

THE CONSTITUTIONAL LIFE OF LEGISLATIVE INSTRUCTIONS IN AMERICA

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In the United States' early history, state legislatures often formally instructed their federal representatives on particular votes. This practice flourished for a century but then died out—a change that many scholars attribute to the Seventeenth Amendment. This Note argues that previous scholars have ignored other, more important, reasons for the demise of instructions.

The six-year term length for U.S. senators, combined with the increasingly rapid turnover in state legislatures, prevented binding instructions from becoming permanently entrenched. Instructions were held in place after the Founding only by constitutional culture, but even this did not last. After Southern Democrats vigorously used instructions to purge Whigs from the Senate in the 1840s and 1850s, the use of instructions was indelibly linked to the South. Not surprisingly, the doctrine of instructions was one of the casualties of the Civil War. Following the War, the roles were reversed: The states—especially the Southern states—were taking instructions from the federal government. Today, instructions still exist but as nonbinding “requests” for action. This new conception of instructions returns us full circle to James Madison’s conception of the proper role of instructions: a right of “the people . . . to express and communicate their wishes” to their representatives.

INTRODUCTION

Under the Articles of Confederation, state legislatures often formally instructed their federal representatives on particular votes, continuing a practice common in England and the American colonies. These instructions were backed by the right to recall representatives, a threat that was eliminated by the U.S. Constitution, which did not explicitly provide such authority.¹ Nevertheless, the practice of instructions continued under the Constitution. State legislatures regularly instructed their U.S. senators, even after James Madison argued

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¹ For discussion of the right to recall and its effect on instructions, see *infra* notes 55–76 and accompanying text.

that the Senate was designed to provide “a due sense of national character”² and even after a constitutional amendment providing a “right to instruct” was rejected by both houses of the First Congress.³ Not only were many in the Founding generation eager to use instructions to control their representatives, instructions remained common—and potent—for many years afterward. By the end of the Jacksonian era, at least a dozen U.S. senators had resigned in disagreement with their instructions.⁴ More would resign before the Civil War began.⁵ Countless others, for a time, simply acceded to their state legislatures’ wishes.

This Note explains why instructions survived the Founding, flourished for a period, but then weakened and largely died out, and it details how instructions remain with us today, though in a modified form. Previous scholars have blamed the Seventeenth Amendment for ending the practice of instructions while ignoring other, more important, factors.⁶ Further, while historians and political scientists have mentioned instructions and their place in the United States’ constitutional saga, they have done so only in passing while studying broader issues or narrower time periods.⁷ In contrast, this Note examines the practice from the colonial era through the present and argues that the interaction between the Constitution, the structure of state legislatures, and the reigning constitutional culture—rather than the Seventeenth Amendment alone—contributed to the decline of instructions. More broadly, this Note demonstrates that federal *and*

² THE FEDERALIST NO. 63, at 380–81 (James Madison) (Clinton Rossiter ed., 1961) (“[I]t can scarcely be doubted that if the concurrence of a select and stable body had been necessary, a regard to national character alone would have prevented the calamities under which that misguided people [Rhode Island] is now laboring.”).

³ See *infra* Part II.C.3 (describing debate over, and ultimate rejection of, proposed constitutional right to instruct in First Congress).

⁴ William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 458–59 & n.18 (1955) (listing fifteen U.S. senators “forced” to resign and six whose resignations were “almost forced”).

⁵ *Id.*

⁶ See, e.g., Kenneth Bresler, *Rediscovering the Right To Instruct Legislators*, 26 NEW ENG. L. REV. 355, 365, 367 (1991) (“The [Seventeenth] Amendment’s ratification not only established direct popular election of U.S. Senators, but it also eliminated a major source of instructions to American legislators”); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 557 & n.346 (1997) (listing scholars attributing downfall of instructions to Seventeenth Amendment).

⁷ See, e.g., ROY SWANSTROM, THE UNITED STATES SENATE 1787–1801, S. DOC. NO. 87-64, at 159–72 (1st Sess. 1962) (discussing instructions to senators from 1781 through 1801); Clement Eaton, *Southern Senators and the Right of Instruction, 1789–1860*, 18 J.S. HIST. 303, 305, 316–19 (1952) (focusing on use of instructions in South in 1830s).

state actors have “fleshed-out”⁸ the meaning of our Constitution over time, even the supposedly “hard-wired”⁹ parts. U.S. senators’ ability to resist instructions was not fixed at the Founding but has fluctuated depending on both changes in the constitutional culture (as Southern Democrats’ use of instructions before the Civil War tainted the practice) and changes to the term lengths of state legislators (as shorter term lengths reduced the credibility of threats to imperil senators’ reelection).

This Note will proceed as follows. In Part I, I provide an overview of the use of instructions in England, where boroughs¹⁰ used instructions to communicate their views to their representatives in the House of Commons. In Part II, I briefly discuss instructions in colonial and Revolutionary legislatures before turning to analyze the controversial proposal during the First Congress to amend the Constitution to include a right to instruct. In Part III, I argue that the six-year term length for U.S. senators, combined with the possibility of rapid turnover in state legislatures, prevented binding instructions from becoming entrenched. In Part IV, I explain why instructions disappeared after the Civil War. Lastly, in Part V, I detail the historical transition from instructions to instructing resolutions, which “respectfully request” action instead of commanding it. I then analyze a recent year’s worth of such resolutions, focusing on which states enacted them, what topics they addressed, and whether they garnered publicity.

I

ENGLISH HISTORY

Those who believed that the U.S. Constitution established or affirmed a “right to instruct” never attracted overwhelming support for their view, in large part because the content of a “right to instruct”—even among supporters—never was clear. Whose instructions were relevant? How could a disobeying legislator be sanctioned? Was “instructing” your representative any different from “petitioning” if your only recourse for a legislator’s failure to obey

⁸ Akhil Reed Amar, *America’s Constitution, Written and Unwritten*, 57 SYRACUSE L. REV. 267, 270 (describing chapter of forthcoming book, which details how “the paper Constitution was actually embodied and fleshed-out” after Founding).

⁹ See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 108, 142 (2006) (distinguishing between “hard-wired” aspects of Constitution, like “the allocation of voting power in the Senate or the presidential veto power,” and “open ended[]” aspects, like Commander-in-Chief Clause).

¹⁰ See BLACK’S LAW DICTIONARY 209 (9th ed. 2009) (defining “borough” as “[a] chartered town that originally sent a member to Parliament”).

was at the ballot box?¹¹ These questions persisted in part because supporters of the doctrine of instruction relied on precedents from a number of different settings—England’s House of Commons, Revolutionary-era state legislatures, the Congress of the Confederation, and the Philadelphia Constitutional Convention—none of which precisely applied.

Supporters of instructions in the United States often noted the historical importance of instructions in England. In England, boroughs used instructions to request legislative action through their common councils. Instructions informed the people of pressing constitutional issues, and common councils, which issued most of the instructions, provided a forum to debate these issues.¹² For example, boroughs often commanded the House of Commons to hold elections more frequently or to disqualify members of Parliament who held commissions from the crown.¹³ After Britain lost the Battle of Minorca to France during the Seven Years’ War, a flood of “instructions to members of Parliament”¹⁴ declared that a British national militia “would answer all of our wishes”¹⁵ after the “disgrace brought upon the British navy in the Mediterranean.”¹⁶ Economic issues also were a common concern: Given a House of Commons policy barring petitions on fiscal matters from “without-doors”—that is, by nonmembers of the House—instructions often were the only way for boroughs to express opposition to unpopular taxes.¹⁷

¹¹ Legislators were “bound to obey” instructions (with narrow exceptions, *see infra* note 158), while petitions appealed to their reason but ultimately left the decision to the legislator’s discretion. TIMOTHY WALKER AS REVISED BY CLEMENT BATES, INTRODUCTION TO AMERICAN LAW 221–22 (11th ed. 1905) (noting that while representatives are obliged only to “consider” petitions, instructions “convert the representative into an automaton”).

¹² JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 97–98 (1989); *see also* BRYAN KEITH-LUCAS, THE UNREFORMED LOCAL GOVERNMENT SYSTEM 15, 18–19 (1980) (describing structure of some boroughs in England, in which usually “an inner group, a common council or governing body” managed the municipal affairs of borough).

¹³ REID, *supra* note 12, at 101.

¹⁴ For a collection of these instructions, see 1 THE VOICE OF THE PEOPLE: A COLLECTION OF ADDRESSES TO HIS MAJESTY, AND INSTRUCTIONS TO MEMBERS OF PARLIAMENT BY THEIR CONSTITUENTS, UPON THE UNSUCCESSFUL MANAGEMENT OF THE PRESENT WAR BOTH AT LAND AND SEA; AND THE ESTABLISHMENT OF A NATIONAL MILITIA (London, J. Payne 1756) [hereinafter VOICE OF THE PEOPLE].

¹⁵ Letter from County of Suffolk to Sir Cordell Firebrace, Bart. & John Afflect, Esq. (Aug. 21, 1756), in VOICE OF THE PEOPLE, *supra* note 14, at 10, 10.

¹⁶ Letter from County of Salop to Sir John Astley, Bart. & Richard Lyster, Esq. (Aug. 20, 1756), in VOICE OF THE PEOPLE, *supra* note 14, at 9, 9.

¹⁷ Paul Kelly, *Constituents’ Instructions to Members of Parliament in the Eighteenth Century*, in PARTY AND MANAGEMENT IN PARLIAMENT, 1660–1784, at 169, 182 (Clyve Jones ed., 1984).

Instructions also gave the House of Commons increased democratic legitimacy—compared to the King—because the House could claim to be representing the will of the people.¹⁸ However, this claim to popular legitimacy, though rhetorically powerful, was imperfect: Common councils (like their town meeting counterparts in New England) did provide boroughs an easy way to aggregate preferences, but counties without common councils rarely issued instructions, and when they did, “the high sheriff and the grand jury” spoke for all.¹⁹ Further, instructions were not always—or even usually—organic grassroots efforts by the people of a borough; instead, interested members of Parliament often contrived instructions for political purposes and publicity.²⁰ Despite these caveats, when judged in light of past English practice, the use of instructions was a democratic advance.²¹

However, English precedent provided only mixed support for the use of instructions in the United States, in part because even some members of the House of Commons disputed that instructions were binding. Benjamin Watkins Leigh, a member of the Virginia General Assembly, argued in a resolution adopted by the Assembly that the right to instruct was “firmly established in England”²² and provided examples of its use from as far back as 1640.²³ Although Leigh argued that an instruction is a “command,” which senators have a “duty to obey,”²⁴ he admitted that English legislators—specifically, the “celebrated” Edmund Burke—often had disobeyed instructions and noted that even English scholars who approved of the practice of instructions would accept a representative’s decision to disobey instructions as legally proper.²⁵ Indeed, many of the self-described “instructions”

¹⁸ REID, *supra* note 12, at 97.

¹⁹ *Id.* at 98; see also CAMERON CHURCHILL & A. CARMICHAEL BRUCE, *THE LAW OF THE OFFICE AND DUTIES OF THE SHERIFF* 112–34 (London, Stevens & Sons 1879) (describing ministerial duties of sheriffs in England, including summoning of juries, grand juries, and special juries).

²⁰ Kelly, *supra* note 17, at 175–76 (describing how many instructions in 1740s were “largely contrived for propaganda purposes”).

²¹ REID, *supra* note 12, at 96–97.

²² H.J. Res. 2, 1812 Gen. Assemb. (Va. 1812), 1812 Va. Acts 158, 160.

²³ *Id.* at 158–67.

²⁴ *Id.* at 165 (emphasis omitted).

²⁵ *Id.* at 160 (noting that English politician and political theorist Algernon Sydney “admit[ed] that the constituents cannot call the representatives to account, otherwise than by not re-electing them, if they disapprove their conduct”); see also Kelly, *supra* note 17, at 170 (“John Hatsell, the leading authority of his time on the law and customs of Parliament, quotes Coke, Blackstone and Algernon Sydney in support of the conservative view of instructions, as well as Speaker Onslow’s judgment that they are not absolutely binding upon votes and actings, and conscience, in Parliament.” (internal quotation marks omitted)). Burke himself believed instructions were not legally binding. G.E. WEARE,

after the Battle of Minorca resembled petitions, as they stated “it is our request” and pleaded that “these advices, . . . *if executed*, will greatly strengthen the hands of government.”²⁶

Members of the First Congress, twenty-three years before Leigh’s resolution, also focused on the evidence that instructions were not binding in England. Opponents of instructions argued that the “majority” of legislators in Parliament would not “submit[] to the binding force of instructions”; they had “thrown off the shackles with disdain.”²⁷ Even supporters of instructions in the United States agreed that instructions in England were not binding; instead, they contended that the disobeying of instructions was a feature of the English monarchy that the United States should firmly repudiate.²⁸

Although Leigh aimed to prove that instructions must be binding in a “representative republic,”²⁹ his use of Edmund Burke as an example exposes some of the limitations of instructions. Burke’s constituents declined to reelect him after one six-year term, but this sanction was too weak to make every instruction binding.³⁰ Burke’s failing was not only in declining to follow a particular instruction; rather, he acted contrary to his constituents’ views too often.³¹ Perhaps even worse, he was inattentive to the parochial needs of his constituents. An early and vocal opponent of King George III’s military actions in America,³² Burke had visited his constituents in Bristol only twice

EDMUND BURKE’S CONNECTION WITH BRISTOL, FROM 1774 TILL 1780, at 89 (Bristol, William Bennett 1894) (citing Burke as stating that “authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, . . . are things utterly unknown to the laws of this land, and which arise[] from a fundamental mistake of the whole order and tenor of our constitution” (emphasis omitted)).

²⁶ Letter to the Editor, LONDON EVENING POST, Nov. 2, 1756, reprinted in VOICE OF THE PEOPLE, *supra* note 14, at 42, 42–43 (emphasis added).

²⁷ 1 ANNALS OF CONG. 762 (Joseph Gales ed., 1834) (statement of Rep. Hartley of Pa., Aug. 15, 1789) (“In England, this question [of instructions] has been considerably agitated. The representatives of some towns in Parliament have acknowledged, and submitted to the binding force of instructions, while the majority have thrown off the shackles with disdain.”).

²⁸ *Id.* (statement of Rep. Page of Va., Aug. 15, 1789) (“I am not astonished to find that the administrators of a monarchical Government [in England] are unassailable by the weak voice of the people; but under a democracy . . . the popular opinion ought to be collected and attended to.”).

²⁹ H.J. Res. 2, 1812 Gen. Assemb. (Va. 1812), 1812 Va. Acts 158, 158.

³⁰ See *id.* at 160 (“[T]he people of Bristol would not reelect Mr. Burke, for this very offence of disobeying instructions.”).

³¹ His opponents charged that “in the teeth of opposition from his constituents he had supported measures for the relief of Irish trade, insolvent debtors and Roman Catholics.” P.T. Underdown, *Edmund Burke, the Commissary of His Bristol Constituents, 1774–1780*, 73 ENG. HIST. REV. 252, 252 n.4 (1958).

