FOREWORD

WRITING AMERICA'S CONSTITUTIONS: UNDERSTANDING THE DRAFTING AND RE-DRAFTING OF AMERICA'S FOUNDATIONAL TEXTS

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I. INTRODUCTION

It is a great honour to deliver the Robert F. Williams Lecture on State Constitutional Law. No institutions, and few scholars, have done as much in recent decades to promote the study of state constitutional law as have the Center for State Constitutional Studies at Rutgers Law School, and Professors Robert Williams and G. Alan Tarr.

This is an essay about how state constitutions are written and rewritten, and how we should understand those processes. It does not purport to offer any theory of constitutional interpretation—rather, it argues that the question of how a particular constitutional text came to

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constitutional text has been balanced by industrious amendment and wholesale redrafting at state level.[1] At least 236 constitutional conventions (including the 1787 Federal Convention) have met and successfully drafted constitutional texts.[2] This number excludes many other conventions that have either failed to reach a consensus, or have offered texts for ratification that did not meet with the approval of voters. If these conventions, or other formal bodies meeting to propose constitutional reform were to be included, the number would be much greater. This count also excludes a very significant number of convention or convention-like processes that have drafted foundational law for native peoples.[3]

The neglect of these constitutional conventions by broader scholarship has been profound. At the federal level, detailed analyses (both qualitative and quantitative) of voting behaviour, shifting alliances, rhetoric, and tactics, have helped to explain why the federal constitutional text took the form that it did.[4] The nature of the records themselves, down to controversies about the way in which individual votes were recorded, has been exhaustively considered.[5] Some have even

1. *See generally* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 81–86 (2nd ed. 2023).

2. *See, e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1170 n.9.

3. *See, e.g.*, Gerald Murphy, *About the Iroquois Constitution*, FORDHAM U.: INTERNET HIST. SOURCEBOOKS PROJECT, https://sourcebooks.fordham.edu/mod/iroquois.asp (last visited Sept. 2, 2023).

4. A full list of such pieces would be impossible to compile. Social scientists, for example, have used the Federal Convention to develop and test models of coalitions and voting behaviour, some more speculative than others. *See, e.g.*, Gordon Ballingrud & Keith L. Dougherty, *Coalitional Instability and the Three-Fifths Compromise*, 62 AM. J. POL. SCI. 861 (2018); Jac C. Heckelman & Keith L. Dougherty, *An Economic Interpretation of the Constitutional Convention of 1787 Revisited*, 67 J. ECON. HIST. 829 (2007); Jac C. Heckelman & Keith L. Dougherty, *A Spatial Analysis of Delegate Voting at the Constitutional Convention*, 73 J. ECON. HIST. 407 (2013); Robert A. McGuire, *Constitution Making: A Rational Choice Model of the Federal Convention of 1787*, 32 AM. J. POL. SCI. 483 (1988). Other social scientists have sought to understand the dynamics of debate within the Federal Convention using a variety of methodologies. *See, e.g.*, Calvin C. Jillson, *Constitutional-Making: Alignment and Realignment in the Federal Convention of 1787*, 75 AM. POL. SCI. REV. 598 (1981); David Brian Robertson, *Madison's Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225 (2005); David A. Gelman, *Ideology and Participation: Examining the Constitutional Convention of 1787*, 71 POL. RSCH. Q. 546 (2018).

5. *See* James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411, 412–14 (1987) (summarizing the older historiography of convention records); *see also* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 1–2, 8, 126 (2015) (providing the most thorough analysis of the evidentiary problems presented by Madison's notes and most widely used source of convention records).

attempted to evaluate how different rules at the Federal Convention might have made a difference in the outcome.[6] Some of this speculation is rooted more securely in the available evidence than others, and much of it is hampered by the imperfections of the surviving record. Yet it is striking that no similar body of work exists evaluating the work of state conventions.[7] Indeed, for most state conventions, not even an article-length description and analysis of the work of the convention exists.[8]

Not only have historians and political scientists largely avoided engaging with the (taken collectively) literal years of effort invested in these convention processes, but the records themselves have not received adequate attention from editors. It is perhaps no exaggeration to say that in many—indeed in the majority of—cases, historical understanding of the various state-level conventions is comparable to the understanding of the Federal Convention as it was towards the end of the nineteenth century. For the most part, such journals of state-level constitutional conventions as are easily available represent a partial publication of the records available, often edited hastily and for the purposes of memorialization rather than scholarly understanding. It is as if William Jackson's journal of the 1787 Constitutional Convention, as published by John Quincy Adams in 1819,[9] remained the basis of histories of the Federal Convention. Max Farrand's *The Records of the Federal Convention of 1787*, published nearly a century later, was the effort that tried to bring together not only the surviving official papers of the Convention, but to edit and set alongside each other the various unofficial accounts.[10] Without this effort, subsequent historical work on the nature of the Federal Convention would have been incalculably more difficult.

It is perhaps partly for this reason that—with the exception of the series, *Oxford Commentaries on the State Constitutions of the United States*—there has been relatively little attempt to chart the processes that have written and rewritten American constitutional law and to analyse them comparatively. Essays charting the history of state conventions typically treat them in the context of a particular territory or

6. Paul D. Carlsen & Jac C. Heckelman, *State Bloc Versus Individual Delegate Voting at the Constitutional Convention: Did It Make a Difference?*, 82 S. ECON. J. 781 (2016).

7. Brady, *supra* note 2, at 1170.

8. *See id.*

9. JOURNAL, ACTS AND PROCEEDINGS OF THE CONVENTION, ASSEMBLED AT PHILADELPHIA, MONDAY, MAY 14, AND DISSOLVED MONDAY, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (John Quincy Adams ed., Boston, Thomas B. Wait, 1819).

10. 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911).

state's development, rather than considering them as part of a broader American tradition.[11] The few books that do consider the phenomenon of constitution-writing at state level stand in marked contrast to the body of works that consider the Federal Convention.[12] The nature of the records has led a recent law review article to warn courts and lawyers against relying on the records of state constitutional conventions.[13] It is true that in some cases records were either poorly kept in the first instance, or have been subsequently lost, and it is quite true that not all accounts of conventions found in the press are to be trusted.[14] Certainly, Brady is right to suggest that as the records are currently available, courts should be cautious if invited to rely on the records of state constitutional conventions when attempting to discern the meaning of a specific provision. Yet these things should not be overstated. In many—and in quite probably majority of cases—extensive records of the work of state constitutional conventions exist, either as official papers, or as unofficial accounts that can be set alongside official papers. The work of collating, editing, and interpreting these records, let alone of beginning to set the work of state conventions alongside each other for systematic comparative work, has scarcely been begun in the majority of cases. Even where records are incomplete or missing, careful, systematic analysis of surviving records can still reveal much; yet the records of no state's convention have ever received the attention given to the records of the Federal Convention.

