Wyo. 1931); *see Wets Clinch Margin for Repeal in House*, *supra* note 361, at 9.

³⁶⁴ *See* S. Con. Res. 3, 1st Reg. Sess. of 1932 Leg., 1932 La. Acts 767; 1932 N.J. Laws Joint Resolution No. 1 (calling on Congress for Eighteenth Amendment repeal convention); *see also Wets Clinch Margin for Repeal in House*, *supra* note 361, at 9 (reporting that Louisiana voters "overwhelmingly" approved two anti-prohibition proposals).

³⁶⁵ In other states, such as New Jersey, the state legislatures called for a constitutional convention to propose repeal. *See, e.g.*, H.R.J. Res. 1, 157th Leg., 1st Reg. Sess., 1933 N.J. Laws 609-10.

Members of Congress also began paying attention to what was happening to state-level prohibition. As early as November 1926, Senator Copeland of New York, previously a supporter of prohibition, stated publicly that he would change his position in Congress in response to the recent statewide referendum in which prohibition was defeated. He regarded the vote as binding on him and every other member of Congress from the state of New York.³⁶⁶ In November 1932, referendum voters in eight states chose to repeal the dry clauses in their state constitutions.³⁶⁷ As a result, more than one-third of the national population lived in states that would not enforce prohibition on a state or local level.³⁶⁸ This development accelerated the campaign to repeal the Eighteenth Amendment, due to the fact that the cooperation and concerted effort of state authorities was critical for the enforcement of federal prohibition.³⁶⁹ More importantly, a member of Congress from a state that had repealed state-level prohibition was likely to have viewed the referendum result as a charge to vote for the Twenty-first Amendment, which repealed the Eighteenth Amendment.³⁷⁰ For example, Representative Horr of Washington cited his state's repeal of its prohibition clause in explaining his vote for the repeal amendment.³⁷¹ Representative Sinclair of North Dakota also voted according to the expressed will of his constituents. As he explained, "[A] majority of the citizens of North Dakota having spoken decisively on the question, I deem it my duty to accept their mandate and support the resolution."³⁷² Although these votes were not directly instructed by constituents, they were unquestionably shaped by their constituents' referendum ballots. To do otherwise than vote

³⁶⁶ See LUCE, *supra* note 107, at 477.

³⁶⁷ See *State Dry Laws Fall*, KAN. CITY STAR, Nov. 10, 1932, at 17 (reporting that Arizona, California, Colorado, Louisiana, New Jersey, North Dakota, Oregon, and Washington repealed prohibition enforcement laws).

³⁶⁸ See *Id.* (noting that besides eight states that voted to repeal state-level prohibition in 1932, six other states — Maryland, Massachusetts, Montana, Nevada, New York, and Wisconsin—lacked state codes that enforced prohibition).

³⁶⁹ See *id.*

³⁷⁰ "The eighteenth article of amendment to the Constitution of the United States is hereby repealed. . . . The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI.

³⁷¹ See 76 CONG. REC. 28 (1932). "My State of Washington has given its answer to prohibition. The issue was clear-cut, and in the recent election the people of that Commonwealth voted by an overwhelming majority to repeal its bone dry law." *Id.*; see also 1933 Wash. Laws 23 (codifying initiative measure no. 61, "Repeal of Intoxicating Liquor Laws").

³⁷² 76 CONG. REC. 35 (1932); see also N.D. CONST. art. XX, § 217 (repealed 1933).

in conformity with the expressed will of one's constituents would have entailed significant political risk, just as disobeying the stipulations of the instruct-and-inform laws and having that fact presented on the ballot would have entailed significant political risk. In this way, instruction via referendum (in the case of Massachusetts) and ballot issues generally played a significant role in pressing Congress to set Article V into motion.