³² See Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775) (arguing that American spirit, “unhappily meeting with an exercise of power in England, which, however lawful, is not reconcilable to any ideas of liberty,

during his six-year term from 1774 to 1780, with his last visit coming shortly after July 4, 1776.³³ He later explained—somewhat unconvincingly—that he stayed away in the later years of his term to avoid appearing to flaunt the fact that the war was going poorly, as he had predicted.³⁴ Although other representatives had disobeyed instructions and had still been reelected, representatives could not disobey too often or remain absent from their town for four straight years and expect to be reelected. Burke’s statement that a representative owes his electors “his judgment” and would betray them by “sacrific[ing] it to [their] opinion” was not extraordinary: It “was simply a statement of constitutional orthodoxy” in England at the time.³⁵

II

EARLY AMERICAN PRACTICE

Much as occurred in other areas of law and politics, the English practice of instructions influenced colonists in New England, who quickly adopted the practice and adapted it to their circumstances and unique political institutions.³⁶ Further, as discussed in Parts II.B and II.C below, Americans continued the popular practice of instructions under the Articles of Confederation and, perhaps surprisingly, under the Constitution. While instructions were quite popular in colonial and Revolutionary America, such a right was not included in the original Constitution, nor were proponents of instructions able to amend the Constitution to include such a right—omissions that later became significant.³⁷

A. *Instructions by Colonial Towns*

New England townspeople, expanding on English practice, had a long history of gathering at town meetings to issue instructions to state representatives. Annually elected to the Massachusetts General Court (a legislative body), these representatives—fittingly called

. . . has kindled this flame that is ready to consume us”), in 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 450, 469 (London, Henry G. Bohn 1854).

³³ WEARE, *supra* note 25, at 129, 133.

³⁴ Burke explained, “I felt sorely this variety in our wretchedness; and I did not wish to have the least appearance of insulting you with that show of superiority, which, though it may not be assumed, is generally suspected in a time of calamity, from those whose previous warnings have been despised.” Edmund Burke, Speech at Bristol, Previous to the Election, 1780, in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE, *supra* note 32, at 134.

³⁵ Kelly, *supra* note 17, at 170.

³⁶ See *infra* Part II.A (discussing pre-Revolutionary War use of instructions in New England).

³⁷ See *infra* Part II.C (discussing debate over including right to instruct in Constitution).

“deputies”³⁸—were highly responsive to the demands of their electors. They were agents of the people of their town, and their short term length ensured that they would remain faithful to this view of representation.³⁹

Instructions were issued in New England as early as 1640⁴⁰ and, although the instructions usually dealt with “the economic and social conditions of [the] particular locality,”⁴¹ they played a major role during the Revolutionary period. Whereas in England instructions were “of doubtful constitutionality,”⁴² New England instructions were “the constitutional basis for [the revolutionary] political action,” helping leaders of the Revolution get noticed.⁴³ One such leader, John Adams, “first came into public notice” by writing the instructions of his town of Braintree against the Stamp Act—words that “a half hundred and more Massachusetts towns” later adopted.⁴⁴ Although the words and ideas they expressed may have been memorable and creative, the town’s use of instructions was not unique. A year earlier, as part of his town’s regular practice, John Adams’s cousin Samuel had written Boston’s instructions to its newly elected representa-

³⁸ MASSACHUSETTS BODY OF LIBERTIES OF 1641, § 68 (“It is the libertie of the freemen to choose such deputies for the Generall Court out of themselves, either in their owne Townes or elsewhere as they judge fittest. . . . [T]he Deputies (to attend the Generall Court in the behalfe of the Countrie) shall not any time be stated or inacted, but from Court to Court, or at the most but for one yeare”), reprinted in *THE COLONIAL LAWS OF MASSACHUSETTS* 29, 49 (Boston, Rockwell & Churchill 1889).

³⁹ See Kenneth Colegrove, *New England Town Mandates*, 21 PUBLICATIONS COLONIAL SOC’Y MASS. 411, 435–36 (1919) (“[Other than in connection with the 1754 Excise Bill.] I have failed to find another case of disobedience on the part of any deputy previous to the American Revolution.”).

⁴⁰ *Id.* at 414.

⁴¹ *Id.* at 427.

⁴² REID, *supra* note 12, at 100, 108 (reporting that Baron Rivers protested that instructions would “take away the Freedom of the House of Commons,” while Edmund Burke argued that one who obeyed instructions against his judgment “scandalously betray[ed] the people” and acted contrary to constitution).

⁴³ Colegrove, *supra* note 39, at 436–38 (explaining that towns instructed their legislators on matters such as whether to declare independence from England, whether to adopt state constitution, and which policies to pursue).

⁴⁴ *Id.* at 436–37. John Adams’s instructions (also known as the Braintree Instructions) were sent to the town of Braintree’s representative in the Massachusetts legislature. After setting forth “a succinct and forthright defense of colonial rights and liberties,” Adams concluded:

As these, sir, are our sentiments of this act, we, the freeholders and other inhabitants, legally assembled for this purpose, must enjoin it upon you, to comply with no measures or proposals for countenancing the same, or assisting in the execution of it, but by all lawful means, consistent with our allegiance to the King, and relation to Great Britain, to oppose the execution of it, till we can hear the success of the cries and petitions of America for relief.

JOHN ADAMS, *Instructions of the Town of Braintree to Their Representative*, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 38, 41 (C. Bradley Thompson ed., 2000).

tives—to “guide[] [them] during the year’s legislation.”⁴⁵ Before launching into a list of particular matters he expected to see the representatives pursue in their “earliest endeavors,” Samuel Adams reminded the town’s representatives that “the people had delegated to them the power of acting in their public concerns in general” but had reserved “the right of instructing them upon particular matters.”⁴⁶ True to form, these instructions “formed the corner-stone of [the Massachusetts legislature’s] policy” for the term.⁴⁷

Instructions thrived in the colonies in part because the town was the most powerful political institution in New England. For example, when the most significant decision of the colonial era came before the Massachusetts legislature—whether to declare independence from England—it asked the towns for instructions.⁴⁸ The state legislature was not the locus of power; rather, it needed to know whether the towns and their inhabitants would “solemnly engage with their Lives and Fortunes” to support independence.⁴⁹ The towns held the power to say no.⁵⁰ After a “vigorous” positive response to this town-based referendum,⁵¹ “John Adams could assure his colleagues [in the Continental Congress], as a matter of positive certainty,” that his state favored independence.⁵² Popular ratification solidified the determination of New Englanders to fight for independence, just as it would later ensure the legitimacy of the Constitution.

B. Instructions Under the Articles of Confederation

After the Revolutionary War, the states adopted the Articles of Confederation;⁵³ this “firm league of friendship”⁵⁴ allowed, and envisioned, instructions by states to federal representatives. Under the Articles, states could recall their delegates, who voted as a block, at

⁴⁵ 1 WILLIAM V. WELLS, *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 46 (Boston, Little, Brown & Co. 1865).

⁴⁶ *Id.* at 46–48 (noting that, as of 1865, this instruction was “the earliest public document written by Samuel Adams, of which any traces remain”).

⁴⁷ 3 GEORGE BANCROFT, *HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT* 78 (New York, D. Appleton & Co. 1888).

⁴⁸ REID, *supra* note 12, at 102.

⁴⁹ *Id.*

⁵⁰ Colegrove, *supra* note 39, at 424 (noting that Massachusetts towns “refused . . . proposed law” in similar town-based referendum in 1641 (internal quotation marks omitted)).

⁵¹ *Id.* at 425.

⁵² HISTORICAL CELEBRATION OF THE TOWN OF BRIMFIELD 45 (Springfield, Mass., The Clark W. Bryan Co. 1879).

⁵³ Massachusetts, again, used town-based referenda to decide if the Articles of Confederation should be adopted. Colegrove, *supra* note 39, at 438.

⁵⁴ ARTICLES OF CONFEDERATION, art. III (1781).

any time and for any reason.⁵⁵ Delegates, as their name suggests, were mouthpieces of the states: states' men, not yet statesmen.⁵⁶ Surprisingly, states rarely exercised the power to recall; some at the ratification debates believed that Rhode Island had recalled a delegate,⁵⁷ but others insisted that no state had done so.⁵⁸

Recognizing that the Articles needed to be, at the very least, revised, states instructed their congressional delegates to recommend a general convention.⁵⁹ And later, when states sent delegates to the Philadelphia Constitutional Convention, the states made sure to instruct their delegates on which changes to support and which to prevent.⁶⁰ Delaware's delegates, for example, were instructed to reject any changes to the equal numerical representation between the states.⁶¹ Taking instructions like these seriously, some members left in the middle of the Convention "because they felt that their instructions did not warrant them in countenancing" the direction of the

⁵⁵ ARTICLES OF CONFEDERATION, art. V (1781) ("[D]elegates shall be annually appointed in such manner as the legislature of each State shall direct . . . with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.").

⁵⁶ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 58 (2005) (using states' men versus statesmen comparison).

⁵⁷ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 23 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 1836) [hereinafter *ELLIOT'S DEBATES*] (statement of Rufus King of Mass.) ("[T]he state of Rhode Island did, by a solemn resolution, some time since, recall its delegates from Congress.").

⁵⁸ *Id.* at 23 (statement of Phanael Bishop of Mass.) ("I have been informed by people belonging to Rhode Island, sir, that that state never has recalled her delegates from Congress."); see also *id.* at 289 (statement of John Lansing of N.Y.) (arguing that recall was unlikely to be abused because under Articles, while it was "an excellent check," it had "never been exercised").

⁵⁹ Even the state legislature of New York, which had been the only state to resist the creation of an impost system run by Congress, instructed its state representatives at the Continental Congress to vote to recommend a general convention at Alexander Hamilton's instigation. 1 GEORGE TICKNOR CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 246–48, 358–60 (New York, Harper & Bros. 1861).

⁶⁰ In some ways this mirrored the meeting of the First Continental Congress—where some states (New York and New Jersey) simply indicated that the delegates' job was "to represent their colony and others provided a detailed list of objectives that the delegates should try to accomplish. 1 GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES: FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR* 11 n.2 (New York, Harper & Bros. 1889).

⁶¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 37 (Max Farrand rev. ed., 1937) [hereinafter *FARRAND'S RECORDS*] ("Mr. Reed moved that the [proposal for proportionate legislative representation] be postponed; reminding the [Committee], that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention.").

Convention.⁶² However, those who stayed in Philadelphia almost certainly went further than their instructions allowed: Instructed to amend the Articles, they instead created a new system of government.⁶³ Nevertheless, these delegates did something no supporter of binding instructions could criticize: They humbly submitted their draft to a popular vote. This was a “breathtakingly novel” action at the time,⁶⁴ and it fueled the passion for popular participation in government. Unresolved, however, was what role instructions should play in the new government.

C. Instructions Under the Constitution

1. A New Form of Government

Instructions had flourished in the colonies and under the Articles, but the replacement of a confederacy of sovereign states with a constitutional form of government led to significant changes. Recall was no longer available as a sanction, nor was the ability to threaten a pay decrease, as senators were paid from the national treasury.⁶⁵ Further, instead of voting as a block from each state,⁶⁶ senators voted individually.⁶⁷ These changes made senators more independent from states than their counterparts under the Articles. Indeed the name change alone is telling: No longer were they “Delegates,” they had become

⁶² *Id.* at xiv.

⁶³ Lewis R. Harley, *Independence and Union*, 7 AM. MAG. CIVICS 187, 194 (1895) (“When the delegates met at Philadelphia, they learned the Articles could not be amended. The states had instructed them toward amendment, but they found it necessary to go counter to their instructions. When they decided upon this, their actions were revolutionary.”).

⁶⁴ AMAR, *supra* note 56, at 8.

⁶⁵ U.S. CONST. art. I, § 6, cl. 1; AMAR, *supra* note 56, at 58. There have been many modern examples of efforts to schedule recall elections for U.S. senators. *See, e.g.*, Mark Neumann, *Republican Hothead*, ECONOMIST, May 3, 1997, at 26 (noting effort to recall Wisconsin Senators Russ Feingold and Herb Kohl); Dan Nowicki, *McCain Targeted by Recall Drive over Continued Iraq War Support*, ARIZ. REPUBLIC, Feb. 14, 2007, at A8 (noting filing of application to recall Arizona Senator John McCain, who had “signed a voluntary pledge on file with the Secretary of State’s Office agreeing to resign immediately if defeated in a recall election”); Jon Ralston, *Flashpoint: You Mean You Can’t Recall a U.S. Senator?*, LAS VEGAS SUN, Mar. 29, 2008, at 5 (noting attempt to recall Nevada Senator Harry Reid); Susan Yoachum, *Huffington Plan for a Recall Is Recalled*, S.F. CHRON., Feb. 27, 1995, at A13 (noting plan to recall California Senator Dianne Feinstein).

⁶⁶ ARTICLES OF CONFEDERATION, art. V (1781) (“In determining questions in the United States, in Congress assembled, each State shall have one vote.”).

⁶⁷ U.S. CONST. art. I, § 3, cl. 1 (“[E]ach Senator shall have one Vote.”).

“Senators,”⁶⁸ borrowing the name of the republican Roman Senate, renowned for its independence, stability, and deliberation.⁶⁹

This independence worried some.⁷⁰ In fact, many state legislatures, soon after having ratified the Constitution, declared that the Constitution needed to be amended.⁷¹ A number of states made two related requests: They wanted “the people” to have the right to instruct “their representatives,” and they wanted “the state legislatures” to have the right to recall “their senators.”⁷² The proposed right to recall never gained traction at the Philadelphia Convention⁷³ and apparently was not voted on by the First Congress.⁷⁴ Adding a

⁶⁸ AMAR, *supra* note 56, at 58 (“Th[e] new ‘Senate’ would bear a classical title suggesting independent judgment rather than slavish subordination to the dictates of state legislatures . . .”).

⁶⁹ See THE FEDERALIST NO. 63, at 383–84 (James Madison) (Clinton Rossiter ed., 1961) (“[H]istory informs us of no long-lived republic which had not a senate. Sparta [and] Rome . . . [each had] a senate for life [and Carthage likely had a similar institution]. These examples . . . [are] very instructive proofs of the necessity of some institution that will blend stability with liberty.”); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 7–8 (1994) (“American ‘republicanism’ signified above all a touching faith in the social and political institutions of republican Rome. . . . Of the pseudonyms Americans adopted from historical figures [during arguments over the proposed Constitution], about half, including the most important ones, belonged to republican Roman heroes, such as ‘Publius’, ‘Brutus’ and ‘Cato.’” (internal citation omitted)); Jaroslav Pelikan, *General Introduction: The Legislative Branch as an Institution of American Constitutional Democracy* (“Above all it was the Roman experience of ‘legislation’ to which the framers of the American Constitution looked for guidance [I]n addition to their use of the designation ‘republic’ as their common name for the new political entity, . . . they . . . chose [] the name Senate and Senator for the upper house of its legislature.”), in THE LEGISLATIVE BRANCH xi, xii (Paul J. Quirk & Sarah A. Binder eds., 2005).

⁷⁰ Attorney General Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland* (Nov. 29 1787) (“[F]or six years the senators are rendered totally and absolutely independent of their States During that time, they may join in measures ruinous and destructive to their States, even such as should totally annihilate their State governments, and their States cannot recall them, nor exercise any control over them.”), in 3 FARRAND’S RECORDS, *supra* note 61, at 194.

⁷¹ See, e.g., 1 ELLIOT’S DEBATES, *supra* note 57, at 329 (statement of N.Y. ratifying convention); 2 ELLIOT’S DEBATES, *supra* note 57, at 544–45 (statement of Pa. ratifying convention).