II. THE AMERICAN TRADITION OF CONVENTIONS

To neglect the work of these convention processes is to neglect one of the most distinctive features of the American constitutional tradition. They sit in a much larger history of processes that allowed groups of individuals to collectively draft, and be meaningfully understood as the

11. For recent examples of efforts to make the constitutional history of a state more intelligible, see Patrick M. Garry, *The Rising Role of State Constitutional Law: An Introduction to a Series of Articles on the South Dakota Constitution*, 59 S.D. L. REV. 4 (2014); Jon Lauck, *"The Organic Law of a Great Commonwealth:" The Framing of the South Dakota Constitution*, 53 S.D. L. REV. 203 (2008).

12. Works that attempt a comparative approach between states include G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES (2015); SILVANA R. SIDDALI, FRONTIER DEMOCRACY: CONSTITUTIONAL CONVENTIONS IN THE OLD NORTHWEST (2016). *See also*, WILLIAMS, *supra* note 1, at 81–82 (analysing the different periods of constitution-making at state level).

13. Brady, *supra* note 2.

14. *Id.* at 1172–80.

authors of, important texts. In the first *Federalist* essay signed by "Publius," Hamilton wrote:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.[15]

When we think of the operation of democracy in the contemporary moment, we emphasize (rightly, of course) the universal franchise, and free and fair elections. Ratifying conventions, and direct ratifying votes, have both confirmed and frustrated the work of constitutional conventions. The concept of democratic choice was and is essential. Yet Hamilton's emphasis on "conduct" and "reflection" referred to another important and foundational aspect of eighteenth-century republican thought and practice, which was the ability of groups of people to meaningfully author texts collectively.[16] The 1787 Constitution of the United States was but one of countless documents drafted by official and unofficial assemblies in America's eighteenth, nineteenth, and twentieth centuries. This culture of collective authorship shaped, in turn, the operation of countless political meetings, civic institutions, and private clubs and societies across this period. Whether the echoes of this once widely shared culture can survive the twenty-first century remains to be seen.

We forget now that there were few of the most significant texts of the Revolution that had a single author. The Declaration of Independence, even if largely written by Thomas Jefferson, was revised first by the other four members of the drafting committee to which Congress had assigned the task, and then by Congress itself.[17] The 1774 Address to the King and the later Olive Branch Petition had similarly been written by drafting committees.[18] State constitutions written after Independence

15. THE FEDERALIST NO. 1 (Alexander Hamilton).

16. *Id.*

17. Robert E. McGlone, *Deciphering Memory: John Adams and the Authorship of the Declaration of Independence*, 85 J. AM. HIST. 411, 411–13, 434, 436–37 (1998).

18. 1 JOURNALS OF THE CONSTITUTIONAL CONGRESS 1774-1789, at 5 (Worthington Chauncey Ford ed., 1904); 2 JOURNALS OF THE CONSTITUTIONAL CONGRESS 1774-1789, at 6-7 (Worthington Chauncey Ford ed., 1904). *The Journals of the Continental Congress, 1774–1789* were edited and printed between 1904 and 1937. The edition is published online by the Library of Congress at https://memory.loc.gov/ammem/amlaw/lwjc.html. For the authorship of the Declaration of Independence, see McGlone, *supra* note 17, at 411–

were adopted by convention processes or by drafting processes within the state legislative bodies.

The nature of these convention processes, however, makes them difficult to understand. Most scholarship, even on the 1787 Federal Constitutional Convention, tends to emphasize the substance of the debates, as captured by Madison's *Notes*, explained in the subsequent *Federalist* essays and the other debates and pamphlet-literature of the process of ratification, and the implications of the ultimate compromise.[19] Relatively few works address the importance of process itself at the Federal Convention, and the ways in which that process shaped both the records that we possess and the ultimate nature of the text itself.[20] Failure to properly understand the nature of the process of debate at the Federal Convention can undermine interpretation.[21] Some analyses have recognized that process—the sequence of and context within which specific questions were decided by the Federal Convention—as well as substance helped to determine outcome.[22] Yet properly understanding the actual process of debate that produced a particular piece of text, at least with non-digital techniques, requires painstaking work and often an extensive prose description. Riker's attempt to formalize a methodology for doing so in the early 1980s largely failed to impact scholarship on the Federal Convention, in part, in all likelihood, because doing so without the assistance of more advanced digital techniques for a

13, 434, 436–37; Wilfred J. Ritz, *From the Here of Jefferson's Handwritten Rough Draft of the Declaration of Independence to the There of the Printed Dunlap Broadside*, 116 PA. MAG. HIST. & BIOGRAPHY 500–01 (1992).

19. *See, e.g.*, John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147 (2006).

20. An important work on the committee process at the Federal Convention is Vile's *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*. *Supra* note 19. Other important works on this theme include: William B. Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008) and William B. Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012). For the status of *The Federalist*, see the discussion in Dan T. Coenen, *A Rhetoric for Ratification: The Argument of* The Federalist *and Its Impact on Constitutional Interpretation*, 56 DUKE L. J. 469 (2006). Mary Sarah Bilder's work on the nature of the sources available is invaluable. *See* BILDER MADISON'S HAND, *supra* note 5.

21. *See* Mary Sarah Bilder, *The* Ordeal *and the Constitution*, 91 NEW ENG. Q. 129, 139–41 (2018).