To be sure, other external pressures also impelled Congress to propose the Twenty-first Amendment in February 1933. The presidential and congressional elections of 1932 were dominated by two issues: prohibition and the depression.³⁷³ The sweeping Democratic victory of that year was due, in part, to the Democratic Party's adoption of a platform that advocated repeal of the Eighteenth Amendment.³⁷⁴ Despite the fact that the Republican Party had also criticized the Eighteenth Amendment, the Democratic election victories were interpreted by many to be an unequivocal mandate for repeal.³⁷⁵ Further solidifying this mandate was the fact that more than 300 congressional candidates had pledged to carry out the Democratic platform or had offered a personal guarantee to vote for repeal.³⁷⁶

³⁷³ See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 282 (1996). The Democratic Party's stand on both issues proved popular, allowing the party to turn an evenly divided Congress into a 310-117 House majority and a 60-35 Senate majority. *Id.*

³⁷⁴ See 76 CONG. REC. 33 (1932). The platform specifically pledged to "advocate the repeal of the eighteenth amendment. To effect such repeal we demand that the Congress immediately propose a constitutional amendment to truly representative conventions in the States called to act solely on that proposal." *Id.* (quoting Democratic Platform adopted by National Convention in Chicago, Ill., June 27-July 2, 1932).

³⁷⁵ See *Way Open to Beer*, KAN. CITY STAR, Nov. 9, 1932, at 1 ("The wet avalanche so closely followed the Democratic sweep that the result was a foregone conclusion long before the issue had been settled in all senatorial and congressional elections.").

³⁷⁶ See *State Dry Laws Fall*, *supra* note 367, at 17 ("The new house will have more than 300 members pledged to submit repeal or modification of the eighteenth amendment [sic] and nearly 300 pledged to vote to legalize beer."). As Rep. Britten of Illinois stated:

Both parties have gone on record for the submission of this question to the people, and how in the name of Heaven can Republicans on this side or Democrats on the other side refuse to vote for it because of the language it carries. The people in your district and in mine are not interested in the language of this resolution. They are interested in your vote, and that is the thing they are going to recall two years from now when many of us want to come back to Congress.

76 CONG. REC. 10 (1932). Rep. McSwain of South Carolina explained that he was:

In addition to partly driving the proposal of the Twenty-first Amendment by Congress, constituent instructions played an important role in shaping the second stage of the Article V process — ratification. The Twenty-first Amendment was the only constitutional amendment that Congress ever sent to state conventions for ratification, rather than to the state legislatures. This departure from the normal ratification path was motivated by a strategic political calculation. Congressional advocates of repeal realized that it might amount to political suicide for some dry-state legislators to vote in favor of ratification. They felt that the outlook for repeal was more propitious in specially elected ratifying conventions, as provided for in Article V.³⁷⁷

In the state of Oregon, voters took the opportunity to instruct their convention delegates how to vote. On July 21, 1933, a special referendum was held to decide the following ballot issue:

AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA — Purpose: To instruct the delegates to the constitutional convention as to whether the electors of the respective counties of the state of Oregon desire the amendment of the constitution of the United States by the adoption of the proposed article of amendment:

[text of proposed Twenty-first Amendment.]

Vote YES or NO

Yes. I vote for the proposed amendment.

No. I vote against the proposed amendment.³⁷⁸

The overwhelming majority of voters voted yes, in favor of ratification. The statewide totals were 136,713 in favor the amendment and 72,854 against, or sixty-five percent in favor.³⁷⁹ Seventeen days later, on August 7, 1933, the convention ratified the Twenty-first

bound by the pledge which [he] signed as a Democratic candidate for Congress in South Carolina to support the Democratic platform. In South Carolina there is a rule more stringent and strict than in any other State. It requires Democratic candidates for Congress to sign a pledge, binding them not only to abide by the rules of the party in South Carolina but to support and defend the principles and policies of the Democratic Party and to act in conjunction with their Democratic colleagues in Congress in supporting and defending said policies and principles.

Id. at 29.

³⁷⁷ See BERNSTEIN & AGEL, *supra* note 297, at 176.

³⁷⁸ 1933 Or. Laws 2d Spec. Sess. 10.

³⁷⁹ See *id.*

Amendment.³⁸⁰ Four months after that date, conventions in three-fourths of the states had ratified, and the amendment became part of the Constitution.

This episode completed the historical interplay between constituent instructions and the Article V amendment process. With the Bill of Rights and other early amendments, constituent instructions drove both the congressional proposal of the amendments and the subsequent ratification of the amendments by state legislatures. These early instances of constitutional transformation demonstrated the expectation of the framing generation that Article V would allow for indirect popular involvement in the form of constituent instructions. However, the Article V ratification route through state conventions, rather than state legislatures, was still unexplored. Finally, nearly a century and a half after the framing, the Twenty-first Amendment traveled the path of ratification, and on the one occasion that it occurred, ratification by convention was constrained by constituent instructions.