⁷² See, e.g., 1 ELLIOT’S DEBATES, *supra* note 57, at 328 (statement of N.Y. ratifying convention) (“That the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives, and that every person has a right to petition or apply to the legislature for redress of grievances.”); *id.* at 335 (statement of R.I. ratifying convention) (same); *id.* at 330 (declaration of N.Y. convention on right to recall); *id.* at 337 (declaration of R.I. convention on same).

⁷³ 1 FARRAND’S RECORDS, *supra* note 61, at 287 (objecting to New Jersey plan because “[t]he members of Congs. being chosen by the States & subject to recall, represent all the local prejudices”); see also *id.* at 217 (striking out language that would have made representatives “incapable of reelection . . . and subject to recall”).

⁷⁴ Bybee, *supra* note 6, at 529–30 (noting that proposals in First Congress to amend Constitution by adding right to recall did not survive).

right to recall would have undermined the six-year term length for senators, a provision that Madison argued was needed to bring “order and stability” to the national government.⁷⁵ Madison believed that senators, if subject to recall, would not be able to wait out moments where the people were “stimulated by some irregular passion” and appeal later to the people’s “cool and deliberate” senses.⁷⁶

2. *The Concept of Representation: Trustee or Delegate?*

Although most in Congress believed that a right to recall senators would fundamentally change the government and not merely clarify its basic structure, there was much debate in Congress about whether the right to instruct representatives would have a similar effect. Though the federal legislature was formally representative—senators and representatives would be elected to Congress—a type of direct democracy still could flourish if constituents were able to issue binding instructions. But was this what the Constitution envisioned? Later scholars have used considerable amounts of ink analyzing Madison’s “fine linguistic distinction” between a “democracy” and a “republic” in the *Federalist Number 10*,⁷⁷ but it was not an important issue at the Founding.⁷⁸ Rather, the key distinction was between popular sovereignty, the backbone of the Founders’ new government, and the monarchy or aristocracy that they had just overthrown.⁷⁹ The difficult question was how to implement a government in which the people were sovereign.

For the Founders, disagreements over the proper conception of representation often lay beneath debates about the use of instructions. Some believed that representatives, especially senators, were somewhat independent of their constituents and should follow their own

⁷⁵ THE FEDERALIST NOS. 62, 63 (James Madison), *supra* note 69, at 380–82; *see also* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* (1896) (reporting that Virginia sought in 1803, 1805, and 1808 to amend U.S. Constitution to provide for right to recall senators), *reprinted in* 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, at 64 (Wash., Gov’t Printing Office 1897).

⁷⁶ THE FEDERALIST NO. 63 (James Madison), *supra* note 69, at 382; *see also* THE FEDERALIST NO. 62 (James Madison), *supra* note 69, at 377 (“[T]he propensity of all single and numerous assemblies [is] to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”).

⁷⁷ THE FEDERALIST NO. 10 (James Madison), *supra* note 69, at 76 (noting one “great point[] of difference between a democracy and a republic” is “the delegation of the government, in the latter” and arguing that “pure democrac[ies],” which “assemble and administer the government in person, can admit of no cure for the mischiefs of faction”).

⁷⁸ AMAR, *supra* note 56, at 277 (“The Federalist No. 10 went largely unnoticed at the Founding.” (emphasis omitted)).

⁷⁹ *Id.* at 277–78.

best view of each situation (like a trustee), while others championed a model in which representatives were mere agents (or delegates), who would follow the expressed preferences of their constituents.⁸⁰

To many, the new government made senators more independent than under the Articles and encouraged deliberation on national issues. For example, Connecticut Senator Roger Sherman argued that representatives have a “duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community.”⁸¹ Such a legislature also would help avoid some of the problems of particularism.⁸²

While particularism posed a threat with regard to all locally elected representatives, it was a special problem in New England, where towns often had more authority than the state legislature. Many towns acted like autonomous bodies, instructing their state legislators on all matters important to the town. A backlash over excessive localism quickly followed, with observers like Judge William Smith of New York complaining that the state legislature was an assembly “of plain, illiterate husbandmen, whose views seldom extended farther than to the regulation of highways, the destruction of wolves, wild cats, and foxes, and the advancement of the other little interests of the particular counties, which they were chosen to represent.”⁸³ In Massachusetts, it was feared that towns were “erecting little democracies,” and in Pennsylvania, towns were described as “independent hostile republics, with discordant objects of pursuit.”⁸⁴

Concern about excessive localism—whether in the form of rogue states like the oft-derided Rhode Island or autonomous towns—influenced those at the Philadelphia Convention. Unfortunately, scholars intent on proving the Constitution antidemocratic have misinterpreted

⁸⁰ See, e.g., HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 120–33 (1967) (examining distinction between representatives as trustees and representatives as delegates).

⁸¹ 1 ANNALS OF CONG., *supra* note 27, at 763 (“If [representatives] were to be guided by instructions, there would be no use in deliberation.”); see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1559 (1988) (arguing that debate in First Congress over right to instruct “made it clear that the representatives’ task called for deliberation, and that task was inconsistent with a right to instruct”).

⁸² Colegrove, *supra* note 39, at 446 (noting that for Founding generation, “nationalism was triumphing over particularism” and states no longer asserted right to promote their own interests without regard to impact on nation).

⁸³ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 194–95 (1969) (quoting 1 WILLIAM SMITH, *THE HISTORY OF THE LATE PROVINCE OF NEW YORK, FROM ITS DISCOVERY, TO THE APPOINTMENT OF GOVERNOR COLDEN, IN 1762*, at 367 (New York, N.Y. Historical Soc’y 1829)).

⁸⁴ *Id.* at 192–93.

statements expressing this concern.⁸⁵ For example, the “follies” and “excess[es]” of democracy lamented by Delegates Elbridge Gerry of Massachusetts and Edmund Randolph of Virginia (neither of whom signed the Constitution at Philadelphia)⁸⁶ resulted in part from towns and districts voting in their own self-interest, without proper regard for statewide interests.

In light of these concerns, James Madison and James Wilson (who later would be described as America’s “foremost legal scholar”)⁸⁷ understood that the solution was not to forbid direct local participation in politics but to design a scheme of government that would work in light of direct participation.⁸⁸ In 1788, Madison complained that “[a] spirit of locality” characterized state legislatures and stated that this “evil” was “inseparable” from the fact that legislators were chosen by small towns or counties.⁸⁹ He recommended to Thomas Jefferson, who was drafting the Virginia Constitution, that “the most effectual remedy for the local bias” was to make state senate seats subject to a statewide election.⁹⁰ Wilson shared this concern, arguing at the Philadelphia Convention that senators should be elected *by the people* of a state rather than by state legislatures. He believed that election by state legislatures—who, unlike “the people” of a state, easily could instruct senators—would “introduce & cherish local interests & local prejudices” because of how instructions would be used.⁹¹ For example, Wilson warned against allowing Congress to refer appointments to states because he feared that state legislatures would then issue “standing instruction[s]” to Congress “to pass no law cre-

⁸⁵ See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 189–217 (1913) (quoting statements of Founders as evidence that they and Constitution were insufficiently democratic and instead concerned with protecting private property).

⁸⁶ AMAR, *supra* note 56, at 279 n.* (citing 1 FARRAND’S RECORDS, *supra* note 61, at 26–27, 48, 51).

⁸⁷ *Id.* at 467 n.*.

⁸⁸ Alexander Hamilton also shared this view:

[T]here should be, in every republic, some permanent body to correct the prejudices, check the intemperate passions, and regulate the fluctuations, of a popular assembly. . . . It is . . . necessary that it should be small, that it should hold its authority during a considerable period, and that it should have such an independence in the exercise of its powers, as will divest it, as much as possible, of local prejudices.

2 ELLIOT’S DEBATES, *supra* note 57, at 301–02 (statement of N.Y. ratifying convention).

⁸⁹ James Madison, Observations on the “Draught of a Constitution for Virginia,” in 5 THE WRITINGS OF JAMES MADISON 284, 285 (Gaillard Hunt ed., 1904) [hereinafter MADISON, WRITINGS]; see also WOOD, *supra* note 83, at 195 (quoting similar statements by Madison).

⁹⁰ MADISON, WRITINGS, *supra* note 89, at 285.

⁹¹ 1 FARRAND’S RECORDS, *supra* note 61, at 405–06.

ating offices unless the [appointments] be referred to them.”⁹² This argument, which assumed that state legislatures would instruct, proved persuasive, and the proposal was defeated.⁹³ Nevertheless, it did not settle the debate over the proper view of representation. Advocates of both the delegate and trustee models remained firm.⁹⁴

3. *The Debate over the Proposed Constitutional Right To Instruct*

When Representative Thomas Tudor Tucker of South Carolina introduced the idea of binding instructions—and thus the idea of representatives as delegates—the First Congress balked.⁹⁵ This proposed amendment, one of the most controversial,⁹⁶ was soundly rejected by a vote of forty-one to ten in the House⁹⁷ and fourteen to two in the Senate.⁹⁸ The particulars of Tucker’s amendment are important: He introduced it primarily for its effect on members of the House of Representatives,⁹⁹ and the new clause would have been inserted into

⁹² 2 FARRAND’S RECORDS, *supra* note 61, at 406.

⁹³ *Id.*

⁹⁴ Some states tried to settle this question, at least as to state officials, by stating that they are the “agents” or “trustees” of the people. Kenneth Bresler, *Rediscovering the Right To Instruct Legislators*, 26 NEW ENG. L. REV. 355, 360 n.26 (1991) (comparing constitutions of Massachusetts, Vermont, Virginia, and West Virginia); *see also* MASS. CONST. of 1780, pt. 1, art. V (“[T]he several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are [the people’s] substitutes and agents, and are at all times accountable to them.”); VT. CONST. of 1786, ch. I, art. 6 (“[A]ll officers of government, whether legislative or executive, are [the people’s] trustees and servants; and at all times, in a legal way, accountable to them.”); VA. CONST. of 1776, Bill of Rights § 2 (“[M]agistrates are [the people’s] trustees and servants, and at all times amenable to them.”); W. VA. CONST. of 1872, art. III, § 2 (same). However, “[d]espite their provisions declaring government officials to be trustees, the Vermont and West Virginia Constitutions both explicitly guarantee the right [of the people] to instruct legislators.” Bresler, *supra* at 360 n.26.

⁹⁵ 1 ANNALS OF CONG., *supra* note 27, at 760–76.

⁹⁶ *See* WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 245 n.16 (1996) (“[The right to instruct] proposal sparked more controversy, measured by the volume of discussion reported in the *Annals*, than any other single provision.”); *see also* 1 ANNALS OF CONG., *supra* note 27, at 768 (statement of Rep. Gerry of Mass.) (requesting, and receiving, “further discussion” about instructions after several members opposing amendment called for vote); *id.* at 773 (statement of Rep. Sumter) (“I . . . beg the committee to consider the consequences that may result from an undue precipitancy and hurry. Nothing can distress me more than to be obliged to notice what I conceive to be somewhat improper in the conduct of so respectable a body.”).

⁹⁷ 1 ANNALS OF CONG., *supra* note 27, at 776.

⁹⁸ JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (Wash., D.C., Gales & Seaton 1820) (proceedings of Sept. 3, 1789).

⁹⁹ *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1356 n.38 (1996) (“[The right to instruct] amendment was directed primarily, if not exclusively, at members of the House, who would be instructed by the People.”). Although the *Annals of Congress* report Tucker’s amendment as the right “to instruct their Representatives,” with a capital “R,” 1 ANNALS OF CONG., *supra* note 27, at 761, the capitalization of the word may not

the (now) First Amendment after the phrase “the right of the people.”¹⁰⁰

There were two main reasons the First Congress rejected the right to instruct amendment. First, Madison, echoing the views of other opponents, feared that the right to instruct amendment was “of a doubtful nature.”¹⁰¹ Madison recommended sticking to “an enumeration of simple, acknowledged principles,” and avoiding those principles whose meaning was “doubtful.”¹⁰² A constitutional right to instruct raised more questions than answers: Were instructions binding? How could “the people” issue instructions? Who were the relevant “people”? Would a law remain valid if the tie-breaking vote was cast by a representative voting against an instruction? Could state legislatures otherwise sanction representatives for disobeying instructions? Tucker’s amendment raised a dizzying array of questions, which the First Congress was more than happy to sidestep by declining to amend the Constitution.¹⁰³

The second reason opponents gave for voting against Tucker’s right to instruct amendment was that it would fundamentally change the government. The amendment was aimed primarily at members of the House of Representatives, many of whom would be instructed by the people of their small districts.¹⁰⁴ Madison feared, perhaps hyperbolically, that with the amendment the country would “run the risk of

have been carefully transcribed. A page earlier, Tucker’s description of the amendment was recorded using the lower-case representatives. *Id.* at 760.

¹⁰⁰ U.S. CONST. amend. I. Although Tucker was not explicit about the amendment’s placement in the “right of the people” sentence, earlier state constitutions had placed the clause after the rights to “assemble” and “consult” and before the right to apply for a “redress of grievances.” *E.g.*, PA. CONST. of 1776, Declaration of Rights art. XVI, reprinted in THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 57 (Harrisburg, John S. Wiestling 1825) [hereinafter PROCEEDINGS].

¹⁰¹ 1 ANNALS OF CONG., *supra* note 27, at 766–67.

¹⁰² *Id.* at 766.

¹⁰³ *Cf. id.* at 771 (statement of Rep. Sedgwick) (calling right to instruct amendment a “crude and indigested proposition [], more likely to produce acrimony than . . . harmony”).

¹⁰⁴ On the other hand, some members of the House of Representatives would be elected by the entire state. Connecticut, New Hampshire, New Jersey, and Pennsylvania all elected representatives to the First Congress via at-large statewide races, as did Delaware and Rhode Island, two states that had only one representative. MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESSES 1–2 (1998); *see also* D.W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM 1834 TO 1865, INCLUSIVE 58 (Wash., D.C., Gov’t Printing Office 1865) (“Six of the original States established single districts for the election of their representatives to the first Congress . . .”). Further, Georgia’s and Maryland’s representatives were elected at-large but “had to be residents of specific districts”; that is, each voter in the state cast a vote for a candidate in each of the state’s congressional districts. DUBIN, *supra*, at 3 nn.1–2. Election of representatives by single districts was mandated by Congress on July 14, 1862. Act of July 14, 1862, ch. 170, 12 Stat. 572. For an interesting discussion of the history of single-member

losing the whole system” of representative government.¹⁰⁵ Roger Sherman concurred, declaring that binding instructions would eliminate deliberation, as a representative would simply “lay [his instructions] on the table, and let them speak for him.”¹⁰⁶ A representative from South Carolina pushed the point further: Why would a state need to have numerous members of the House if the members simply would be receiving instructions? Why not have one member from a state receive all of the instructions and then have his vote weighted by his state’s representation?¹⁰⁷ In addition to these deficiencies, the amendment might have led to the same excessive localism that had plagued New England towns.¹⁰⁸ Soon after Tucker introduced the amendment, a chorus of representatives immediately questioned whether a “small community” or a “single district in a State” would really exercise better judgment regarding the “general interests of the Union” than would current representatives.¹⁰⁹

Although some at the First Congress believed instructions had led to “bad consequences, both in England and America,”¹¹⁰ or would be otherwise unsuited for America, it is not clear that the First Congress ruled out instructions to senators. Senators had much larger constituencies than did representatives—an entire state’s worth of legislators—thus potentially diminishing concerns of localism. Still, if states could instruct their senators with *binding* resolutions, then the problem of excessive localism merely would be transplanted to a larger stage, where states were self-interested actors without due regard for the general good. Indeed, even members of the House

districts, see Tory Mast, *History of Single Member Districts for Congress*, <http://www.fairvote.org/reports/1995/chp2/mast.html> (last visited July 2, 2009).