22. *See, e.g.*, Adam Slez & John Levi Martin, *Political Action and Party Formation in the United States Constitutional Convention*, 72 AM. SOCIO. REV. 42 (2007).

comprehensive account of the work of the Federal Convention would have been daunting and would hardly have resulted in a readable narrative.[23]

Yet the general familiarity of the work of the 1787 Federal Constitutional Convention makes it helpful to revisit as a way of introducing the work of state constitutional conventions, with which it can helpfully be both compared and contrasted. The following discussion is not an account of the particular compromises made by particular delegates and delegations, but rather an account of the process that allowed a text to be agreed at all. Recent decades have so focused on a discussion of the various merits and deficiencies of the eventual compromises that we too often fail to notice that the process of debate achieved the apparently impossible.[24] A text neither fully national nor confederal in its design; a text that did not resolve questions of sovereignty fully in favour of the states nor of the national government, and which instead divided and shared power in ways that almost all theorists before the summer of 1787 (and many subsequently) had declared to be impossible. The impossibility of shared sovereignty was at the core of many antifederalist objections to the Constitution, and James Madison's reading before the Federal Convention—which he compiled into his "Notes on Ancient and Modern Confederacies"—appears to have persuaded him that an absolute federal veto on state legislation would be an essential feature of any new national constitution.[25] No individual (as far as can be gathered from the discussions in our extant sources), and certainly no state delegation, arrived at the Convention with a clear theoretical framework for the division of sovereignty. Rather, the Federal Convention was divided between those who wished to establish a national government and those who wished to maintain state sovereignty as part of a confederal union. Had the two sides simply maintained their respective positions, agreeing a final text would have been impossible.

This was far from the only dividing line at the Federal Convention. Controversy raged around the competing desires of those who wished all

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23. *See generally*, William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SCI. REV. 1 (1984).

24. *See supra*, part I.

25. *See* James Madison, *Notes on Ancient and Modern Confederacies*, *in* 9 THE PAPERS OF JAMES MADISON 3, 3–23 (Robert A. Rutland et al., eds., 1975); Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215–35 (1979). Though it was not impossible for even British theorists to imagine divided sovereignty in the 1780s, such speculations were certainly entertained by a small minority on both sides of the Atlantic prior to the Ratification debates. *See* H. L. A. Hart, *Bentham on Sovereignty*, 2 IRISH JURIST 327–35 (1967),

states to have an equal voice and those who thought that larger, or even richer, states should have a proportionate say in the Union.[26] Delegates were divided about the accommodations that ought to be made to states with large, enslaved populations, and there was considerable disagreement over the proper scope of any new federal legislative or tax-raising powers.[27] Any one of these issues might have shattered the possibility of reaching an agreed text. A crucial story of the Federal Convention, then, is the story of how the mechanics of debate facilitated what might have seemed an impossible compromise and how similar, parliamentary-style processes have facilitated constitutional decision-making ever since.

It is perhaps worth noting here the importance of what, since the seventeenth century at least, has been understood as "Parliamentary Law"—the rules and customs that govern the meetings of deliberative bodies. Farrah Peterson has recently suggested the power of remembering the importance of private law when understanding the constitutional debates of the founding era.[28] In a similar way, it is helpful to remember that the members of the convention did not invent a process for debate, nor did they view the conduct of a legislative or pseudo-legislative body as merely arbitrary, but one which conformed to ancient customs and rules of behaviour, even if it possessed the power to modify those rules in order to suit its own circumstances.

III. A BRIEF HISTORY OF PARLIAMENTARY LAW

It is, perhaps, tempting to think that the ability for assemblies to meaningfully draft text collectively is a wholly modern invention, and it is true that the processes with which this essay engages depended for their operation not only on literacy, but also on pens, papers, secretaries, copyists, and printers. Surely the assemblies of the ancient world, largely illiterate and of seemingly unmanageable size would have been incapable of anything akin to the modern process of proposal and amendment, but there are tantalizing hints that this was not, in fact, the case. It appears that speeches in the Roman Senate could materially affect published decrees, though the procedure by which this happened is obscure.[29] Most

26. *See* Madison, *supra* note 25, at 220.

27. *See id.*

28. Farah Peterson, *Expounding the Constitution*, 133 YALE L.J. 2, 6–7 (2020).

29. For a readable introduction to procedure in the Roman Senate, as far as it can be reconstructed, see RICHARD J. A. TALBERT, THE SENATE OF IMPERIAL ROME 221–88 (Princeton University Press 1987). For a brief discussion of documentary practices, see LAURENS E. TACOMA, ROMAN POLITICAL CULTURE: SEVEN STUDIES OF THE SENATE AND

discussions of actions by legislative assemblies in the ancient world suggest that assemblies usually had the power only to vote on questions posed by magistrates,[30] but Plutarch's Lycurgus suggests in chapter 6 that the ancient popular assembly of the Spartans might have had (at least at one stage) quite extensive powers of amendment:

> When the multitude was thus assembled, no one of them was permitted to make a motion, but the motion laid before them by the senators and kings could be accepted or rejected by the people. Afterwards, however, when the people by additions and subtractions perverted and distorted the sense of motions laid before them, Kings Polydorus and Theopompus inserted this clause into the rhetra: "But if the people should adopt a distorted motion, the senators and kings shall have power of adjournment"; that is, should not ratify the vote, but dismiss outright and dissolve the session, on the ground that it was perverting and changing the motion contrary to the best interests of the state.[31]

Whatever the ancient history, however, of collective text-making, modern processes were associated most strongly with the traditions of the British Parliament, codified in 1689 by George [Philips] Petyt in his *Lex Parliamentaria*, which he almost immediately revised into a much expanded edition in 1690.[32] An edition in 1716 was reprinted in both New York and Philadelphia.[33] It is impossible to judge exactly how widely circulated this work was in America, but both American printings and imported copies appear to have circulated. A note in Benjamin Franklin's receipt book shows that he lent out his copy to the merchant Hugh Roberts in 1752.[34] No more convenient compilation of the law and traditions of the British Parliament was available before the Revolution,

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CITY COUNCILS OF ITALY FROM THE FIRST TO THE SIXTH CENTURY AD 237–40 (Oxford Univ. Press 2020).

30. Max Radin, *Fundamental Concepts of the Roman Law*, 12 CAL. L. REV. 393 (1923).

31. PLUTARCH, LYCURGUS ch.6 (Bernadotte Perrin trans., Harvard University Press 1914), https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2008.01.0047%3Achapter%3D6. I am grateful to Dr. G. Kantor, St. John's College Oxford, for pointing the significance of this passage out to me.