CONCLUSION

It is no exaggeration to state that the U.S. Constitution is largely the product of constituent instructions. As this Article has attempted to demonstrate, the practice of instructing representatives shaped our constitutional history in profound ways. The American political culture of the late colonial period wholeheartedly embraced the instruction of representatives on matters both statutory and constitutional.³⁸¹ Accordingly, constituent instructions induced the seminal constitutional act of the Republic: the Declaration of Independence.³⁸² Without express authority from the people in the form of instructions, it would have been politically untenable for the delegates at the Continental Congress to change course 180 degrees and declare independence.

During the War of Independence, constituent instructions regulated political events in the fledgling American Republic. After the war, instructions were used to call for and frame the Articles of Confederation — the first national constitution. Members of the Confederation Congress then operated under constituent instruc-

³⁸⁰ See *id.*

³⁸¹ See *supra* Part II.A.

³⁸² See *supra* Part II.B.

tions.³⁸³ Instructions were not mentioned in the Articles, but it did not matter: they were an intrinsic component of the American model of representative government. The supposition today that constituents are not permitted to instruct their representatives on matters of constitutional amendment would have been greeted with derision at the time.

When the Confederation Congress decided to call the Philadelphia Convention, it did not do so unilaterally. The call was impelled by constituent instructions from the state of New York.³⁸⁴ At the Convention itself, some of the delegates were bound by constituent instructions. And these instructions were not without consequence. It is fair to say that the equal representation of states in the U.S. Senate was due in part to the force of these instructions.³⁸⁵ After the Constitution was drafted, instructions constrained its ratification in the states.³⁸⁶ Moreover, the Framers and ratifiers who defended the Constitution promised wavering anti-Federalist skeptics that constituent instructions would continue to govern the process of constitutional amendment under Article V.³⁸⁷

They would make good on this promise a few years later during the adoption of the first ten amendments to the Constitution, including the Bill of Rights. Constituent instructions drove the proposal and ratification of these amendments.³⁸⁸ Thus, on this most important maiden voyage of the Article V process, a voyage steered by the framing generation, constituent instructions set the course. There is perhaps no plainer demonstration of the Framers' understanding of how Article V was supposed to work.

When presented with a proposal that the right to instruct be explicitly inserted into the Constitution, the members of the First Congress deemed the addition of such a clause unnecessary; the right was inherent in the scheme of American government and instructions were already guiding the statutory and constitutional deliberations of the Republic.³⁸⁹ And they were correct; constituent

³⁸³ See *supra* Part II.C.

³⁸⁴ See *supra* Part II.D.

³⁸⁵ See *supra* Part II.D.

³⁸⁶ See *supra* Part II.D.

³⁸⁷ See *supra* Part II.E.

³⁸⁸ See *supra* Part II.F. Members of Congress, most notably James Madison, were also concerned that imposing a *constitutional* obligation to follow constituent instructions would create uncertainty regarding the validity of laws on which representatives voted contrary to their instructions.

³⁸⁹ See *supra* Part II.G.

instructions would continue to shape the process of constitutional amendment for decades to come.³⁹⁰

Not until the middle of the nineteenth century would constituent instructions begin to fade from the American political scene. The political culture had shifted subtly; by the end of the century the assumption that state legislatures could bind U.S. senators via instructions began to erode, as did public trust in the process of senatorial selection by state legislatures.³⁹¹ However, with the advent of the popular initiative, constituent instructions returned for a brief moment in the early twentieth century. The Twenty-first Amendment was in part the product of constituent instructions voted in directly in popular referendums.³⁹² Thereafter, instructions once again disappeared from the national political scene, but the stage was set for their return.

As this history plainly illustrates, the Framers of Article V understood and intended that the process of constitutional amendment would be controlled by constituent instructions. Their numerous statements on the issue, combined with their own experiences drafting, ratifying, and amending the Constitution *under instruction*, permit no other conclusion.