¹⁰⁵ 1 ANNALS OF CONG., *supra* note 27, at 767. Madison never believed that instructions must be binding; in the Continental Congress, he felt free to violate the instructions of Virginia and did so without losing his office. Eaton, *supra* note 7, at 304.

¹⁰⁶ 1 ANNALS OF CONG., *supra* note 27, at 763–64.

¹⁰⁷ *Id.* at 767 (statement of Rep. Smith).

¹⁰⁸ See, e.g., *id.* at 735 (statement of Rep. Clymer) (“This is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body . . . [it would] render[] Congress a mere passive machine.”); *id.* at 764 (statement of Rep. Jackson) (“[C]onsider the dangerous tendency of establishing such a doctrine; it would necessarily drive the house into a number of factions.”).

¹⁰⁹ *Id.* at 761 (statement of Rep. Hartley); see also, *id.* at 771 (statement of Rep. Livermore) (“The doctrine of instructions would hold better in England than here, because the boroughs and corporations might have an interest to pursue totally immaterial to the rest of the kingdom”); *id.* at 774–75 (statement of Rep. Lawrence) (“[It would be] wrong to be guided by the voice of a single district, whose interests might happen to clash with those of the general good”). But see *id.* at 772 (statement of Rep. Ames) (“Those States which had selected their members by districts would have no right to give them instructions”).

¹¹⁰ *Id.* at 761 (statement of Rep. Hartley).

voiced this concern in their debate:¹¹¹ “There might be different instructions from every State, and the representation from each State would be a faction to support its own measures.”¹¹²

To ease the most pressing concerns about the effects of the amendment, some supporters of a constitutional right to instruct insisted that instructions would not, in fact, be binding. Elbridge Gerry, a supporter of the amendment, argued that legislators would remain “at liberty to act as [they] pleased.”¹¹³ Instructions would become merely advice—petitions for legislators to weigh, knowing that their reelection could hang in the balance. On this view, such a right was “provided for . . . already” in the proposed First Amendment.¹¹⁴ For a proposal whose “doubtful” consequences had scared away other legislators, the admission that it accomplished nothing important was fatal.

In sum, the debate over creating a constitutional right to instruct was part of a larger debate about the relation between representatives and the people in the new government. The Founders saw representatives in colonial New England as delegates who took instruction from their hometowns. This view of representation held true in the Continental Congress and under the Articles of Confederation. Nevertheless, this changed after the delegates at the Philadelphia Convention disobeyed their instructions and proposed, and won ratification of, a system of government for the entire Union. Members of Congress were now representatives of the United States, with incentives to look after the welfare of the nation, as trustees. As I argue in the next Part, senators, with their long six-year term of office under the Constitution, were encouraged to put the nation’s welfare above their own state’s, especially because the structure of state legislatures made it difficult for the state to control senators.

¹¹¹ Debates in the Senate during the First Congress were not transcribed and published because the proceedings were closed to the public. See Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates, 1789–1802*, 12 J.S. HIST. 223, 223–24 (1946) (“[T]he Senate sat behind closed doors for more than six years, and refused for a much longer time to admit reporters on the floor for the purpose of recording debates.”).

¹¹² 1 ANNALS OF CONG., *supra* note 27, at 764 (statement of Rep. Jackson). *But cf. id.* at 771 (statement of Rep. Sedgwick) (“We stand not here, said he, the representatives of the State Legislatures . . . but as the representatives of the great body of the people. The sovereignty, the independence, and the rights of the States are intended to be guarded by the Senate . . .”).

¹¹³ *Id.* at 765 (statement of Rep. Gerry).

¹¹⁴ *Id.* at 766 (statement of Rep. Madison) (“In one sense [Tucker’s] declaration [of the right to instruct] is true . . . ; if we mean . . . that the people have a right to express and communicate their sentiments and wishes, we have provided for it already. . . . If gentlemen mean to go further, and to say that the people have a right to instruct their representatives [such that] delegates are obliged to conform to those instructions, the declaration is not true.”).

III THE INTERRELATION BETWEEN STATE LAW AND THE CONSTITUTION

One important reason for the ultimate demise of the doctrine of instruction—much before the Seventeenth Amendment, the impact of which many overstate—is that the Constitution insulated U.S. senators from reelection for six years, a long time compared to state legislators. Although many states believed the right to instruct was an important one—in fact, it often was provided for in their state constitutions¹¹⁵—the structure of state legislatures limited their ability to instruct federal representatives. If state legislators had long term lengths, their threats in year one not to reelect disobeying senators might remain credible by year six. However, state legislative bodies at the Founding had shorter term lengths (often two years or less) than U.S. senators.¹¹⁶ Promises to punish a senator for disobeying an instruction would be hard to keep if the same state legislators were not around for the senator's reelection. And later, as it became more popular to divide legislative bodies into lots or classes for staggered elections, state legislatures turned over more frequently,¹¹⁷ further weakening the doctrine of instruction.

A. *The Effect of Senators' Six-Year Term*

The six-year term length for senators was designed, in part, to avoid excessive localism (sometimes a byproduct of instructions) but not necessarily to eliminate the ability to instruct. At the Philadelphia Convention, James Madison urged that senators should hold office for a “considerable duration”—he recommended nine years—to give senators firmness to “interpose [against] impetuous counsels,” “sudden

¹¹⁵ States recognizing the right of instruction at the time of the First Congress included Pennsylvania (1776), North Carolina (1776), Massachusetts (1780), New Hampshire (1784), and Vermont (1786). See Colegrove, *supra* note 39, at 442–43. Pennsylvania's Constitution is typical: “That 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.” PA. CONST. of 1776, Declaration of Rights art. XVI, *reprinted in* PROCEEDINGS, *supra* note 100, at 57. While Pennsylvania removed the “right to instruct” clause from its constitution in 1790, a steady flow of states added such a right over the years. PA. CONST. of 1790, art. IX, § 20, *reprinted in* PROCEEDINGS, *supra* note 100, at 305; Colegrove, *supra* note 39, at 443 (“[After the adoption of the Federal Constitution, states adopting the right to instruct were] Tennessee in 1796, Ohio in 1802, Indiana in 1816, Illinois in 1818, Maine in 1820, Michigan in 1835, Arkansas in 1836, California in 1849, Kansas in 1855, Oregon in 1857, Nevada in 1864, Florida in 1868, West Virginia in 1872, and Idaho in 1889.”).

¹¹⁶ See *infra* notes 131–34 and accompanying text (detailing term lengths for state legislators at Founding).

¹¹⁷ See *infra* notes 138–40 and accompanying text (describing changes in structure of state legislatures).

impulses,” and the “fickleness and passion” that resulted in “temporary errors.”¹¹⁸ Madison, hinting at prior problems of localism, warned that we must compensate for “the defects which our own experience ha[s] particularly pointed out” because it was “more than probable” that the Constitution would “decide forever the fate of Republican [government].”¹¹⁹ The Constitution, which provided for six-year terms for senators, aimed to place the Senate in the role of “a counterpoise to the local prejudices which are incompatible with a liberal view of national objects, and which commonly accompany the representatives of a state.”¹²⁰ Nevertheless, if, as expected, senators voted with an eye toward reelection by state legislators, it was “entirely probable that local interests, opinions, and prejudices, [would] ever prevail in the general government, in a greater or less degree.”¹²¹

Although the threat of undue local influence by states’ use of instructions would remain after the adoption of the Constitution, the degree of the threat would vary depending on changes in the constitutional culture and term lengths of *state* legislators. States had power over senators by virtue of the selection process, which made both the method of selection and the composition of state legislatures important.

In broadly worded language, the Constitution specified that senators would be “chosen by the Legislature” of the state.¹²² Given that states had presumptive control over the “manner” of Senate elections,¹²³ states with a multicameral legislative branch¹²⁴ might have been able to select senators by a vote in only one house.¹²⁵ Placing the vote in the hands of the upper house, which generally had a longer term length, could have given the state greater leverage over its sena-

¹¹⁸ 1 FARRAND’S RECORDS, *supra* note 61, at 421–23. This was not the sole motivation for a long term length for senators—James Wilson argued that a long term (he also recommended nine years) was needed to make the Senate “respectable in the eyes of foreign nations,” *id.* at 425–26—but it was at least a significant one.

¹¹⁹ *Id.* at 421–23.

¹²⁰ 2 ELLIOT’S DEBATES, *supra* note 57, at 300 (statement of Mr. Lansing).

¹²¹ *Id.*

¹²² U.S. CONST. art. I, § 3, cl. 1.

¹²³ U.S. CONST. art. I, § 4, cl. 1.

¹²⁴ At the Founding, a number of state legislatures were unicameral, including Georgia, Pennsylvania, and Vermont. GA. CONST. of 1777, art. II; PA. CONST. of 1776, ch. II, § 2, *reprinted in* PROCEEDINGS, *supra* note 100, at 57; VT. CONST. of 1777, ch. II, § 2. As of 1790, all of these states except Vermont had bicameral legislatures. GA. CONST. of 1789, art. I, § 1, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS 785 (Francis Newton Thorpe, ed. 1909) [hereinafter Thorpe]; PA. CONST. of 1790, art. I, § 1, *reprinted in* PROCEEDINGS, *supra* note 100, at 296; VT. CONST. of 1793, amend. III, *reprinted in* 6 Thorpe, *supra*, at 3772.

¹²⁵ *But see, e.g., infra* note 128.

tors, while still retaining frequent elections in the lower house. There is a strong textual argument, however, that the entire state “[l]egislature”—both houses—had to “cho[o]se” the state’s senators, and in fact this is how senators were elected.¹²⁶ Some states used a joint (per capita) vote of both houses of the state legislature, and others used a concurrent vote, like a legislative act.¹²⁷ Contemporary scholars debated whether a joint vote of state legislators was constitutional,¹²⁸ but both schemes, which took into account the votes of the lower house, weakened the use of instructions by granting the legislators with shorter term lengths a prominent voice in Senate elections.¹²⁹

By the year 1803, seventeen states had been admitted to the Union.¹³⁰ The short term length these states provided for their state legislators is striking.¹³¹ All of the states except two elected their lower house annually (or more often),¹³² and the median upper house

¹²⁶ I leave aside whether this requirement could be satisfied by a state law providing that the senator who wins the most votes in the upper house will be considered elected by the lower house.

¹²⁷ 1 JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 69–70 (New York, Harper & Bros. 1847) (“The Constitution has not provided for the manner, in which the choice [of senators] shall be made by the State Legislatures, whether by a joint vote, or by a concurrent vote Generally, but not universally, the choice of Senators is made by a concurrent vote.”).

¹²⁸ See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 226–27 (John M. Gould ed., 14th ed., Boston, Little, Brown & Co. 1896) (“[I]t has been considered and settled, in New York, that the legislature may prescribe that [senators] shall be chosen by joint vote or ballot of the two houses, in case the two houses cannot separately concur in a choice [However,] I should think, if the question was a new one, that when the Constitution directed that the senators should be chosen *by the legislature*, it meant not the members of the legislature *per capita*”).

¹²⁹ It could be argued that the joint-vote method was more likely to weaken the state legislature’s influence over U.S. senators through instruction because the upper house’s vote would be “dissipated and lost in the more numerous vote” of the lower house, unlike in a concurrent vote. *Id.* at 226.

¹³⁰ 3 THE UNITING STATES: OKLAHOMA TO WYOMING app. I at 1379 (Benjamin F. Shearer ed., 2004).

¹³¹ But the short term lengths are not surprising, given the widely held view that “frequent elections” are “essential to liberty.” THE FEDERALIST No. 52 (James Madison), *supra* note 67, at 324.

¹³² South Carolina and Tennessee were the outliers, electing their lower house biennially. S.C. CONST. of 1778, art. XIII; TENN. CONST. of 1796, art. I, § 5; see also AMAR, *supra* note 56, at 75 (noting that state constitutions of Revolutionary period went even further than U.S. Constitution in guaranteeing frequent elections). Legislators in Rhode Island were chosen for six-month terms of office. CHARLES MASON, AN ELEMENTARY TREATISE ON THE STRUCTURE AND OPERATIONS OF THE NATIONAL AND STATE GOVERNMENTS OF THE UNITED STATES 207 & n.† (Boston, James Munroe & Co. 1843) (reflecting law as of 1837).

term length was two years (mean length of 2.35 years).¹³³ Only one state, Maryland, gave its upper house a term length greater than four years—and even it was not willing to go as high as six years.¹³⁴ The shorter term lengths are understandable because the Constitution gave senators a long six-year term in order to allow them to learn about foreign affairs and the vast (and growing) territory of the United States¹³⁵—concerns that state legislators did not share. Nevertheless, this structure made it difficult for binding instructions to take hold. With state legislators facing election more frequently during a senator's six-year term and with legislatures less static year-to-year because of election by classes, senators could disobey instructions on important political issues if they believed their position—and their state political party—would win the voters' sympathies.¹³⁶

B. Changes in the Structure of State Legislatures

In addition to having bicameral legislatures with consistently shorter term lengths, many state legislatures began to split the upper house—which typically had a longer term length than the lower house¹³⁷—into lots or classes.¹³⁸ For example, no longer would the

¹³³ The term lengths of state upper houses in 1803 were: one year (Connecticut, Georgia, Massachusetts, New Hampshire, New Jersey, North Carolina, Rhode Island, and Vermont); two years (Ohio and Tennessee); three years (Delaware); four years (Kentucky, New York, Pennsylvania, South Carolina, and Virginia); five years (Maryland). CONN. CHARTER (1662) (continued as law by CONN. CONST. of 1776 n.*), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS 253 (Ben Perley Poore, ed., Wash., D.C., Gov't Printing Office 1877) [hereinafter Poore]; GA. CONST. of 1798, art. I, § 3, reprinted in 1 Poore, *supra*, at 388; MASS. CONST. of 1780, pt. II, ch. 1, § 2, art. I, reprinted in 1 Poore, *supra*, at 961; N.H. CONST. of 1792, pt. II, § 25, reprinted in 4 Thorpe, *supra* note 100, at 2478; N.J. CONST. of 1776, art. III, reprinted in 5 Thorpe, *supra* note 100, at 2595; N.C. CONST. of 1776, art. II, reprinted in 5 Thorpe, *supra* note 100, at 2790; MASON, *supra* note 132, at 207 tbl. III & n.† (noting term length for Rhode Island upper house); VT. CONST. of 1793, ch. II, § 8, reprinted in 6 Thorpe, *supra* note 100, at 3765; OHIO CONST. of 1802, art. I, § 5, reprinted in 5 Thorpe, *supra* note 100, at 2902; TENN. CONST. of 1796, art. I, § 5, reprinted in 6 Thorpe, *supra* note 100, at 3415; DEL. CONST. of 1792, art. II, § 3, reprinted in 1 Poore, *supra*, at 280; KY. CONST. of 1799, art. II, § 9; N.Y. CONST. of 1777, art. XI.; PA. CONST. of 1790, art. I, § 5, reprinted in PROCEEDINGS, *supra* note 100, at 297; S.C. CONST. of 1790, art. I, § 7, reprinted in 6 Thorpe, *supra* note 100, at 3259; VA. CONST. of 1776 para. 3, reprinted in 2 Poore, *supra*, at 1910; MD. CONST. of 1776, art. XIV. Vermont's House of Representatives is treated for the above analysis as the state's upper house, although Vermont had no lower house (the legislature was unicameral).