32. GEORGE PETYT, LEX PARLIAMENTARIA: OR, A TREATISE OF THE LAW AND CUSTOM OF THE PARLIAMENTS OF ENGLAND 215–19 (1698).

33. *Id.* For the American printings, see AMERICAN ANTIQUARIAN SOCIETY, EARLY AMERICAN IMPRINTS, SERIES 1 (Charles Evans, ed. 1850).

34. EDWIN WOLF, II & KEVIN J. HAYES, THE LIBRARY OF BENJAMIN FRANKLIN 627 (Am. Phil. Soc'y & Libr. Co. of Phila. eds., 2006).

though in 1781 John Hatsell published *Precedents of Proceedings in the House of Commons*.[35] Thomas Jefferson used that work as an authority when compiling his own *Manual of Parliamentary Practice for the Use of the Senate of the United States* in 1801, a work subsequently frequently printed and widely cited as an authority on matters of Parliamentary Law by American authorities.[36] On both sides of the Atlantic, a series of titles appeared throughout the nineteenth century. While some, such as the many reprintings of Jefferson's *Manual* or the British Erskine May's *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, very explicitly concerned themselves only with the rules of specific legislative assemblies,[37] but most works of this type addressed themselves more generally to the needs of many types of "corporate" body, whether of a temporary or permanent nature, political, commercial, or even social in character. Luther Cushing's 1845 *Rules of Proceeding and Debate in Deliberative Assemblies* addressed itself to all sorts of assemblies,[38] and one of many later revisions even retitled it *Cushing's Manual of Parliamentary Practice for Deliberative Assemblies and Rules of Procedure in Business Corporations Meetings*.[39] The many revisions of these more famous titles and many other more minor works are too numerous to list here. What all works of this genre had in common, however, was the idea that the rules of debate in a legislative assembly drew upon what was thought to be a longstanding and authoritative (if constantly developing) tradition.

In America, codifying the specific practice of the many legislative bodies proved impossible, and Cushing's *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America* found itself commenting most frequently on the evolving practices of the nineteenth-century British House of Commons

35. HENRY M. ROBERT, III ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED, at xxxvii (Sarah Corbin Robert et al. eds., 11th ed. 2011).

36. *Id.*

37. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES 14 (Philadelphia, Parrish, Dunning & Mears, 1853) (1801); *see also* THOMAS ERKSINE MAY, A TREATISE UPON THE LAW, PIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, at v (London, Charles Knight & Co. Ludgate-Street 1844).

38. ROBERT, *supra* note 35, at xxxviii.

39. LUTHER S. CUSHING & ALBERT S. BOLLES, CUSHING'S MANUAL OF PARLIAMENTARY PRACTICE FOR DELIBERATIVE ASSEMBLIES AND RULES OF PROCEDURE IN BUSINESS CORPORATION MEETINGS (Philadelphia, John C. Winston Co. 1914).

and House of Lords and then contrasting trends in American practice.[40] While he may have shown continuing deference to British practice, however, other compilers and authorities in America maintained that the ultimate source of examples of proper practice was the United States House of Representatives, a view that was expressed strongly by Henry Martyn Robert in his *Rules of Order*.[41]

Yet discerning fine points of detail of the practice of the House of Representatives could be extremely difficult. And here, it is perhaps important to note two features of all codifications of parliamentary practice. In the first place, an appeal to historic practice was important for all these manuals, which often distorted the rules they recommended. Many of the authors, including the author of the *Lex Parliamentaria* itself, found it easier to document the practice of older Parliaments than to document contemporary practice. Though compiled in 1689, many of the points of practice quoted are rulings of the Speaker or resolutions of the Houses of Parliament from the previous century.[42] The authors also seemed to delight in strange, archaic, and even contradictory rules, all of which were seen to add to the ancient mystery of deliberative debate. Jefferson quoted Hatsell, and was in turn quoted by many other writers or re-publishers of his work:

> And whether these forms be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by, than what the rule is; that there may be a uniformity of proceeding in business, not subject to the caprice of the Speaker, or captiousness of the members.[43]

Secondly, these works were all, to an extent—and especially those seeking not to codify the law of a particular body, but rather to use the general form of Parliamentary Law to propose basic rules for specific bodies—seeking to chart a tradition of practice that was, by its very nature, constantly evolving.

IV. UNDERSTANDING THE CONVENTION IN THE CONTEXT OF

40. *See* LUTHER S. CUSHING, LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 2–3 (Boston, Little, Brown, & Co. 1874) (1856).

41. *See* ROBERT, *supra* note 35, at xxxix.

42. *See* PETYT, *supra* note 32, at 1.

43. *See* JEFFERSON, *supra* note 37, at 14.

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In 1787, however, the points raised by these later publications were for the future. On the 14th of May, 1787, delegates began to arrive for the Federal Convention, but the Federal Convention was not quorate until the 25th.[44] On that day, the Federal Convention (in accordance with usual parliamentary practice) immediately elected George Washington to the chair, appointed William Jackson secretary, and established a rules committee.[45] These steps—the appointment of a chair, electing a secretary or establishing a secretariat to keep records, and the establishment of a committee to agree rules to govern all subsequent debate—have been the initial actions of constitutional conventions and legislative bodies ever since.

The records kept by Jackson have been a disappointment to generations of historians. It is clear he did not even preserve all of the papers in his possession, a selectivity which he would share with his successors at many state conventions. A letter he wrote to Washington on 17th September, the final day of the Federal Convention, reads: "Major Jackson, after burning all the loose scraps of paper which belong to the Convention, will this evening wait upon the General with the Journals and other papers which their vote directs to be delivered to His Excellency."[46]

The journals and papers which he did give to Washington consist of four bound volumes. The first of these is the Journal of the Convention itself, the second the Journal of the Committee of the Whole, then two volumes in which records of votes on particular questions were kept, and finally the engrossed copy of the Constitution.[47] Separately, Jackson handed over copies of the Virginia Plan, the revised Virginia Plan, and printed texts related to various stages of the convention process.[48]

When John Quincy Adams, at the direction of Congress, came to publish these records, he discovered numerous deficiencies, including missing papers (including the "Pinckney Plan" that had been introduced for discussion at the Federal Convention) and that resolutions passed on