Evidently, the judges who held the instruct-and-inform laws unconstitutional under Article V were unaware of this history. It is a chapter of our national story that has disappeared from the collective memory of the legal community. Judicial assertions that Article V prohibits constituents from constraining the "independent judgment" of legislators³⁹³ are simply incredible, given the staggering weight of the historical evidence indicating that the Framers and ratifiers intended the Article V process to be guided by instructions. Marching lockstep behind one another, these courts have blindly reiterated this ahistorical view of Article V. Offering precious little in the way of historical authority, they claim to preserve "the deliberative and independent amendment process envisioned

³⁹⁰ See *supra* Part II.H. In his study of the Senate, Bybee notes that the frequent instruction of senators to propose constitutional amendments prior to the adoption of the Seventeenth Amendment in no way violated Article V. See Bybee, *supra* note 295, at 567 ("Nothing in Article V forbid the states from influencing Congress — whether through instructions or through some other means.").

³⁹¹ See *supra* Part II.H.

³⁹² See *supra* Part II.I.

³⁹³ See, e.g., *Gralike v. Cook*, 996 F. Supp. 901, 916 (W.D. Mo. 1998), *aff'd*, 191 F.3d 911 (8th Cir. 1999).

by the Framers when they drafted Article V,³⁹⁴ an amendment process in which “the function of citizens . . . is strictly limited to the election of federal and state officials,”³⁹⁵ and “[c]ongressional officeholders must not, and cannot, be bound to . . . vote in one particular way.”³⁹⁶ Thus, instructions “interfere[] with the independent judgment of state legislators or convention delegates that is contemplated by Article V.”³⁹⁷ They amount to “undue influence” over constitutional debate, with the consequence that, “the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost.”³⁹⁸

Because most of the individuals who drafted or ratified the U.S. Constitution were bound by instructions before the 1787 Convention, during the Convention, or after the Convention when putting Article V into practice as members of the First Congress, it is simply untenable to suggest that the Framers implicitly rejected this long tradition and their own experience when they drafted Article V. Moreover, this suggestion is contradicted by the express statements of various defenders of the Constitution during the ratification debates.³⁹⁹ Instructions permeated the Framers’ world. The autonomous, free-floating Article V deliberations fancied by the courts invalidating the instruct-and-inform laws simply did not exist in the early republic.

Indeed, such a deliberative environment is impossible to create, even in the absence of constituent instructions. Legislatures do not act in a vacuum. Representatives inevitably feel external pressure to favor or disfavor particular constitutional amendments. And that pressure proceeds from myriad sources: voters, lobbyists, financial contributors, party leadership, the executive branch, and the media, to name a few. This was as true in the 1780s as it is at the turn of the twenty-first century.

For example, the members of the First Congress who proposed the Bill of Rights were not only constrained by constituent instructions, they were also pressured by Rhode Island and North Carolina’s ongoing refusal to accede to the Union until certain

³⁹⁴ *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998).

³⁹⁵ *Id.* at 1093.

³⁹⁶ *Id.* at 1095.

³⁹⁷ *Gralike*, 996 F. Supp. at 916.

³⁹⁸ *Hazeltine*, 3 F. Supp. 2d at 1094.

³⁹⁹ *See supra* Part II.E.

amendments were adopted.⁴⁰⁰ They were also responding to intense popular pressure. If members of Congress had not proposed the Bill of Rights, they would have fueled the popular unrest that was already widespread; and they would have strengthened calls for a second constitutional convention.⁴⁰¹ Thus, even if representatives in the First Congress had not been operating under instructions, they hardly would have been unconstrained deliberators, free to follow only the dictates of their conscience. The Article V amendment process has always been a porous one, in which it is impossible for representatives to insulate their decision making from coercive external influences.⁴⁰²

Similarly, even in the absence of instruct-and-inform laws, members of Congress at the turn of the twenty-first century have been exposed to considerable political pressure on both sides of the term limits issue. The issue is a fundamental structural one with a decisive impact on the membership and character of Congress. Interest groups whose primary *raison d'être* is to attempt to influence Congress have been sensitive to the tidal change that term limits would likely initiate. For example, term limits at the state

⁴⁰⁰ See Statement of Elbridge Gerry (June 8, 1789), in 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1789). Although both states eventually ratified the Constitution prior to the final passage of the Bill of Rights, Rhode Island continued to exert coercive pressure on the First Congress through alternative means. The Rhode Island convention delegates accomplished this coercion by withholding military assistance to the new national government. The state's ratification message of May 29, 1790, declared that the state's militia would not serve outside of Rhode Island for a period of more than six weeks until the desired amendments were adopted. See Ratification Message of Rhode Island (May 29, 1790), in 1 ELLIOT'S DEBATES, *supra* note 203, at 335.