¹³⁴ See *supra* note 133.

¹³⁵ AMAR, *supra* note 56, at 76, 144.

¹³⁶ For an example of a senator who disobeyed an instruction, confident that his party would retake the state legislature before his reelection, see notes 140–47 and accompanying text.

¹³⁷ South Carolina and New Hampshire were the exceptions, with South Carolina providing each house two years and New Hampshire providing each house only one. S.C. CONST. of 1778, art. XII, XIII; N.H. CONST. of 1783, pt. II.

entire Maryland Senate stand for reelection every fifth year; in 1851, the new constitution shortened the term length to four years and provided that every two years one-half of the Senate would face reelection.¹³⁹ A similar change occurred in Kentucky in 1799.¹⁴⁰ Staggered elections meant that new members would enter the upper house at more frequent intervals, diminishing the ability of one state legislature to issue credible threats not to reelect a U.S. senator.

A senator wishing to cast a vote contrary to an instruction could take comfort in the fact that different members very likely would be voting for his reelection. In fact, this often happened. A number of senators, especially in the early years, resigned after being criticized for disobeying instructions.¹⁴¹ However, senators' longer term length allowed them to stand their ground if they believed they could convince the next wave of state legislators not to follow through on their predecessors' threats.¹⁴² For example, in 1835, Samuel Southard, a Whig senator from New Jersey, disobeyed instructions to expunge the censure of President Jackson from the Senate Journal.¹⁴³ He believed the expunging resolution would be a "degradation of the most humiliating character" for the Senate and refused to vote for it.¹⁴⁴ He did not quietly cast his vote; instead, he gave a long and forceful speech

¹³⁸ Lots were proposed early at the constitutional convention and were part of the compromise for a longer term length for senators. *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 61, at 426 ("The popular objection [against] appointing any public body for a long term was that it might [eventually] become a hereditary one. It would be a satisfactory answer to this objection that as 1/3 would go out triennially, there would be always three divisions holding their places for unequal terms, and consequently acting under the influence of different views, and different impulses" (statement of James Wilson, June 26, 1787)).

¹³⁹ MD. CONST. of 1851, art. III, §§ 2, 5–6, *reprinted in* 1 Poore, *supra* note 133, at 843–44. Maryland changed the term length for its senate in 1837 to six-year terms, with three classes staggered biennially (later, in 1851, further reduced to four years, with only two classes).

¹⁴⁰ Kentucky moved from a single class, which would face election every four years, to four classes, which would face reelection every fourth year. *Compare* KY. CONST. of 1792, art. I, § 10, *with* KY. CONST. of 1799, art. II, § 10, *reprinted in* 1 Poore, *supra* note 133, at 658. In 1850, Kentucky's upper house was reduced to two classes. KY. CONST. of 1850, art. II, § 12.

¹⁴¹ *See* Riker, *supra* note 4, at 458–59 (describing John Quincy Adams's resignation in 1808 and those of Senators David Stone and William Branch Giles after War of 1812).

¹⁴² The most well-known example, perhaps, is Lucius Q.C. Lamar's reelection after he opposed the Silver Bill, contrary to instructions from the state legislature. 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 1029–30 (1938). After vigorously campaigning across the state, he was reelected by an "overwhelming majority." *Id.* at 1030.

¹⁴³ 1 THOMAS H. BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 528–29 (New York, D. Appleton & Co. 1854).

¹⁴⁴ *Id.*

criticizing the doctrine of instruction, calling it “an evil,” which the Framers took “extra constitutional means to prevent.”¹⁴⁵ Nevertheless, Southard won “an easy reelection” over his Democratic opponent in 1838.¹⁴⁶ By that time, the expunging resolution had faded from voters’ minds as they dealt with the effects of the depression in 1837.¹⁴⁷ Voters in New Jersey blamed the party in power (the Democrats) for the depression, helping the Whigs regain control of the state legislature.¹⁴⁸

Senator Southard’s reelection, after violating instructions on the biggest issue of the day, illustrates a key lesson: The six-year term for senators, when compared to the short term length for state legislators, undercut the doctrine of instruction because senators could disobey if they were willing to take their chances with the new members of the state legislature (who would be elected by the people). Once the culture of adherence to instructions weakened, there was no constitutional structure in place to sustain it.

Furthermore, as I discuss in Part IV.A., the Southard incident shows that, by the 1830s, instructions had become highly politicized. Andrew Jackson and the Democrats were effectively instructing southern Whigs out of their seats, a tactic that led to the demise of the doctrine after the southern Democrats lost the Civil War.

IV

RECONSTRUCTION AND THE QUIET DEMISE OF THE RIGHT TO INSTRUCT

A. *Instructions in the Jacksonian Era*

President Andrew Jackson permanently changed the public’s view of instructions. Although he was not the first to use instructions for political purposes,¹⁴⁹ he was devastatingly successful in deploying

¹⁴⁵ ANDREW W. YOUNG, *THE AMERICAN STATESMAN: A POLITICAL HISTORY* 622 & 986 n.I (New York, J.C. Derby 1855) (emphasis omitted).

¹⁴⁶ MICHAEL BIRKNER, *SAMUEL L. SOUTHARD: JEFFERSONIAN WHIG* 177 (1984).

¹⁴⁷ See DAVIS RICH DEWEY, *FINANCIAL HISTORY OF THE UNITED STATES* 232–33 (8th ed. 1922) (noting that Panic of 1837 resulted in instability of financial institutions, particularly in New Jersey, Rhode Island, and southern and western United States).

¹⁴⁸ BIRKNER, *supra* note 146, at 177.

¹⁴⁹ During the first few terms of the Senate, the proceedings were closed to the public, which angered many state legislatures. Southerners were especially worried that with the Federalists in power, the Senate would pass legislation contrary to the South’s economic interests. See McPherson, *supra* note 111, at 227–31 (discussing South’s advocacy of open Senate sessions to promote “legislation more favorable to southern political ideals and economic interests”). In response, “the legislatures of Virginia, North Carolina, South Carolina, and Maryland instructed their respective senators to urge the Senate to open its doors.” *Id.* at 229.

them to expand the Democratic party in the South. As state legislatures began to turn Democratic in the mid-1830s, Jackson urged Southern Democratic state legislators to instruct their Whig senators on the politically divisive matters of the day.¹⁵⁰ This would put the senators in the position of either voting against their party or against their instructions—a difficult choice in areas like Virginia, where most people strongly believed in the sanctity of instructions.¹⁵¹ In such areas, a vote against an instruction was more than a vote against the community's desired outcome; it was an insult to the community—a declaration that its formal opinion, democratically expressed, did not matter. Thus, senators from these places faced an especially delicate task when deciding whether to violate their instructions or their conscience—and many, not surprisingly, resigned before or shortly after the vote.

One issue that caused the resignation of a number of senators was the “Expunging Resolution,” which sought to expunge from the Senate Journal the censure of President Jackson for removing the deposits from the Second Bank of the United States. Instructing Whigs out of their Senate seats over this issue was particularly effective because it dealt with a contested constitutional question: If the Constitution required that “Each House shall keep a Journal of its Proceedings,” excepting only matters “requir[ing] Secrecy,” could parts of the Senate Journal be expunged?¹⁵² After receiving instructions from newly Democratic state legislatures, a number of Southern senators resigned—some before the vote,¹⁵³ some soon after,¹⁵⁴ and others about a year later, once it became clear that their state legisla-

In addition, it appears that some senators leaked information about upcoming votes, hoping that certain state legislatures would instruct their senators on how to vote. See 2 HAYNES, *supra* note 142, at 1026 (“[After] South Carolina ‘instructed their representation’ . . . Maclay heard colleagues querying: ‘Could any hints have gone from here to set them on this measure?’”).

¹⁵⁰ See, e.g., Letter from Andrew Jackson to James K. Polk (urging organization of public campaign for resolution instructing Tennessee senators to vote for expunging Jackson's censure from Senate Journal), in 5 CORRESPONDENCE OF ANDREW JACKSON 358–59 (John Spencer Basset ed., 1926).

¹⁵¹ Eaton, *supra* note 7, at 314.

¹⁵² U.S. CONST. art. I, § 5, cl. 3.

¹⁵³ Senator Tyler of Virginia resigned with three years left in his term. 2 HAYNES, *supra* note 142, at 1028–29. In a letter of rebuke to the legislature, Tyler noted that the resolution, which the legislature was asking him to expunge, was the same resolution the previous Virginia legislature had instructed him to vote for. *Id.*

¹⁵⁴ In the immediate aftermath, Senator Leigh of Virginia remained a senator because he wanted to “signalize his resistance to unconstitutional instructions,” although a few months later he resigned claiming ill health. Eaton, *supra* note 7, at 314–15.

ture would remain controlled by Democrats.¹⁵⁵ One of the most surprising resignations came from Senator Benjamin Watkins Leigh of Virginia, who two decades earlier as a young state senator had written a long, scholarly resolution affirming the “right of instruction.”¹⁵⁶ But facing the Expunging Resolution as a Whig senator of the United States, he voted *against* his instructions, arguing that senators need not obey instructions that would require them to violate the Constitution.¹⁵⁷ Indeed, this exception was present in his previous work,¹⁵⁸ but instead of immediately resigning, he remained in office for a few months. Like other Whig senators forced out by instructions,¹⁵⁹ Leigh realized that the Jacksonian Democrats’ “real motive . . . was to instruct him out of his seat in the Senate.”¹⁶⁰

After Jackson’s use of instructions to “intervene in state politics and purge his opponents” from the Senate, the doctrine was strongly, if not indelibly, associated with Southern Democrats.¹⁶¹ Leading up to the Civil War, and faced with the momentous decision of whether to secede from the Union, some state legislatures in the South used instructions to express their views to their senators,¹⁶² just as New England towns had earlier instructed their state legislators to vote to declare independence from England.¹⁶³ However, with party lines

¹⁵⁵ Senator Willie P. Mangum of North Carolina and Senator Alexander Porter of Louisiana both resigned in 1836 after the Democrats retained control of the senators’ respective state legislatures. *Id.* at 315. Senator Gabriel Moore of Alabama served the remainder of his term (until 1837) although the Alabama legislature requested him to resign. *Id.*

After Jackson’s presidency ended, Southern Whig senators continued to be instructed into resignation when Democrats gained control of state legislatures. For example, in President Jackson’s home state of Tennessee, the Democrats instructed Senators Hugh Lawson White and Ephraim H. Foster to vote for Van Buren’s sub-Treasury bill. *Id.* at 317. Foster resigned shortly after the instructions were issued, and White resigned once the sub-Treasury bill was introduced in the Senate. *Id.*

¹⁵⁶ See generally H.J. Res. 2, 1812 Gen. Assemb. (Va. 1812), 1812 Va. Acts 158. See also *supra* note 22 and accompanying text, which describes Leigh’s argument for a right of instruction.

¹⁵⁷ Eaton, *supra* note 7, at 314.

¹⁵⁸ H.J. Res. 2, 1812 Gen. Assemb. (Va. 1812), 1812 Va. Acts 158, 167 (stating that it is “bounden duty” of senator to obey every instruction that does not require him to “commit a violation of the Constitution, or an act of moral turpitude”).

¹⁵⁹ Senator Mangum of North Carolina refused to resign because he believed that the doctrine of instruction was “being used to reduce office in the Senate to a mere tenancy at will.” Eaton, *supra* note 7, at 309.

¹⁶⁰ *Id.* at 314.

¹⁶¹ *Id.* at 316.

¹⁶² See, e.g., *Maryland Legislature: The Right of Instruction*, BALTIMORE SUN, June 12, 1861, at 4 (introducing instruction for Maryland’s federal representatives to vote to recognize Confederate States of America).

¹⁶³ See *supra* notes 48–52 and accompanying text (describing New England’s popular ratification of fight for independence).

drawn, some saw the instructions as divisive. In Maryland, an attempt to issue such an instruction upset the Whigs, who objected to the “ill-timed introduction of an abstract party principle in the face of a great crisis” and at a time when the legislature in Maryland was “of nearly one mind” regarding secession.¹⁶⁴ Not surprisingly, the issue of slavery was more important than instructions. In 1855, when two Northern Democrats disregarded instructions that demanded they vote to exclude slavery from the Territories, their act of disobedience was “greatly lauded by the Southern Democracy.”¹⁶⁵ Even before the Civil War, the doctrine of instructions was losing its moral force.¹⁶⁶

B. Instructions After the Civil War

The Civil War led to an enormously different Constitution, and the doctrine of instructions was one of the war’s casualties. The Thirteenth Amendment, drafted shortly after Lincoln’s reelection,¹⁶⁷ was a “radical break” with the past constitutional system; it “pulverized bedrock legal principles and practices in more than one-third of the states and imposed new affirmative federal obligations on every state.”¹⁶⁸ The balance of power dramatically shifted away from the states, and Congress began to exercise a broad *M’Culloch*-like¹⁶⁹ power to eliminate the vestiges of slavery. After President Andrew Johnson vetoed the 1866 Civil Rights Act—claiming that it would “sap and destroy our federative system,” imperil “the rights of the States,” and “centraliz[e]” and “concentrat[e]” “all legislative powers in the National Government”¹⁷⁰—Congress responded in dramatic

¹⁶⁴ See *Maryland Legislature: The Right of Instruction*, *supra* note 162 (statement of Mr. Legg objecting to use of word “instructed” in resolution that later passed with “earnestly desired and requested” instead).

¹⁶⁵ The Democratic senators were George E. Pugh of Ohio and George W. Jones of Iowa. EDWARD MAYES, LUCIUS Q.C. LAMAR: HIS LIFE, TIMES, AND SPEECHES 1825–1893, at 407 (Nashville, Publ’g House of the Methodist Episcopal Church S. 1896).

¹⁶⁶ For another indication of the politicization of instructions, see CONG. GLOBE, 35th Cong., 1st Sess. 805 (1858). In 1858, Whig Senator John Bell of Tennessee, upon being instructed by his state legislature, refused to comply, stating that the doctrine of instruction “is resorted to for the most part as an engine of party and to promote party ends,” noting that even many Democratic senators “obey[] or disobey[] instructions at their discretion.” *Id.*

¹⁶⁷ U.S. CONST. amend. XIII (abolishing slavery and granting Congress power to enforce amendment by “appropriate legislation”).

¹⁶⁸ AMAR, *supra* note 56, at 360.

¹⁶⁹ *Id.* at 361–63 (noting that enforcement provisions of Thirteenth and Fourteenth Amendments, which allow Congress to enact “appropriate” enforcement legislation, meant to incorporate broad construction of congressional power under Necessary and Proper Clause found in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹⁷⁰ Andrew Johnson, Message to the United States Senate (March 27, 1866), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 405, 413 (James D. Richardson ed., 1897).

fashion, overriding his veto.¹⁷¹ This, indeed, was a different government.