44. *See* RECORDS, *supra* note 10, at 20, 27.
45. *Id.* at 27.
46. *Id.* at 82.
47. *Constitutional Convention Records*, FOLD3, https://www.fold3.com/publication/61/constitutional-convention-records/browse (last visited Sept. 2, 2023).
48. *Id.*

the two days of debate had not been entered into the journal.[49] Adams confronted Jackson in 1818 about the state of the records, and Jackson defended himself by saying that he had kept more extensive records but had suppressed them at the request of President Washington.[50]

It is possible that he did do so, and certainly some commentators have believed it is within the realm of possibility.[51] Yet a proper consideration of Jackson's actual role at the Federal Convention would be a better defence of his work. As Bilder has pointed out, viewed in this light, the records are in fact relatively well kept.[52] Jackson's job was not to memorialize the work of the Federal Convention—indeed, it was unclear until the end of the Federal Convention whether any records of the proceedings would be kept at all.[53] What was the business of the Secretary? It was to maintain the papers of the Federal Convention in such a way as to facilitate debate.[54] The nature of Jackson's record has been profoundly misunderstood, and John Quincy Adams's frustration seems not to have been shared by any member of the Federal Convention.

Indeed, the volumes that we have are written in a fair hand, with relatively few crossings out or interleavings. They are not quite the very formal handwriting of the official Senate Journal for the years 1790–91, but they may very well be the fair copy of notes kept daily on paper. It is not unreasonable to speculate that some of the "loose scraps of paper" that Jackson burned may well have been his more casual notes.[55] But what was most certainly included in the loose scraps of paper was a running draft of various texts that Jackson must have been keeping during the debates, allowing him, and the members of the Federal Convention, to keep track of how the draft in question changed through amendment over the course of a given day. Without a secretary who could tell delegates to the Federal Convention what, at any moment, they had definitely agreed, and which resolutions had been tabled for discussion, any hope of orderly debate would have been impossible.

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49. John Quincy Adams, *JQA Diary, Volume 31, 16 May 1819*, MASS. HIST. SOC'Y, https://www.masshist.org/publications/jqadiaries/index.php/document/jqadiaries-v31-1819-05-16-p102 (last visited Sept. 2, 2023).

50. John Quincy Adams, *JQA Diary, Volume 30, 19 November 1818*, MASS. HIST. SOC'Y, https://www.masshist.org/publications/jqadiaries/index.php/document/jqadiaries-v30-1818-11-19-p430#sn=0 (last visited Sept. 2, 2023).

51. *See, e.g.*, Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1632 (2012).

52. *Id.* at 1635.

53. *See id.* at 1640.

54. *See id.* at 1652.

55. *Id.* at 1625.

The rules adopted by the Federal Convention over the course of its first few days did not invent a new process of debate, nor did they—with the pedantic precision of many later conventions—specify any authority to consult in the event of a situation not covered by their rules.[56] Instead, it was assumed that members of the Federal Convention were familiar with the norms of legislative debate and with governing Parliamentary Law.[57] In spite of the heated nature of some of the debates at the Federal Convention, no one ever appears to have disputed the process of debate and deliberation itself, even when it foreclosed discussion of controversial matters.

Two broad classes of rules were adopted by the Federal Convention. Some simply reaffirmed the norms of Parliamentary Law as authorities both before and since would have understood them: members could not speak twice on the same question without special leave, all propositions for discussion had to be seconded and made in a definite form of words (and, if requested, in writing) before they could be discussed, and a rule was adopted allowing complicated questions to be divided into separate proposals.[58] Rules were adopted to ensure that the minutes would be read regularly, and that any proposition would be clearly stated.[59] Longer papers for discussion would be read once and then debated by paragraphs, and then, if amended, debated again by paragraphs.[60] The Federal Convention adopted the parliamentary terms of "first" and "second" readings to describe this process.[61] By adopting these rules, the Federal Convention set itself firmly in the tradition of a parliamentary assembly, albeit one with more flexibility than the strictest bodies—members could speak more than once on a question with permission, for example.

In two matters, the Federal Convention departed from usual parliamentary practice. Firstly, it provided that any state delegation could delay a final decision on any question for a day.[62] The second was the adoption of a complicated rule that provided that the Federal

56. 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 29 (1949), https://historicalpubs.njstatelib.org/searchable_publications/constitution/constitutionv1/NJConst1n29/. Rule 37 of the 1947 State Constitutional Convention for New Jersey specified *Cushing's Manual of Parliamentary Practice*, though not a specific edition, for this purpose. *Id.*

57. *See id.* at 7.

58. *See* Bilder, *supra* note 51, at 1641.

59. *Id.*

60. *See id.*

61. *See* NEW JERSEY CONSTITUTIONAL CONVENTION, *supra* note 55, at 186.

62. *See* Bilder, *supra* note 51, at 1641.

Convention could vote to reconsider any matter that it had decided upon previously.[63] In effect, this explicitly allowed the Federal Convention to change its mind, something which represented a significant departure from the norms of formal proceedings, which held that once a question had been decided, it could not be revisited. There were both practical and theoretical reasons why this was (and is) normally the case. Reopening questions not only wastes the time of legislative bodies, but also threatens to upset the delicate fiction that the answer given to a particular question represents the rational will of a deliberative assembly. If that assembly is seen to give one answer on one day and another the next, why should its deliberations and resolves carry any weight at all?

As soon as the rules had been introduced, Edmund Randolph, leader of the Virginia delegation, introduced the so-called Virginia Plan for discussion.[64] This text did not have the form of a draft constitution. Rather, it is best understood as a series of fifteen propositions that were supposed to inform the work of a later drafting committee.[65] The same day, Charles Pinckney introduced his own plan.[66] This, to judge both from the comments made in the contemporaneous record and from the version of it that he furnished to John Quincy Adams for the 1819 publication, looked much more similar to a constitutional text than anything else introduced at this stage. Both were referred to the Committee of the Whole, a body not mentioned in the rules, but which was inherited from the norms of Parliamentary Law.[67] The New Jersey Plan would not be introduced until the 15th of June.[68]

From then until the 19th of June, 1787, the Federal Convention would meet each morning. The order of the day would be read, Washington, with (according to the rules) the Federal Convention standing, would leave his chair and take his seat with the Virginian delegation.[69] Nathanial Gorem of Massachusetts would then take the chair, and the

63. *See id.* at 1636 n.130.