⁴⁰¹ Elbridge Gerry of Massachusetts pointed to the clamoring of "a great body of our constituents opposed to the constitution as it now stands." 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1789). If Congress failed to propose the demanded amendments, they would only "bring conviction to the people out of doors." *Id.* Many dissatisfied opponents of the Constitution would not be content with merely the amendments that Congress might propose; they were demanding a second constitutional convention. See DICKINSON, *supra* note 259, at 496-97.

⁴⁰² Undoubtedly, the most severe coercion occurred during the adoption of the Thirteenth and Fourteenth Amendments. See generally BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 99-159 (1998) (discussing circumstances leading to ratification of these amendments). Southerners who had participated in the rebellion were required to pledge support for the Thirteenth Amendment in order to gain amnesty. See *id.* at 138-39. In the case of the Fourteenth Amendment, martial law was not rescinded and Southern congressional delegations were not seated until the Southern states voted to ratify the amendment. See *id.* at 110-11. If the courts invalidating the instruct-and-inform laws are correct in their assertion that the coercion of legislators during amendment deliberations violates Article V, then we are led inexorably to the conclusion that the ratifications of the Thirteenth and Fourteenth Amendments were not constitutionally valid.

level have made it abundantly clear that lobbyists are worse off in term-limited legislatures, with the constant turnover of membership requiring them to continually build new relationships with suspicious lawmakers.⁴⁰³ Accordingly, well-heeled interest groups carrying the political influence of hefty campaign contributions have had an incentive to fight term limits in Congress. The instruct-and-inform laws merely add the voice of the people to this cacophony, a voice reinforced by ballot notations to keep voters apprised of whether or not they have been heard.

Presented with the dominant role played by constituent instructions in our nation's constitutional history and in the Framers' vision of how Article V would operate, the courts striking down the instruct-and-inform laws cannot tenably claim that the Framers deemed instructions impermissible under Article V. However, one might argue that the addition of ballot notations to enforce constituent instructions makes them fundamentally different from the instructions of the Framers' world. That is, they are so much more coercive than the instructions of the eighteenth century that they are impermissible under Article V. Indeed, several courts maintained that it is the political risk associated with such ballot notations that make the instruct-and-inform laws unduly coercive.⁴⁰⁴

This argument of last resort is unpersuasive, however, in light of the overwhelming coercive effect that eighteenth-century instructions exerted before, during, and after the Framing. The constraints imposed by such instructions in a political culture that demanded resignation as the price of disobedience certainly equaled or exceeded the coercive effect of the modern instructions combined with ballot notations. The political scruples of the framing

⁴⁰³ See Douglas Lederman, *Term Limits Bring Fears of Uninformed Lawmakers and Quick Fixes*, CHRON. OF HIGHER EDUC., May 15, 1998, at A40 ("Some Legislature watchers here think that lobbyists in general oppose term limits primarily because it will force them to work a lot harder. . . ."); Charles Mahtesian, *So Much Politics, So Little Time*, GOVERNING, Aug. 1999, at 22, 26; see also Stephen Moore, *Limit Terms, Not Contributions*, WASH. TIMES, Dec. 16, 1998, at A17 (noting that polls indicate most lobbyists oppose term limits). This experience in term-limited state legislatures arguably casts doubt on the claim of some opponents of term limits that lobbyists would benefit from term limits. See, e.g., Albert R. Hunt, *The Good and Bad Varieties of Term Limits*, WALL ST. J., July 2, 1998, at A23.

⁴⁰⁴ See, e.g., *Barker v. Hazeltine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998) (noting that notations are disseminated "at a time when candidates are most politically vulnerable"); *Donovan v. Priest*, 931 S.W.2d 119, 127-28 (Ark. 1996) (suggesting that ballot notations threaten "potential political deaths" of state legislators), cert. denied sub nom. *Arkansas v. Donovan*, 519 U.S. 1149 (1997).

era made it all but impossible for representatives to disobey their instructions.⁴⁰⁵