Four months after using its newly minted Thirteenth Amendment authority to pass the 1866 Civil Rights Act, Congress demonstrated that it was not wary of using its powers under the Founders' Constitution to prevent state recalcitrance. Acting to regulate the "Times . . . and Manner" of Senate elections,¹⁷² Congress decreed that state legislatures, on the day of election, should vote concurrently for a senator, and if the two houses did not agree, then on the next day at precisely "twelve o'clock, meridian" a joint vote of all state legislators should be conducted.¹⁷³ Writing less than two decades after the Civil Rights Act was passed, prominent Republican Senator James Blaine¹⁷⁴ declared that the Act "has done much to insure the fair and regular choice of senators."¹⁷⁵ He added that whereas before the Civil War there was a "reluctance to interfere" with the states, after the War, "thoughtful statesmen" believed that "every thing which may be done by either Nation or State may be better and more securely done by the Nation."¹⁷⁶ Little wonder, then, that the practice of states instructing federal legislators on how to vote virtually disappeared after the War. Instead, the roles were reversed: Now the states were taking instructions from the federal government.

The South's loss of the Civil War, and the resulting constitutional changes, dealt a fatal blow to the doctrine of instruction; never again was it meaningfully exercised.¹⁷⁷ At least one newspaper, in the heart of Texas, lost hope that instructions would be obeyed,¹⁷⁸ and Jefferson

¹⁷¹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 29–30; *see also* AMAR, *supra* note 56, at 362 ("Congress overrode, in a dramatic vote that made headlines and indeed made history . . .").

¹⁷² U.S. CONST. art. I, § 4, cl. 1.

¹⁷³ Act of July 25, 1866, ch. 245, 14 Stat. 243, 243; *see also* RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 185–87* (2001) (describing legislation and arguing that after Civil War, Congress "felt little compunction about placing an enormous burden on the states").

¹⁷⁴ Blaine was a dominant figure in the Republican party. In 1884, he narrowly lost the presidential race to Democrat Grover Cleveland. With the switch of 575 votes in Cleveland's home state of New York, Blaine would have been President. Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 7 (1968).

¹⁷⁵ 2 JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD* 160 (Norwich, Conn., The Henry Bill Publ'g Co. 1886).

¹⁷⁶ *Id.*

¹⁷⁷ *See* Eaton, *supra* note 7, at 319 ("The doctrine of the right of legislative instruction became obsolete after 1860."); Riker, *supra* note 4, at 462 (describing "gradual obsolescence" of instruction).

¹⁷⁸ *See Can a State Withdraw Its Ratification?*, FLAKE'S BULL. (Galveston, Tex.), Jan. 15, 1870, at 4 ("[C]an Texas do anything toward the defeat of this proposed [fifteenth] amend-

Davis's exhortations defending instructions as "a principle of the old Democracy" only tethered the doctrine more firmly to the past.¹⁷⁹ Even men who had worked strenuously for the Confederate cause, like Mississippi Senator Lucius Q.C. Lamar and Kentucky Senator William Lindsay, felt free to disobey instructions.¹⁸⁰ After Reconstruction, "instructions were obeyed if palatable and unconcernedly ignored if they were not."¹⁸¹

V

MODERN INSTRUCTIONS

Instructions, no longer binding after Reconstruction, did not disappear altogether. Rather, over time they took a more deferential form: State legislatures "requested" or "respectfully urged" their senators (and representatives) to vote in certain ways¹⁸²—issuing what I

ment? She can. It is within the power of her people to defeat it, if they will but assert their undoubted right to instruct their representatives. . . . [However,] the power, ability and determination of the Radical Legislature to disobey those instructions, is equally plain and evident.").

¹⁷⁹ Riker, *supra* note 4, at 462–63 (noting Jefferson Davis "broke the silence of his retirement" to denounce Lucius Q.C. Lamar and reaffirm doctrine of instruction); *see also* Jefferson Davis, Instructions to Senators (Dec. 14, 1878) (arguing in letter that "the Senator who accepts his election by the Legislature as [an] expression of the will of the State, would seem to be estopped from contending at any future time that the Legislature was not the proper channel through which the States [s]hould speak to him"), in *Gleanings from the Mails*, N.Y. TIMES, Jan. 20, 1879, at 2.

¹⁸⁰ Lamar "triumphantly" won reelection soon after disobeying his instruction. *See* Riker, *supra* note 4, at 462 (describing Lamar's subsequent reelection). Additionally, in answering the Kentucky legislature's request for his resignation, Lindsay stated: "I do not exercise my senatorial duties subject to legislative supervision. . . . Resolutions of legislatures can not relieve a Senator of his responsibilities. His own judgment and conscience must guide his conduct." JAMES ALBERT WOODBURN, *AMERICAN POLITICS: THE AMERICAN REPUBLIC AND ITS GOVERNMENT* 240–41 (1906). Neither senator's decision to disobey his instructions was easy. Lamar voted against Representative Richards Bland's 1878 Silver Bill, which would have allowed "the free coinage of all silver brought to the Mint" and would have resulted in "easy, inflationary money," a particular boon to the South and West, which felt depressed by "the steadily increasing financial domination of the East." JOHN F. KENNEDY, *PROFILES IN COURAGE* 166 (1956); *see also id.* at 165–77 (describing Lamar's controversial decision to vote against his instructions and overwhelming reelection). In Mississippi, the "free silver" movement—and Bland's bill—were "tremendously popular." *Id.* at 165–66. Like Lamar, Lindsay voted against a number of "free silver" policies that were popular with his constituents, such as the reenactment of the Bland Silver Act and the enactment of a bill "providing for the free coinage of silver at the ratio of 16 to 1," despite contrary instruction from his state legislature. *Senator Lindsay's Reply: Rejoinder to the Kentucky Legislature's Request That He Resign on Account of His Silver Views*, N.Y. TIMES, Feb. 5, 1898, at 3.

¹⁸¹ Eaton, *supra* note 7, at 319 ("[I]nstruction[s] became obsolete after 1860."); Riker, *supra* note 4, at 462.

¹⁸² *See, e.g.*, JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 44–45 (1919) (proceedings of Aug. 20, 1919) (resolving that senators and representatives be "respectfully urged" to support bill to promote production, sale, and distribution of livestock); THE

will call “instructing resolutions.”¹⁸³ In some southern states, this change in language occurred later, around 1900, probably because state legislators were reluctant to admit they had lost power¹⁸⁴—even though it was clear to observers in their states that “[s]enators do not now recognize the right” of binding instructions.¹⁸⁵

At the same time that state legislatures began using more deferential language to convey their views to senators, states also began to experiment with new ways to elect their senators.¹⁸⁶ After Wisconsin and Oregon enacted the first statewide direct primary laws in 1903 and 1904, respectively, other states “widely copied” the idea.¹⁸⁷ By 1910, more than half the states chose their candidates by direct prima-

JOURNAL OF THE SENATE OF THE TWENTIETH LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON 108–09 (1899) (proceedings of Jan. 16, 1899) (adopting memorial “earnestly and respectfully ask[ing]” that senators and representatives ensure pension benefits for veterans of Indian wars); *Many Legislative Projects: The House Calendar Lengthened by Addition of Many Bills*, N.Y. TIMES, Dec. 7, 1895, at 3 (noting resolution of Connecticut legislature calling on senators to “urge” legislation preventing mob violence); *id.* (noting Massachusetts resolution “asking” for “the suppression of the lottery traffic”).

¹⁸³ Instructing resolutions are most similar to the “requests” of, or “petitions” to, members of the U.S. House of Representatives and English Parliament. *See, e.g.*, Extract from the Files of the *Richmond Enquirer* (Feb. 1, 1812) (“[A]n *instruction* to a Senator, in contradistinction to a *request* to a Representative, implies a *command*.”), in 2 THE EXTRA GLOBE, CONTAINING POLITICAL DISCUSSIONS, DOCUMENTARY PROOFS, ETC. FOR 1835, at 411, 413 (Francis P. Blair & John C. Rives eds., Wash. 1835); Eaton, *supra* note 7, at 303 (“Almost invariably [instructions of the nineteenth century] read that senators were ‘instructed’ and the representatives merely ‘requested’ to vote in accordance with the will of the majority of the legislature.”); *see also supra* note 27 and accompanying text (noting that many English “instructions” resembled petitions more than binding commands).

¹⁸⁴ *See, e.g.*, S.J. Res. 28, 49th Leg., 2d Sess. (Tenn. 1895) (instructing senators to secure aid for levy), reprinted in ACTS OF THE STATE OF TENNESSEE PASSED BY THE FORTY-NINTH GENERAL ASSEMBLY 471 (Nashville, Franc M. Paul 1895); Bybee, *supra* note 6, at 527 n.172 (citing instructions in 1890s and 1900s); *State Legislation*, 24 PUB. OPINION 139, 139 (Feb. 3, 1898) (discussing Virginia resolution instructing senators “to secure some financial relief for the people of their section”).

¹⁸⁵ Joshua W. Caldwell, *A Biographical Sketch of Hugh Lawson White*, 14 B. ASS’N TENN. 90, 105 (1895); *see also* CONG. GLOBE, 35th Cong., 1st Sess. 805 (1858) (statement of Sen. John Bell of Tenn., Feb. 23, 1858) (“I do not acknowledge the instructions of my Legislature as carrying with them any obligation of obedience”). Further, “this modern view of the subject” was deemed “clearly right in principle.” Caldwell, *supra*, at 105. Contemporary writers agreed with this assessment. *See, e.g.*, WOODBURN, *supra* note 180, at 240 (“No one now [in 1906] expects a Senator to surrender his individual judgment and be moved from the course that he thinks wisest because of his State legislature’s censure or instructions.”).

¹⁸⁶ In addition to alleviating concerns of corruption and undue influence of interest groups on senators’ selection, direct election of senators promised to solve the common problem of deadlock in state legislators balloting for senators—a frustration that had recurred nearly fifty times between 1891 and 1905. AMAR, *supra* note 56, at 412.

¹⁸⁷ ARTHUR N. HOLCOMBE, STATE GOVERNMENT IN THE UNITED STATES 107 (2007); ALAN WARE, THE AMERICAN DIRECT PRIMARY 117–23 (2002); Riker, *supra* note 4, at 466.

ries.¹⁸⁸ In fact, by 1911, two years before the Seventeenth Amendment required that senators be elected by the people, thirty-seven out of the forty-six state legislatures had “indicated that they no longer wanted to elect senators.”¹⁸⁹ The Seventeenth Amendment—far from being the sole cause of the demise of instructions, as some scholars have argued¹⁹⁰—merely signaled that binding instructions could not be revived. Virginia, long the most ardent supporter of instructions, began to “respectfully urge” its U.S. Senators on votes instead.¹⁹¹

In the decades after the Seventeenth Amendment, state legislatures continued to pass instructing resolutions. States that had previously “instructed” instead began to “request” action. New states entering the Union—and even U.S. territories—followed suit, introducing instructing resolutions of their own.¹⁹² On extraordinary occasions, state legislatures sent copies of instructing resolutions to their sister states, prodding them to follow along.¹⁹³ All told, state legisla-

¹⁸⁸ AMAR, *supra* note 56, at 411 (citing Riker, *supra* note 4, at 466) (noting Senate primaries existed in twenty-eight of forty-six states in 1910).

¹⁸⁹ Riker, *supra* note 4, at 467.

¹⁹⁰ See *supra* note 6 and accompanying text (listing such scholarship).

¹⁹¹ Little changed in states’ use of instructions after the Seventeenth Amendment because few states still issued binding instructions, but Virginia, long the most ardent supporter of instructions, gave up the fight and began to “respectfully urge” its U.S. Senators on votes instead. See JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 44–45 (1919) (proceedings of Aug. 20, 1919) (introducing resolution “urg[ing]” Virginia senators and representatives to vote for livestock bill); see also *id.* at 14 (proceedings of Aug. 14, 1919) (passing same to committee); JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 534 (1920) (proceedings of Mar. 5, 1920) (passing resolution “urg[ing]” Congress to establish National Highway System and sending copies of resolution to Virginia senators and representatives, “requesting them to support such a measure”).

¹⁹² See, e.g., THE SIXTH LEGISLATURE OF THE TERRITORY OF HAWAII: JOURNAL OF THE SENATE 10 (1911) (proceedings of Feb. 15, 1911) (introducing resolution to “respectfully request[]” funds for public schools from Congress and to send copy of same to Hawaii’s delegate in Congress).

¹⁹³ E.g., THE JOURNAL OF THE SENATE OF THE STATE OF OHIO FOR THE REGULAR SESSION OF THE SEVENTY-SEVENTH GENERAL ASSEMBLY 266–67 (1906) (proceedings of Mar. 7, 1906) (proposing resolution to encourage constitutional amendment providing direct election of U.S. senators and to send copies of same to “legislatures of all the states of the United States with the request that they take like action”); SENATE JOURNAL OF THE LEGISLATURE OF THE STATE OF NEBRASKA: THIRTY-FOURTH SESSION 63–64 (1915) (proceedings of Jan. 5, 1915) (proposing anti-arms instructing resolution that would mandate transmitting copies of same not only to members of Nebraska’s congressional delegation but also to “the Legislatures of all other States of the United States . . . now in session”); H.J. Memoiral 2, 23d Leg., Reg. Sess., (Wash. 1933), 1933 Wash. Sess. Laws 935, 937 (resolving that “this Memorial be immediately forwarded to the legislatures of all the states of the United States requesting that they pass and present similar Memorials to Congress”).

tures issued resolutions¹⁹⁴ on issues as varied as the creation of a system of national highways, President Eisenhower's decision to send troops to Little Rock, Arkansas, Soviet participation in the 1984 Olympics, membership in the United Nations, and the Patriot Act.¹⁹⁵ And they have continued to pass such resolutions today.¹⁹⁶

However, it is not clear why, and for what purposes, state legislatures use instructing resolutions if they are not binding on senators. In an attempt to shed light on this issue, Part V.A examines the content of instructing resolutions that states adopted in 2006. It reveals that

¹⁹⁴ These resolutions often took the form of a memorial, "a request, usually from a state legislature, that the Congress take some action, or refrain from taking certain action." PAUL S. RUNDQUIST, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: MESSAGES, PETITIONS, COMMUNICATIONS, AND MEMORIALS TO CONGRESS 2 (1999) ("Today, [state legislatures] use memorials or less formal means of communication to urge congressional action rather than demanding it."); *Glossary of Congressional Terms*, CQ GUIDE TO CURRENT AM. GOV'T, Spring 1963, at 6, 10 ("All communications, both supporting and opposing legislation, from state legislatures are embodied in memorials."); *State Resolutions Mostly Bite Dust*, WASH. POST, May 6, 1973, at F19 ("[S]tate legislatures have taken the trouble to 'memorialize' Congress about 150 times so far this session.").

¹⁹⁵ See, e.g., S.J. Res. 28, 204th Leg., 2d Reg. Sess. (N.J. 1990), 1990 Bill Text NJ S.J.R. 28 (LEXIS) ("The government of the State of New Jersey . . . respectfully but firmly memorializes the Congress and the President of the United States to enact legislation to direct the United States Postal Service to provide for the recycling of bulk mail . . ."); 1 JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK AT THEIR ONE HUNDRED SEVENTY-THIRD SESSION 977-78 (1950) (memorializing federal government to stop "shipment of arms to the Arabs"); JOURNAL OF THE SENATE OF THE STATE OF CONNECTICUT JANUARY SESSION 1927, at 185 (1927) (proceedings of Jan. 27, 1927) (introducing and referring to committee joint resolution "requesting" that Congress repeal certain provisions of Revenue Act); JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 534 (1920) (proceedings of Mar. 5, 1920) ("urg[ing]" Congress to establish National Highway System); *Congress Gets a Plea: Florida Legislature Asks It To Censure the President*, N.Y. TIMES, Oct. 2, 1957, at 16 (describing petition asking Congress to censure President Eisenhower and "prohibit the ordering of Federal troops into a state without the approval of its governor"); Dan Harrie, *World Worries: Utah House Takes on U.N.*, SALT LAKE TRIB., Jan. 31, 1996, at A1 (urging withdrawal from United Nations); *Inquiry on Mexico Asked by Arizona: State Senate Votes Memorial Calling on Congress To Grant Borah Request*, N.Y. TIMES, Mar. 7, 1935, at 3 (reporting on Senate memorial asking for congressional action on threats to religious freedom in Mexico); Kenneth Reich, *Legislature Urges Ban on Soviet Olympians*, L.A. TIMES, Sept. 16, 1983, at B19 (describing unanimous resolution to Congress asking for ban on Soviet athletes at Olympic games in Los Angeles); S.J. Res. 44, 65th Gen. Assemb., 1st Reg. Sess. (Colo. 2005), 2005 Bill Text CO S.J.R. 44 (LEXIS) (urging Congress to amend Patriot Act to avoid infringements on civil liberties).