64. Lynn Uzzell, *The Deep South's Constitutional Con*, 53 ST. MARY'S L.J. 711, 722 (2022).

65. *See* Orrin G. Hatch, *At Last a Look at the Facts: The Truth about the Judicial Selection Process: Each is Entitled to His Own Opinion, but Not to His Own Facts*, 11 GEO. MASON L. REV., 476, 469 n.6 (2003).

66. *See* Uzzell, *supra* note 64, at 722.

67. *See id.*

68. *Id.* at 714, 722. The text of Pinckney's plan was never debated by the Federal Convention or its Committee of the Whole, and the written copy was not preserved by Jackson. A detailed account of the historiography is provided by Lynn Uzzell. *See id.* at 714.

69. *See* Vile, *supra* note 19, at 154.

day's debate would proceed.[70] At the end of the day, instead of adjourning, the Committee would resolve that it would rise and report its progress, requesting leave to sit again.[71] Washington would then resume the chair, and Gorem would report to him that the Committee wished to continue its work.[72] The whole Convention would then resolve that the order of the day for the next day's business would be that they would again resolve into the Committee of the Whole.[73] All of this, Jackson took care to record, each day, in the Journal of the Convention.[74]

By operating in this way, the Federal Convention again set itself in the tradition of Parliamentary Law. Authorities declared that the appropriate way to debate a matter of great concern, and to frame instructions for the drafting of legislation was for Parliament to resolve itself into a "grand committee," consisting of all of its members, but chaired by someone other than the speaker.[75] Grand committees were distinguished by the fact that they were barred from adjourning themselves in the ordinary manner, but were forced to repeatedly rise and ask to sit again.[76] In the *Lex Parliamentaria*, the principal advantage of such a procedure was explained as allowing for more relaxed rules of debate,[77] but the Federal Convention had already agreed in its rules to relax the absolute ban on members speaking more than twice to a question that would have been in force in the House of Commons, so why did they persist with this complicated theatre day after day? Aside from knowledge that it was behaving correctly in deferring to the arcane, traditional dictates of parliamentary rules that rooted the Federal Convention firmly in the traditions that legitimized lawmaking, the Federal Convention was able to debate the Virginia Plan—and, though it chose not to in the end, could have debated and amended proposed resolutions based on the other plans submitted to it—without binding the Federal Convention to a particular text.[78]

The Virginia Plan was debated paragraph by paragraph, and indeed clause by clause.[79] As each clause was read out, members could propose an

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70. *Id.*
71. *Id.*
72. *See id.*
73. *Id.*
74. *See id.*
75. *See* PETYT, *supra* note 32, at 215–17.
76. *Id.* at 219.
77. *Id.* at 215–19.
78. For Thomas Jefferson's description of the mechanism of the Committee of the Whole, see JEFFERSON, *supra* note 37, at 31–33.
79. *See* Vile, *supra* note 19, at 155.

amendment, or vote the clause as agreed.[80] Amendments themselves could be amended before being voted upon.[81] It should be noted that there was no role here for the chair to steer debate. While the norms of Parliament in the seventeenth century still allowed that a motion might be put forward by the chair after debate on a given issue,[82] at the Federal Convention—in keeping with the norms of practice at the time—debate in both the plenary sessions and the Committee of the Whole only ever occurred on precisely worded questions that had been either reduced to writing by the proposer or else clearly articulated.[83] In addition, the question under discussion at any given time—whether to agree a text, agree an amended paragraph, agree to an amendment, or some other question—was quite definite.[84] Once the Virginia Plan had been agreed upon, it was referred back to the plenary session. Before the plenary session could resume its work, however, the question of the other plans needed to be resolved. The New Jersey delegation clearly expected that their very different plan of union would now be debated and refined. Charles Pinckney's Plan was also waiting for debate. Alexander Hamilton filibustered and gave notice that he would be introducing his own plan.[85] When the Committee of the Whole met the next day, it was with a sense of wariness. The Committee agreed to rise and report only the Virginia Plan to the full body.[86] After debate returned to the plenary session, issues that had been apparently uncontroversial in the Committee of the Whole were now suddenly deeply so. The Federal Convention moved through each of the paragraphs of the revised Virginia Plan, but any vote now would carry substantially more weight. It would be, in other words, the expressed will of that body. It was only by referring specific points of contention to three smaller groupings (the First, Second, and Third Committees on Representation), and then only just, that the Federal Convention finally arrived at a text that could be passed to the Committee of Detail on Wednesday July 26th.[87] Confusingly, the Committee of Detail also formally passed the other plans that had been placed before the Federal Convention, despite the

80. *See id.*
81. *See id.* at 154.
82. *See id.*
83. *See* JEFFERSON, *supra* note 37, at 48.
84. *See* CUSHING, *supra* note 40, at 483–84 (describing the evolution of the role of the chair in framing questions and the practice of only allowing one question to be under debate at any one time).
85. *See* Uzzell, *supra* note 64, at 722.
86. *See id.*
87. *See id.* at 723.

fact that these had never been debated or amended in the same way. Their status was not clarified by the Federal Convention, but the Committee of Detail could not properly have used any language in these unamended plans that contradicted anything in the resolutions passed by the whole Federal Convention (i.e., the amended Virginia Plan).

The Committee of Detail completed its work on August 6th, passing back a much-extended text to the whole body, which again worked through each paragraph, amending it to produce a further draft.[88] Again, Secretary William Jackson's task was to copy each clause into a fresh copy as the process of amendment and debate continued. Again, small subcommittees were used to address particular points of contention.[89]

This draft was finally passed to a Committee of Style and Arrangement on September 8th. It was this committee that finally produced the first draft in the whole Federal Convention that had the form of a constitutional text.[90] The work of this committee was then voted on and amended by the full Federal Convention paragraph by paragraph, a process that took a little over a week.[91] The resulting text was then sent to be printed. This printed text was then worked through one last time by the whole body, this time with the Federal Convention studying the final text and formally agreeing that each clause was correct.[92] Even here there was an opportunity for amendment. Several significant changes were made to the text on the 15th of September, and some delegates even attempted major amendments at this point.[93]

What are we to make of this laborious process of revision and amendment? Firstly, that this process, with its iterative drafting—and redrafting—was what made compromise possible. Yet it was, in many ways, unremarkable. The legitimacy of the Federal Convention's work may have been questioned by antifederalist writers who pointed out that the Federal Convention had far exceeded the instruction to propose amendments to the Articles of Confederation, but no one at the time, or subsequently, ever questioned the process of debate adopted at the Federal Convention. It conformed to the norms of familiar and authoritative practice without being so rule-bound that the rules themselves became the subject of controversy. Secondly, this process allowed the Federal Convention to be certain, at all times, about the