In effect, the modern ballot notations constitute a formal mechanism that partially replaces the informal cultural norm of the past. In the eighteenth century, the representative regarded himself as duty-bound to follow his instructions. At the dawn of the twenty-first century, this political ethic has all but evaporated. As the episode of February 1997 demonstrated vividly, members of Congress can and will obscure their voting on the term limits question. In that instance, the House of Representatives orchestrated the consideration of eleven different versions of the term limits amendment, allowing each representative to vote yes on one, while assuring members that none would pass.⁴⁰⁶ Instructions paired with ballot notations make such misrepresentation difficult to pull off. The threat of a ballot label undoubtedly has a coercive effect, but that effect is no greater than the political norm of the Framers' generation that demanded resignation as the price of disobedience.⁴⁰⁷

Unquestionably, the instructions of today differ somewhat from the instructions of two centuries ago.⁴⁰⁸ But at their core they remain the same: they are unequivocal messages from constituents to

⁴⁰⁵ See *supra* note 11 and accompanying text.

⁴⁰⁶ See *supra* text accompanying note 11.

⁴⁰⁷ Plainly, there is a structural difference between the coercion that attached to instructions in the eighteenth century and the coercion of the modern instruct-and-inform laws. The former bound representatives through an informal ethic of the political culture. The latter seeks to bind representatives through the combination of a formal labeling requirement with the assumption that a significant number of voters will make individual choices to vote against representatives because of the representatives' decision to disregard their instructions. However, the courts that struck down the instruct-and-inform laws did not analyze the structure and assumptions of the laws' coerciveness. Instead, they simply declared the laws too coercive to pass Article V muster. If this is the standard — the amount of coercion — then the courts' analysis becomes particularly weak when the amount of coercion involved in eighteenth-century instructions is considered.

⁴⁰⁸ Another noteworthy difference is the fact that the instructions of two centuries ago were almost always issued by assemblies that met face-to-face and could deliberate about the content of any instructions that they might vote on. In contrast, modern instructions to members of Congress have been approved by ballot issue, without significant opportunity for voters to engage in face-to-face deliberations. Although deliberation arguably fosters better policymaking (especially on issues that cannot be easily reduced to a simple choice between two options), the lack of deliberation by modern constituents does not present a salient Article V objection. (The rather implausible argument would be that Article V permits voters to instruct, but only after they have deliberated with one another for a constitutionally-sufficient amount of time.) Moreover, with modern instructions via ballot, the simple fact remains that, when instructions are issued, a majority of the voting electorate has affirmed that the instructions express their will.

representatives communicating preferences and demanding obedience. Representatives who choose the Burkean path and disregard their electors' orders hazard the probability that they will suffer Burke's fate: defeat at the next election.⁴⁰⁹ By their very nature, instructions are not friendly suggestions or tentative requests. They are firm orders. But in their firmness lies the soul of representative democracy.

Regardless of what one believes about the merits of congressional term limits, it is difficult not to be deeply troubled by the domino-like line of judicial decisions striking down the instruct-and-inform laws. The decisions are disturbing because they make bald claims to reflect the historical understandings of the Framers, yet they offer no relevant historical evidence to support their assertions. The legal community expects judges to offer extensive, if not conclusive, support for their statements about, and interpretations of, the law. In this line of cases, that obligation was forgotten. Instead, the courts merely cited one another, perhaps assuming that some earlier court did the necessary historical research.

This judicial failure is doubly disturbing because of what is at stake. The Constitution is ostensibly a set of rules that We the People adopted over the course of more than 210 years, implicitly accept today, and may amend tomorrow. The primary mechanism through which we express our continuing consent to be governed by the Constitution is Article V. We implicitly decide every day whether to amend the Constitution or to leave it alone and accept it in its current form. But now we have been told that Article V permits no popular direction of the amendment process whatsoever. For the courts to make this claim is somewhat remarkable, for them to do so without historical support is deeply irresponsible. What is at stake is not merely one small provision of the Constitution, but the premise of the entire Constitution — the premise that the people may have some say in what it contains. Unfortunately, if these judicial decisions stand, our Constitution will be one from which We the People have been politely dismissed.

⁴⁰⁹ Edmund Burke was elected to Parliament in 1774. Shortly after his election, he delivered his famous "Speech to the Electors of Bristol," in which explained that he would not vote in accordance with his constituents' instructions. He eloquently insisted that, "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." LUCE, *supra* note 107, at 440. The people of Bristol thought otherwise and rewarded him with defeat at the next election. *See id.* at 464.