¹⁹⁶ E.g., S. Res. 16, 69th Biennial Sess. (Vt. 2007), 2007 Bill Text VT S.R. 16 (LEXIS) ("[T]he Senate of the State of Vermont urges Vermont's Representative in the United States House of Representatives to introduce, and Vermont's United States Senators to support, a resolution requiring the United States House Judiciary Committee to initiate impeachment proceedings against the President and the Vice President of the United States . . ."); H. Res. 92, 189th Gen. Assemb., 2005-06 Reg. Sess. (Pa. 2005), 2005 Bill Text PA H.R. 92 (LEXIS) ("[T]he House of Representatives of the Commonwealth of Pennsylvania urge[s] the United States Senators and Congressmen from Pennsylvania to support a repeal of the Federal excise tax on telecommunications.").

state legislatures, in addition to instructing legislators on pending legislation, have continued to urge senators to add new legislation to Congress's agenda.¹⁹⁷ Such resolutions inform U.S. Senators, who spend much of their time in Washington, D.C. away from their constituents, about particular local issues in need of immediate attention.¹⁹⁸ Part V.B then argues that state legislatures now view instructions as a way to communicate with, and request action from, federal representatives. Lastly, Part V.C provides an overview of possible areas of future research. For example, just as John and Samuel Adams became famous for writing instructions for their respective towns in the years leading up to the Revolution,¹⁹⁹ modern-day state legislators have used instructing resolutions to establish and publicize their record on federal issues, perhaps as a first step to running for federal office. Unknown, however, is whether such instructions measurably help the state legislator.

A. *A Snapshot of Modern Instructions*

To describe how instructing resolutions are used today, I will focus on those enacted in 2006. That year, over 250 such resolutions were enacted and transmitted to state congressional delegations.²⁰⁰ Only fifteen states failed to enact an instructing resolution in 2006, and in more than one-third of those states, legislators had introduced

¹⁹⁷ See, e.g., S. Res. 1824, 81st Leg., 2006 Reg. Sess. (Kan. 2006), 2005 Bill Text KS S.R. 1824 (LEXIS) (urging Congress to impose limits on sale or dissemination of personal data); H. Con. Res. 142, 2006 Leg., Reg. Sess. (Ky. 2006), 2006 Bill Text KY H.C.R. 142 (LEXIS) (urging Congress to criminalize disruption of military funerals); H.R. Res. 209, 93rd Leg., 2006 Reg. Sess. (Mich. 2006), 2005 Bill Text MI H.R. 209 (LEXIS) (memorializing Congress to provide "flexible funding" to deal with methamphetamine labs); S. Res. 123, 93d Leg., Reg. Sess. (Mich. 2006), 2005 Bill Text MI S.R. 123 (LEXIS) (memorializing Congress to roll back government assistance and tax breaks for oil companies); S. Res. 151, 93d Leg., Reg. Sess. (Mich. 2006), 2005 Bill Text MI S.R. 151 (LEXIS) (memorializing Congress to keep open mail processing center in Gaylord, Michigan); H. Res. 628, 189th Gen. Assemb., 2005-06 Reg. Sess. (Pa. 2006), 2005 Bill Text PA H.R. 628 (LEXIS) (memorializing Congress to increase penalties for vandalizing national war memorials); H.B. 7248, 2006 Gen. Assemb., Jan. Sess. (R.I. 2006), 2005 Bill Text RI H.B. 7248 (LEXIS) (requesting that Rhode Island's congressional delegation introduce legislation calling for nationwide boycott on all Exxon Mobil Corporation petroleum-based products).

¹⁹⁸ See, e.g., *State Resolutions Mostly Bite Dust*, *supra* note 194, at F19 ("[Memorials] indicate when something has strong support in the state legislature and among the people. . . . They can be quite persuasive. . . ." (quoting aide to Senator Milton Young of N.D.)).

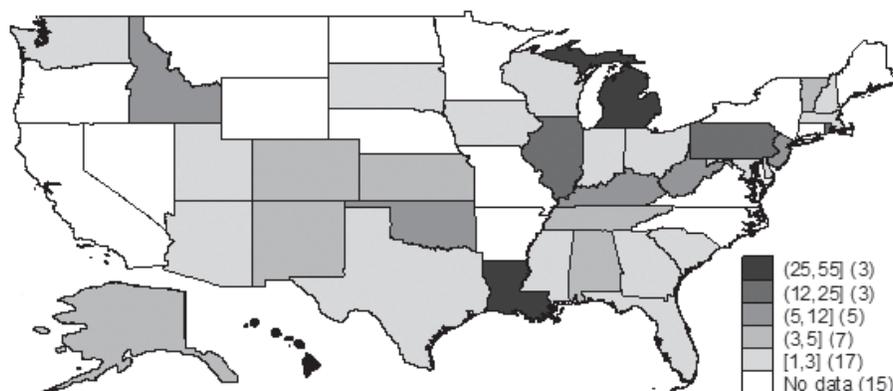
¹⁹⁹ See *supra* notes 44-47 and accompanying text.

²⁰⁰ For data collection methodology, see Appendix, *infra*. I searched the LexisNexis State Net Bill Text database for resolutions enacted in 2006 that instructed, urged, recommended, requested, petitioned, or memorialized members of Congress to perform a certain act. Two hundred fifty-three of 525 results were relevant. See Appendix, *infra* (describing data collection methodology, including electronic databases searched and search terms used).

an instructing resolution.²⁰¹ Since 2000, every state legislature has introduced at least one such resolution.²⁰²

The map below shows the wide variation by state in the number of resolutions enacted. Louisiana enacted twice as many as any other state; Michigan and Hawaii enacted about thirty each; and Illinois, Pennsylvania, and Rhode Island each enacted about fifteen.²⁰³ Every other state enacted fewer than ten instructing resolutions.²⁰⁴ In states like New York, Massachusetts, and California, which passed only one instructing resolution between the three of them,²⁰⁵ legislators may

FIGURE 1
NUMBER OF INSTRUCTING RESOLUTIONS ENACTED IN 2006



²⁰¹ Only in the legislatures of Arkansas, Connecticut, Maine, Montana, North Dakota, Nevada, New York, Oregon, and Wyoming were instructing resolutions neither introduced nor enacted. *See, e.g.*, S.J. Res. 18, 2005–06 Leg., Reg. Sess. (Cal. 2006), 2005 Bill Text CA S.J.R. 18 (LEXIS); H.B. 3160, 84th Legis. Sess., (Minn. 2006), 2005 Bill Text MN H.B. 3160; H. Con. Res. 7, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006), 2006 Bill Text MO H.C.R. 7 (LEXIS); Legis. Res. 252, 99th Leg., 2d Sess. (Neb. 2006), 2005 Bill Text NE L.R. 252 (LEXIS); H. Res. 1811, 2005 Gen. Assemb., Reg. Sess. (N.C. 2005), 2005 Bill Text NC H.B. 1811 (LEXIS); H.J. Res. 5418, 2006 Leg., 1st Special Sess., (Va. 2006), 2006 Bill Text VA H.J.R. 5148A (LEXIS).

²⁰² *See, e.g.*, S. Res. 12, 2d Extraordinary Sess. of 2003 (Ark. 2004), 2003 AR S.R. 12 (SN) (Westlaw); H.J. Res. 3, 2001 Gen. Assemb., Reg. Sess. (Conn. 2001), 2001 Bill Text CT H.J.R. 3 (LEXIS); H. Paper 1329, 120th Leg., 1st Reg. Sess. (Me. 2001), 2001 ME H.P. 1329 (SN) (Westlaw); H. Res. 2, 59th Leg., Reg. Sess. (Mont. 2005), 2005 Bill Text MT H.R. 2 (LEXIS); S.J. Res. 3, 72d Leg., Reg. Sess. (Nev. 2003), 2003 Bill Text NV S.J.R. 3 (LEXIS); S.B. 1964, 224th Ann. Legis. Sess. (N.Y. 2001), 2001 NY S.B. 1964 (SN) (Westlaw); H. Con. Res. 3004, 57th Legis. Assemb., Reg. Sess. (N.D. 2001), 2001 Bill Text ND H.C.R. 3004 (LEXIS); H. Memorial 5, 72d Legis. Assemb., Reg. Sess. (Or. 2003), 2003 Bill Text OR H.M. 5 (LEXIS); H.J. Res. 2, 55th Leg., Budget Sess. (Wyo. 2000), 2000 Bill Text WY H.J.R. 2 (LEXIS).

²⁰³ Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, NYU LAW REVIEW DATAVERSE (June 17, 2009), <http://hdl.handle.net/1902.1/12889>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

have assumed that resolutions were not needed to notify federal representatives of pressing local issues, given the far reach of the local media.

States issued instructing resolutions on a wide range of topics. In the lower houses of state legislatures, the three most popular topics were Banking and Commerce, Health, and Macroeconomics.²⁰⁶ Many of the Banking and Commerce resolutions amounted to requests for federal disaster relief enacted by Louisiana after Hurricane Katrina hit the state in late 2005.²⁰⁷ More than half of the fifty-five instructing resolutions passed by the Louisiana state legislature in 2006 dealt with the effects of the hurricane in some regard.²⁰⁸ Health resolutions touched on diverse concerns, including health care reform, substance abuse programs, health care for veterans and Native Americans, and mental health treatment.²⁰⁹ Macroeconomics resolutions addressed topics such as modification of the income tax, repeal of the inheritance tax, and deficit reduction.²¹⁰

The upper houses of state legislatures shared basically the same concerns (though they enacted half as many resolutions: 87 compared to 166).²¹¹ Both banking and health were among the three most mentioned issues.²¹² The third most popular issue was education, with many resolutions asking Congress to amend the No Child Left Behind Act or provide additional funding for it.²¹³ In both houses, more than eighty percent of the instructing resolutions were passed between February and May,²¹⁴ which are the primary months for state legislative activity.²¹⁵

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Outside of Louisiana, the Banking and Commerce category was ninth most popular—about in the middle. *Id.*

²⁰⁹ *E.g.*, Assemb. Res. 241, 211th Leg., 2d Reg. Sess. (N.J. 2005), 2004 Bill Text NJ A.R. 241 (LEXIS) (urging Congress to pass legislation establishing veterans' regional medical center in New Jersey); H. Res. 209, 93d Leg., 2006 Reg. Sess. (Mich. 2006), 2005 Bill Text MI H.R. 209 (LEXIS) (memorializing Congress to provide money to help states and local communities deal with effects of methamphetamine abuse).

²¹⁰ *E.g.*, H. Res. 225, 93d Leg., 2006 Reg. Sess. (Mich. 2006), 2005 Bill Text MI H.R. 225 (LEXIS) (memorializing Congress to permanently repeal federal inheritance tax); H. Memorial 15, 47th Leg., 2d Reg. Sess. (N.M. 2006), 2006 Bill Text NM H.M. 15 (LEXIS) (requesting New Mexico congressional delegation to support broad tax reform).

²¹¹ Terranova, *supra* note 203.

²¹² *Id.*

²¹³ *E.g.*, S. Con. Res. 1, 81st Legis. Assemb., Reg. Sess. (S.D. 2006) (enacted), 2006 Bill Text SD S.C.R. 1 (LEXIS) (urging changes to No Child Left Behind Act).

²¹⁴ Terranova, *supra* note 203.

²¹⁵ Most states begin their new legislative session in January or February and then adjourn for summer recess in April, May, or June. National Conference of State Legislators, 2009 State Legislative Session Calendar (June 24, 2009), <http://www.ncsl.org/?tabid=13524>.

B. *A Return to Madison's Conception of Instructions*

Instructing resolutions, as enacted by modern state legislatures, closely track James Madison's view of instructions in 1789: They are non-binding recommendations or suggestions with no formal legal power. When a member of the First Congress proposed to amend the Constitution to provide for "a right to instruct," Madison strongly objected, arguing that "[i]n one sense . . . we have provided for it already."²¹⁶ All people, including state legislators, could "publicly address their representatives[,] may privately advise them, or declare their sentiments by petition to the whole body . . ."²¹⁷ Madison believed that to go further—to "oblige [] [representatives] to conform to those instructions"—would have "doubtful" and potentially "dangerous" consequences.²¹⁸

Modern resolutions pose no such threat. Though they frequently call on Congress to act, these resolutions only "request" or "recommend" action.²¹⁹ Rather than compelling a certain vote, the resolutions indicate to federal legislators which local problems require federal help and convey state legislators' views on national issues. As one state legislator said, instructing resolutions "serve [] as a thermometer, . . . telling members of Congress how 'hot' an issue really is."²²⁰ Federal legislators are free to ignore these warnings, but they are taking a risk when they do so—they might get burned on election day. In the end, the people have the same right that Madison proposed in 1789: "The people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."²²¹ Contemporary legislators exercising this power can and often do "speak, [] write, or [] publish their sentiments,"²²² request "the redress of some wrong," or "unite in urging that a contemplated measure be not adopted or passed."²²³

²¹⁶ 1 ANNALS OF CONG., *supra* note 27, at 766.

²¹⁷ *Id.*

²¹⁸ *Id.* at 766–67.

²¹⁹ See *supra* notes 182–83, 191–96 and accompanying text (describing transition from commanding to requesting language); see also *State Resolutions Mostly Bite Dust*, *supra* note 194, at F19 (reporting that state instructing resolutions are frequently ignored).

²²⁰ Sandra Fabry, *Project Helps State Lawmakers Shape National Public Policy*, BUDGET & TAX NEWS, Apr. 1, 2006, available at <http://www.newcoalition.org/Article.cfm?artId=18748> (describing campaign to get states to pass instructing resolutions to provoke federal action on tax reform issues).

²²¹ 1 ANNALS OF CONG., *supra* note 27, at 451.

²²² *Id.*

²²³ BLACK'S LAW DICTIONARY 793, 897 (6th ed. 1991) (defining petition and remonstrance).

C. Future Research Possibilities

Although a close cousin of instructions remains with us today, we do not fully know why they are used, nor whether they are effective. State legislators may have a number of goals in mind when issuing instructing resolutions: They may want to compel action by federal legislators,²²⁴ gain publicity,²²⁵ signal a position on an issue important for reelection,²²⁶ lay the groundwork to run for federal office,²²⁷ or indicate the urgency of a local issue.²²⁸ It is unclear whether instructing resolutions do indeed help state legislators achieve these (or other) goals.