88. *See id.* at 716.
89. *See* Vile, *supra* note 19, at 164–66.
90. *See* Bilder, *supra* note 51, at 1648.
91. *See* Vile, *supra* note 19, at 166.
92. *See id.*
93. *Id.* at 173–74.

following questions: what was currently under discussion? (usually, a short piece of text); when was the appropriate time to intervene on a question? (debating paragraph by paragraph and clause by clause, it was obvious to the members of the Federal Convention when the appropriate moment to contest specific language would be); what had and had not been definitely decided at any point?; and what alternative proposals had been tabled for discussion? Thirdly, the mechanisms adopted by the Federal Convention ensured that every major subject was debated at least three and as many as five times. Fourthly, the momentum of the process probably contributed to the success of the Federal Convention. A focus on the debate of a precise form of words at each stage framed the debate and the use of time.

V. UNDERSTANDING CONSTITUTIONAL CONVENTIONS AFTER PHILADELPHIA

How much of New Jersey's 1947 Constitutional Convention would have been immediately recognizable to the members of the Federal Convention? The New Jersey Convention, like the Federal Convention, had freedom to draft an entirely new text, although one issue, the size and nature of representation in the legislature had been reserved from it by the enabling legislation. In terms of the process of debate, however, there was one very significant change, which mirrors the practice of state conventions from the second half of the nineteenth century onward. The rules for the New Jersey Convention established an extensive series of committees from the beginning that would have responsibility for preparing sections of the draft constitutional text. The convention still made use of the mechanism of a committee of the whole, yet although they were laid out with much more detail than the rules of the Federal Convention, with the duties of the various officers specified more precisely and a greater formality on certain matters, such as a clear specification of the order of business or precedence of particular types of motion. In many ways the rules of the New Jersey Convention, and the general manner in which the text was revised, would have been immediately familiar to eighteenth-century legislators.

The constitutions of all states owe their basic texts to comparable processes. Some states have deliberately chosen to recall earlier convention processes in the design of their conventions. In 1950, Alaska deliberately selected fifty-five delegates to its convention in order to

mirror the fifty-five delegates to the Philadelphia Convention in 1787.[94] Yet in no case has the state constitutional convention been a mere matter of performance. All have had contentious matters to discuss, and while some conventions have managed to dispose of their work quickly by borrowing large sections of text from other states or from previous constitutional texts, most conventions have sat for many months. The New Jersey Convention required only five days to complete its work, while the most recent Illinois State Convention met between December 1969 and September 1970.[95] State constitutional texts generally became longer and more detailed, reflecting a desire to settle many questions in constitutional law that go beyond the scope of documents that distribute power between branches of government and establish bills of rights.

The records of America's rich history of conventions have, for the most part, been misunderstood or neglected. The memorializing editions of journals published sometimes decades after a particular convention are frequently assumed to be the only records available, and a list of resolutions passed, even where speeches are recorded, is of no real use to reconstruct the work of a convention if committee papers or the texts of specific proposals are not also preserved. The editors of these publications for the most part omitted the work of collating committee papers, leaving later readers with the (incorrect) impression that it is not possible to reconstruct more fully the work of these conventions. In fact, the reverse is true. States such as Massachusetts or Washington, where a hapless secretary not only failed to preserve key papers but could not keep pace with the proceedings and left a woefully deficient official record, are the exception rather than the norm, especially given intense press interest in many nineteenth-century processes and considerable general interest in the twentieth-century processes of constitutional revision.

Even at their best, however, the records of any constitutional convention process remain difficult to understand and interpret, and broader questions, such as understanding the evolution of language across time and place in the development of constitutional texts, extremely challenging. A list of proposals made, speeches given in support

94. *100 Years of Alaska's Legislature "From Territorial Days to Today"*, ALASKA STATE LEGIS., https://akleg.gov/100years/legislature.php?id=-22#:~:text=Alaskans%20elect%2055%20delegates%20from,goes%20into%20effect%20at%20statehood. (last visited Sept. 2, 2023).

95. *1776 State Constitution*, STATE OF N.J.: DEPT. OF STATE, https://www.state.nj.us/state/archives/docconst76.html (last visited Sept. 2, 2023); 2021–2022 ILLINOIS BLUE BOOK 475 (Jesse White ed.) https://www.ilsos.gov/publications/illinois_bluebook/ilconst.pdf.

or against them, struggles to capture the nature of the debate in a constitutional convention process. Records that are kept, in the first instance, to assist the members of a convention with the process of debate and reaching a definite agreement of a text tax the memory of later readers, who must try to keep a sense of a constantly evolving set of texts as they are discussed and amended. To be truly useful for modern purposes, these records need more than collating and publishing.[96]

A solution to many of these problems is to republish the records of state constitutional conventions in the form of an interactive and dynamic digital edition that can not only collate information from multiple sources but can represent each proposal made and vote taken in a way that allows the precise text under discussion to be reconstructed, giving readers access to the context that would have been immediately available to participants in a convention process. My colleagues and I published a description of our initial work in this area in 2018, having made an initial prototype (focused on the 1787 records) available in 2016.[97] Since that time, we have focused on three major strands of research: firstly, redeveloping and refining the underlying document model in order to be able to capture the work of constitutional conventions as accurately as possible and to handle the longer and more complicated texts written by state-level constitutional conventions. While a technical description of this work is beyond the scope of this paper, the newer system allows us to track the evolution of language with exceptional precision. Secondly, we have focused on developing new ways to visualize and analyse the work of constitutional conventions, recognizing that the visualizations developed for tracing the work of the (familiar and organizationally simpler) Federal Constitutional Convention would need significant adaptation in order to capture the work of state-level constitutional drafting processes. Thirdly, we have focused on archival work and documentary editing. Funded principally by a generous grant from the National Endowment for the Humanities awarded to colleagues at Utah Valley University, in Summer 2023 we will publish a collection charting constitution-writing in the western United States in the late nineteenth century. This collection joins our work on the 1787 Constitutional Convention, a collection charting proposals for Federal

96. An excellent effort to make the records of constitutional development in South Dakota more useful for legal research is David Giblertson & David A. Barari, *Indexing the South Dakota Constitutional Conventions: A 21st Century Solution to a 125 Year Old Problem*, 53 S.D. L. Rev. 260, 260–64 (2008).

97. Nicholas P. S. Cole, Alfie Abdul-Rahman & Grace Mallon, *A Framework for Modelling and Visualizing the US Constitutional Convention of 1787*, 21 Int'l J. on Dig. Liberties 191, 210 (2020).

Constitutional Amendment between 1860 and 1875, and a collection charting the writing of Arizona's 1910 Constitution—created in conjunction with colleagues Arizona State University. Much of the archival and editing work has been undertaken by undergraduate students, supported by a professional documentary editing team based at Pembroke College, Oxford.[98]

Though it is true that the record-keeping of constitutional conventions varied in quality, and though it is true that not all records (official and unofficial) have been kept as carefully as historians and legal scholars may wish, archival work on each of the state-level projects persuades us firstly, that much more has been preserved than is often recognized, secondly, that sophisticated digital tools can transform the utility of the extant records, and thirdly, that as the database of conventions grows, we will be able to study the process by which constitutional language was adapted across time and place with much greater accuracy and sophistication.

Focusing on the debate within each constitutional convention, rather than studying only the final texts, reveals some surprising connections. For example, the Bill of Rights adopted by the Wyoming State Convention of 1889 reads in section 6:

> No person shall be deprived of life, liberty or property without due process of law.[99]

This language was borrowed directly from the Fourteenth Amendment to the Constitution of the United States, and is, in that sense, unremarkable.[100] But until very nearly the end of the convention, the text would instead have read:

> No person shall be taken or imprisoned, or disseized of his freeholds, liberties or privileges, or outlawed, or exiled, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.[101]

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98. *See* THE QUILL PROJECT, https://www.quill.pmb.ox.ac.uk (last visited Sept. 2, 2023) (offering details on the collections mentioned); *see also* THE QUILL PROJECT, https://www.quillproject.net (last visited Sept. 2, 2023) (offering access to the research platform itself).

99. WYO. CONST. art. I, § 6.

100. U.S. CONST. amend. XIV, § 1.

101. Preamble [File No. 88, Convention], THE QUILL PROJECT, https://www.quillproject.net/current_document_view/676571 (last visited Sept. 2, 2023).

Only after debate in the Committee of the Whole, which struck out the words "in any manner destroyed," did the clause come under greater scrutiny.[102] Unhappy that removing those words might have weakened the whole clause, one member of the convention proposed the more modern language.[103] But where had the original text come from? What a computer can detect immediately is that the original paragraph was taken from the Virginia Ratifying Convention's proposals for a Federal Bill of Rights, introduced into Congress as part of the preliminary discussions when the question of a Federal Bill of Rights was first seriously taken up by Congress.[104] The ultimate source for this form of words is almost certainly Edward Coke's exposition of Magna Carta,[105] since other translations use different forms of words for that phrase. This formulation was used in the Maryland Constitution in 1776.[106] The immediate source for the archaic version of this clause in Wyoming in 1889 is not clear, but the most likely candidate is one of the editions of Johnathan Elliot's *The Debates in the Several State Conventions on the Adoption of the Federal Constitution.*[107]

While it is possible that such a famous fragment of text might be spotted by alert readers, the ability to track fragments of text as they were proposed and reworked in different constitutional conventions will transform the possibilities for meaningful comparative discussion. A comprehensive dataset of the records related to the construction and evolution of America's constitutions, stored in a form that allows the individual proposals for specific language to be identified and visualized within the constantly evolving context of a parliamentary process, and supported by visualizations and research tools designed for different categories of researchers would enable the kind of detailed qualitative and quantitative research into the history and sociology of constitution-writing that has been imagined but which has been unrealistic to realize.[108]

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102. Preamble [File No. 88, Committee of the Whole], THE QUILL PROJECT, https://www.quillproject.net/session_visualize/6527#679428 (last visited Sept. 2, 2023).

103. *See supra* note 99.

104. J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights, 1789–1791*, 25 U. RICH. L. REV. 433, 467 (1991).

105. 2 Edward Coke, *Institutes of the Laws of England*, 50 (W. Clarke & Sons, 1809).

106. MD. CONST. art. XXI, pt. IV.

107. A piece on the compilation and later influence of Elliot's debates is being prepared for publication by Dr. Grace Mallon of Rothermere American Institute, Oxford.

108. One attempt to apply social science methodologies to compare the operation of several conventions was made by Elmer E. Cornwell Jr., Jay S. Goodman, and Wayne R. Swanson. That piece noted that state conventions were the "orphans of political science research." Elmer E. Cornwell Jr., Jay S. Goodman & Wayne R. Swanson, *State*

Work on the history of formal debate and Parliamentary Law has tended to focus on the history of the British Parliament.[109] Given the rich history of both ephemeral institutions such as constitutional conventions, and the complex history of state legislative assemblies, there is surely ample opportunity and need for more studies focused on the history in the United States. It is only through a careful study of the operation of state conventions that a proper understanding of how America's subnational constitutional texts came to take the forms that they did. It seems more likely, rather than less, that the interpretation of state constitutional texts will be the subject of controversy over the coming years.[110] In such debates, the question of how particular forms of words and not others came to be included in a particular text should not be avoided. Properly answering that question will require recovering the contributions of the thousands of people who have played their part in writing (both successful and unsuccessful) constitutional texts, being able to comprehend in detail and with accuracy the processes of drafting in which they were engaged, and evaluating the choices that they made. A necessary first step is to organize, compile, edit, and present the rich archives of material that describe the work of America's constitutional conventions in ways that facilitate ambitious and comparative research agendas. Work on the Federal Constitutional Convention over the last century has integrated insights from across the humanities and social sciences. The state-level conventions, grappling as they do with a much broader range of issues and a much more diverse set of participants serving equally diverse communities, deserve a similar level of attention.

Constitutional Conventions: Delegates, Roll Calls, and Issues, 14 MIDWEST J. OF POL. SCI., 105 (1970).

109. *See generally* Paul Evans, ed., *Essays on the History of Parliamentary Procedure* (Hart Publishing, 2017).

110. *See* Brady, *supra* note 2, at 1171.