²²⁴ A future researcher could ask: For each enacted instructing resolution, did the requested action later occur, and if so, how long after the resolution? Some groups have claimed that instructing resolutions have led to different votes in Congress than would have otherwise occurred. *See, e.g.*, Fabry, *supra* note 220 (claiming that “[w]hen state legislative bodies take a position on an issue of national importance, and this position becomes actual legislation at the state level, Congressional delegations listen . . .”). “In 2001, for instance, the State Legislative Advisory Project asked legislators across the country to pass resolutions in support of President George W. Bush’s tax relief proposal. . . . [After sixteen states did so,] Congress passed the tax relief package even though Senate Democrats had declared it ‘dead on arrival.’” *Id.* Without evidence, however, it is hard not to discount such assertions as mere puffing about their influence on congressional policymaking.

²²⁵ *See infra* notes 229–35 and accompanying text (describing publicity benefits of instructing resolutions).

²²⁶ That is, were state legislators who sponsored numerous resolutions—or numerous well-publicized resolutions—more likely to be reelected than other legislators, controlling for other factors? Even if there is a correlation here, it could be positive or negative, and the causation could flow in either direction. Such legislators could have less competitive elections because they made a favorable impression on constituents through the use of instructing resolutions (positive correlation, instructions causing election results), or more competitive elections may spur legislators to introduce instructing resolutions (negative correlation, nature of election causes instructions).

²²⁷ Instructing resolutions may help state legislators develop a record on federal issues that are important to constituents and donors. This was a motivation behind the Americans for Tax Reform’s (ATR) “State Legislative Advisory Project,” which provided state legislators with predrafted instructing resolutions. Americans for Tax Reform, *State Legislative Advisory Project*, <http://web.archive.org/web/20080108231656/http://www.atr.org/national/lap/index.html> (last visited June 29, 2009) (noting two advantages of program: “it provides evidence of widespread support for an issue” and “it provides a record for state legislators on national issues”); AMANDA K. HYDRO, THE STATE LEGISLATIVE ADVISORY PROJECT: SETTING THE RECORD STRAIGHT 1–2, <http://www.atr.org/pdf/2005/jun/061505ed-slap.pdf> (last visited June 29, 2009) (detailing reward for passing instructing resolutions and detailing issues ATR advocated via instructing resolutions in 2002 to 2005). Evidence about the efficacy of this innovative program is lacking. The ATR itself may doubt the program’s efficacy since the program now appears to be defunct. *See* WayBackMachine Internet Archive, State Legislative Advisory Project Website, http://web.archive.org/web/*sa/http://www.atr.org/national/lap/index.html (last visited June 29, 2009) (showing website for project disappeared permanently after January 8, 2008). Another website connected to ATR, the Heartland Institute, last mentioned the State Legislative Advisory Project in April 2006. Fabry, *supra* note 220.

²²⁸ *See supra* note 220 and accompanying text.

There are many possibilities for future research. For legislators who sponsor instructing resolutions, home-state newspaper publicity can help them publicize their positions on issues important to their constituents or donors, shift blame to federal legislators, and appear to be acting to solve a problem.²²⁹ Home-state newspapers often publish stories about instructing resolutions that are adopted.²³⁰ They reported on 13% of such resolutions in 2006. This rate varied by state: Alabama newspapers reported the highest percentage of resolutions at 40% (2 of 5), followed by 38% in Kentucky (3 of 8), and 25% in Pennsylvania (4 of 12).²³¹ Though a 13% average reporting rate may seem small, newspaper coverage of state instructions may have a higher visibility than other avenues state legislators use to gain publicity.²³² Issuing an instructing resolution may be more effective than calling a news conference or issuing a press release;²³³ instructing res-

²²⁹ The sponsoring legislator also may have public benefits in mind: Instructing resolutions provide the district's federal legislators (who spend much of their time in Washington, D.C. away from their constituents) with a sense of how important certain issues are to constituents. See *supra* note 220 and accompanying text.

²³⁰ To study this question, I searched the Access World News database for all 198 instructing resolutions outside of Louisiana (an outlier because of Hurricane Katrina) for any mention of the resolution or the sponsor by any home-state newspaper. See Appendix, *infra*. The data, with citations to the newspaper articles, are publicly and permanently available online via the *N.Y.U. Law Review's* data repository. See Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, NYU LAW REVIEW DATAVERSE (June 17, 2009), <http://hdl.handle.net/1902.1/12889>

²³¹ See *id.* This is based on states with at least five resolutions, excluding Louisiana (which is an outlier because of Hurricane Katrina). In states that passed ten or more resolutions, the home-state newspapers reported fewer than 10% of the resolutions. The only exception was Pennsylvania at 25%.

²³² A related question is: Which types of instructing resolutions are most likely to get publicized? In 2006, newspapers focused heavily on land and water management, civil liberties (mostly criminalizing protests at funerals), and immigration, which were the subject of fully half of the home-state newspaper stories on instructing resolutions. In addition, 5 of 12 public lands and water management resolutions were reported (42%); 4 of 15 civil liberties resolutions were reported (27%); 4 of 15 labor and immigration resolutions were reported (27%); and 2 of 8 law and crime resolutions were reported (25%). See *id.*

²³³ One possible problem is that local newspaper reporters may not know that the state legislature passed a resolution. This problem, however, has been solved in some states by adding a provision to the resolution that requires direct notification of the media, along with the federal legislators. For example, an Ohio state instructing resolution enacted in 2006 required the Senate Clerk to directly transmit the resolution to "the news media of Ohio," in addition to the state's congressional delegation. S. Con. Res. 33, 126th Gen. Assemb., Reg. Sess. (Ohio 2006) (enacted), 2005 OH S.C.R. 33 (LEXIS). Other states' instructing resolutions in 2005 required that the press be notified. *E.g.*, S. Res. 128, 148th Gen. Assemb., Reg. Sess. (Ga. 2005) (introduced), 2005 GA S.R. 128 (NS) (Westlaw) ("B[e] it further resolved] that the Secretary of the Senate is authorized and directed to transmit an appropriate copy of this resolution to the Georgia Congressional Delegation and to the press."). Not surprisingly, a local newspaper published a blurb about the Ohio resolution and its sponsor. *Padgett Urges Congress To Recognize Ohio's Role in Lewis and Clark Expedition*, COSHOCTON TRIB., May 5, 2007, at 3A.

olutions may garner more publicity than non-print media;²³⁴ and instructing resolutions can be designed to target and appease a specific interest group that is a small segment of the electorate.²³⁵ In sum, while instructing resolutions have roots in Madison's 1798 conception of instructions, there is still much to learn about why instructing resolutions are used today.

CONCLUSION

Instructions began in England, flourished in the colonies, and were used by state legislatures in the new Union. But as states restructured their legislatures into lots or classes and held more frequent elections, instructions began to fade away, held in place only by constitutional culture. After the Civil War, which dramatically changed the balance between the state and federal governments, states no longer "instruct," but simply "request" action by their federal representatives. In many ways, these instructing resolutions, wholly lacking in the power to bind representatives, are similar to letters, phone calls, and emails from constituents. This new conception of instructions—which "instruct" only in the weak sense of the term—

²³⁴ Legislators sometimes also self-publicize their instructing resolutions. *E.g.*, John Coghill, Web Log, *Representative Coghill's Native Allotment Resolution Passes* (May 12, 2006), <http://johncoghill.blogspot.com/2006/05/representative-coghills-native.html> (blogging about passage of instructing resolution). In addition, legislators may not need publicity at the time of enactment but may want to publicize their resolutions closer to election time. *E.g.*, Gabrielle LeDouix, *Urge Congress Honor Exxon Valdez Judgement*, http://www.akrepublicans.org/ledoux/24/spst/ledo_hjr009.php (last visited June 29, 2009) (providing description, full text, and sponsor statement for resolution Rep. LeDouix sponsored); Gabrielle LeDouix, *Legislation*, <http://www.akrepublicans.org/ledoux/leg-ledoux.php> (last visited June 29, 2009) (providing list of bills and resolutions successfully passed). Also, legislators may use resolutions to force members of the other political party to declare a policy position on record.

²³⁵ For example, if the Korean War Veterans Association knows that a local legislator urged the state's federal legislators to grant the Association a Federal Charter, then that legislator will have succeeded even if no one else is aware. Both houses of Maryland's legislature passed a resolution to this effect. H.J. Res. 3, 421st Gen. Assemb., 2006 Reg. Sess. (Md. 2006), 2006 Bill Text MD H.J.R. 3 (LEXIS); S.J. Res. 8, 421st Gen. Assemb., 2006 Reg. Sess. (Md. 2006), 2006 Bill Text MD S.J.R. 8 (LEXIS) 2006 Leg., Reg. Sess. (Md. 2006). Two years later, the Association received its Federal Charter pursuant to a bill sponsored or cosponsored by both Maryland senators and six of the eight Maryland representatives (no representative from Maryland is recorded as opposing it). S. 1692, 110th Cong., 122 Stat. 2419 (2008); *Korean War Vets Granted Charter*, STAR DEMOCRAT (Easton, Md.), July 27, 2008, <http://www.stardem.com/articles/2008/07/27/news/41933.prt> (on file with the *New York University Law Review*); see also GovTrack.us, S. 1692: A Bill to Grant a Federal Charter to Korean War Veterans Association, Incorporated, <http://www.govtrack.us/congress/bill.xpd?bill=S110-1692> (last visited July 3, 2009) (listing sponsors of bill).

returns us full circle to James Madison's conception of the proper role of instructions: a right of "the people . . . to express and communicate their sentiments and wishes" to their representatives.²³⁶

²³⁶ 1 ANNALS OF CONG., *supra* note 27, at 766.

APPENDIX

This Appendix describes the data collection methodology that I used to search for all instructing resolutions enacted in 2006 and all newspaper stories about such resolutions. The two Sections below discuss these issues in turn.

A. Instructing Resolutions

The dataset consists of all 253 instructing resolutions enacted in 2006.²³⁷ I searched for resolutions that instructed, urged, recommended, requested, petitioned, or memorialized²³⁸ members of Congress to perform a certain act.²³⁹ I used the LexisNexis State Net Bill Text database, with manual limits placed on the date range, as the pre-labeled 2006 bills frequently did not match the date of passage.²⁴⁰

For each bill, I recorded the principal sponsors, the month the resolution was enacted or introduced, a synopsis of the request, and the topic. To standardize the topic category, I used the same nineteen categories that the Congressional Bills Project and the Policy Agendas Project use to categorize federal legislation.²⁴¹ Although placing resolutions into a single category is sometimes arbitrary, the fact that

²³⁷ A total of 525 results were obtained for the search for adopted resolutions in 2006, all of which were viewed, and 1109 hits were obtained for introduced resolutions, a random sample of 200 of which were viewed. I considered as irrelevant those results that did not urge or request a member of Congress to act in a certain way. I excluded resolutions that were forwarded to the state's congressional delegation but made no requests of the delegation, e.g., H.R. 1184, 94th Gen. Assemb. (Ill. 2006), 2005 Bill Text IL H.R. 1184 (LEXIS) (simply urging a federal agency to take action). While I separately listed resolutions from different houses of a legislature, I did not count a resolution and a concurrent resolution from a house separately unless the latter was adopted, in which case it was counted as legislative activity for both houses.

²³⁸ BLACK'S LAW DICTIONARY 1074 (9th ed. 2009) (defining "memorial" as "[a] written statement of facts presented to a legislature or executive as a petition").

²³⁹ The search for adopted resolutions used the following string: "resol! and ((instruct! or urge! or recommend! or request! or petition! or memorialize!) w/p ((senator! or representative! or congress!) w/p ("united states" or federal))) and (VERSION(enacted) or VERSION(adopted) or VERSION(Passed) or VERSION(engrossed))." For introduced resolutions, I replaced the VERSION references with one for "introduced" bills. Instead of trying to narrow the search for introduced bills (only one in four results contained an introduced but not adopted bill), which risked omitting results (and introducing additional sources of bias), I coded only a random subset of the bills.

²⁴⁰ The LexisNexis database TXTARC (combined archive) "contains the full text of bills for the current and past sessions in all 50 states" and is updated "[w]ithin 4-5 days of publication by the state." LexisNexis Source Information, http://w3.lexis.com/research2/source/srcinfo.do?_m=E7e672f7b542a4752978cc62588795ba&src=286356&wchp=dGLbVzz-zSkAB&_md5=842c57aa49be69a9a7e6d705789634fc (last visited September 23, 2009).

²⁴¹ Congressional Bills Project, Codebooks and Crosswalks, <http://www.congressionalbills.org/codebooks.html> (last visited Sept. 23, 2009); Policy Agendas Project, Codebooks-Policy Agendas Project, <http://www.policyagendas.org/codebooks/topicindex.html> (last visited Sept. 23, 2009).

researchers studying different hypotheses created the categories and subcategories constrained my coding.²⁴²

B. Newspaper Articles About Instructing Resolutions

I limited the search to the 198 instructing resolutions enacted in 2006 outside of Louisiana.²⁴³ For each, I searched Access World News's database to see if a major newspaper in the legislature's state mentioned the resolution's introduction or passage.²⁴⁴ Although it was difficult to develop standardized criteria to search for the mention of a resolution, I searched articles that mentioned the author of the resolution or the general topic and then winnowed the pool by reading the articles. The searches were always overbroad (and sometimes painfully so), but this was necessary to avoid missing news stories about the resolution that in fact existed.

²⁴² The standard caveat applies: A researcher who performs the data selection himself, aware of the study's hypothesis, may be influenced by unconscious bias. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 22 (1998) (“[K]nowledge of the hypothesis creates biases in the study itself in favor of finding the hypothesis to be true. Unfortunately, like most others who have published empirical studies [regarding the application of the *Chevron* doctrine], I was unable to comply with this tenet.”).

²⁴³ I excluded Louisiana because the bulk of their instructions dealt with a unique event, Hurricane Katrina, and may not be representative of the instructions usually adopted in that state.

²⁴⁴ As of September 28, 2009, Access World News contains 706 different United States newspapers, classified by the primary place of publication. Access World News, Locations: North America-Selected Source Types, http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=explore&d_loc=North%20America&d_place=f_view=loc&d_selLoc=&d_selSrc= (last visited September 28, 2009). California has 93 sources, while some states like Arizona or Hawaii have very few. *Id.* (expand “United States” results). I searched for articles published in 2005, 2006, and 2007, to catch resolutions that had been introduced in 2005 but passed in 2006, and resolutions that had been passed in late 2006. Unfortunately, Access World News does not contain every newspaper in a state. Thus, we may miss a number of stories in smaller newspapers. For example, in Alaska only three newspapers are covered—*Anchorage Daily News*, *Fairbanks Daily News-Miner*, and *Juneau Empire*, see Access World News, Locations: Alaska-Selected Source Types, http://infoweb.newsbank.com/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=explore&d_loc=AK&d_place=f_view=src&d_selLoc=&d_selSrc= (last visited September 20, 2009)—leaving out smaller newspapers or weeklies like the *Capital City Weekly*, see, e.g., *House Wants Exxon Valdez Damages Paid*, CAPITAL CITY WEEKLY (Juneau), Apr. 27, 2005, http://www.capitalcityweekly.com/stories/042705/news_20050427004.shtml (reporting passage of resolution by Representative LeDoux); Gabrielle LeDoux, *Representative Report: Fisheries Bills Pending in State Legislature*, KODIAK DAILY MIRROR Apr. 19, 2005, at 4, available at <http://www.kodiakdailymirror.com/?pid=19&id=1383> (describing legislative accomplishments). I used a separate Google search to try to catch these omissions.

