

1 democratic government: the ability of that government to alter itself to meet
2 the changing needs of those governed.

3 Thus, any assault on Article V, by failing to follow its clear and plain
4 provisions, serves to strike at the very heart of the Constitution by removing
5 that most precious ability for peaceful change. This is a most dangerous
6 trail--for the country or its government--to follow. For if a government
7 cannot respond to the evolution of its people, then it most certainly will
8 fall to their revolution.

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EVENTS LEADING UP TO THE CONVENTION OF 1787

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14 In November, 1777, the Articles of Confederation and Perpetual Union,
15 drafted by John Dickinson with alterations by the Continental Congress, were
16 adopted.³¹¹ Under the provisions of the articles, each state had one vote in
17 the national legislature, and nine of the thirteen states had to agree on such
18 matters as a declaration of war, treaties and the borrowing of money.³¹² A
19 Committee of the States was provided in the Articles to act between sessions
20 of Congress, exercising all powers except those requiring agreement by nine of
21 the thirteen states.³¹³ While there was a federal system in the Articles of

³¹¹ S. Morison, H. Commager & Leuchtenburg, A CONCISE HISTORY OF THE AMERICAN
REPUBLIC 107 (2d ed. 1983).

³¹² *Id.*

³¹³ *Id.* at 107-08

1 Confederation, the system lacked actual federal power.³¹⁴ By 1786, it was clear
2 to such national leaders as George Washington and John Adams that the union of
3 the states could not endure unless the Articles were extensively revised.³¹⁵
4 The thirteen states were suffering an economic depression that no single state
5 could handle alone, Great Britain had refused to negotiate with the
6 Confederation because of the United States' impotence internationally,³¹⁶ and
7 Shay's Rebellion had demonstrated its impotence domestically.³¹⁷

8 The states had begun to quarrel over matters of commerce. The
9 Commonwealth of Virginia invited the states to send delegates to a convention
10 at Annapolis to "take into consideration the trade of the United States."³¹⁸
11 The convention met in September 1786, but only five states sent delegates.³¹⁹
12 This number was too few to reach meaningful decisions, but under the
13 leadership of Alexander Hamilton, it adopted a report proposing that all
14 thirteen states send delegates to a convention "to devise such further
15 provisions as shall appear to them necessary to render the constitution of the
16 federal government adequate to the exigencies of the Union."³²⁰

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³¹⁴ See *Id.* at 108.
³¹⁵ *Id.* at 114.
³¹⁶ *Id.*
³¹⁷ *Id.*
³¹⁸ *Id.*
³¹⁹ *Id.*
³²⁰ *Id.*

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3 The Constitutional Convention was scheduled to begin May 14, 1787 in
4 Philadelphia, but a majority of states did not arrive until May 25.³²¹ In all,
5 twelve states sent a total fifty-five delegates to the Convention with Rhode
6 Island the single exception.³²² After the Convention elected George Washington
7 as presiding officer and appointed a rules committee,³²³ its real work began.
8 On May 29, as a starting point for discussion, Governor Edmund Randolph of the
9 Commonwealth of Virginia submitted a set of resolutions generally outlining
10 the principles on which the Virginia delegation believed the new government
11 should be based.³²⁴ This set of fifteen resolutions is known as the Virginia
12 Plan.³²⁵

13 The Virginia Plan, which was generally supported by the large states,
14 contained the basic framework of the Constitution as finally adopted,³²⁶
15 including provisions for a national legislature of two branches with members
16 of both houses apportioned according to population, a national executive, and
17 a national judiciary.³²⁷ Resistance by the smaller states to the Virginia Plan
18 was led by New Jersey which offered its own plan largely based on the existing

³²¹ 1 FARRAND, *supra* note 2 at 1. (Reference to the date of the entry and author is supplied parenthetically. As the convention was held entirely in 1787, the listed date does not include a year. Where the date is not given in a listing of several sources, reference is implicitly made to the immediately preceding date.

³²² *Id.*

³²³ 1 FARRAND, *supra* note 2, at 2 (Journal---May 25).

³²⁴ *Id.* at 16 (Journal-May 29), 20 (Madison), 23 (Yates), 27 (McHenry), 27 (Patterson).

³²⁵ *Id.* at 20-22 (Madison-May 29); 3 *Id.* at 593.

³²⁶ See generally S Morison, H. Commager & W. Leuchtenburg, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 115 (2d ed. 1983).

³²⁷ See generally *Id.*

1 Articles of Confederation.³²⁸ The two groups deadlocked on the issue of the
2 representation of the states in the national legislature.³²⁹ In July, the
3 deadlock was broken by a suggestion from Connecticut that one house of the
4 national legislature be apportioned according to population, and the other
5 house, the Senate, provide an equal vote for each state.³³⁰ This has come to be
6 known as the "Great Compromise" so often referred to in histories of the
7 Constitution. The importance of this compromise is demonstrated by the last
8 clause in Article V, which provides "that no State, without its Consent, shall
9 be deprived of its equal Suffrage in the Senate."³³¹ This clause of Article V
10 seeks to ensure that the results of the "Great Compromise" remain intact and
11 undisturbed.

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14 INTRODUCTION TO THE AMENDATORY PROVISION

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16 One subject of discussion and concern at the Constitutional Convention
17 was the matter of future amendments to the Constitution. One commentator has
18 noted that "[t]he idea of amending the organic instrument of a state is
19 peculiarly American."³³² But it was not a new concept for the delegates to the
20 Constitutional Convention. Several of the state constitutions included

³²⁸ See generally *Id.* at 115-16.

³²⁹ See generally *Id.* at 116.

³³⁰ See generally *Id.*

³³¹ U.S. CONST., art. V.

³³² Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D.L. Rev. 355, 359 (1979) [Hereinafter Voegler] (quoting *L. Orfield, THE AMENDING OF THE FEDERAL CONSTITUTION* 1 (1942)).

1 amendment procedures.³³³ Even the Articles of Confederation had its amendment
2 provision in paragraph XIII, which required proposals to be agreed to in
3 Congress and ratified by all the states:

4 "And the Articles of this confederation shall be inviolably observed by
5 every state, and the union shall be perpetual; nor shall any alteration at any
6 time hereafter be made in any of them; unless such alterations be agreed to in
7 a Congress of the united states, and be afterwards confirmed by the
8 legislatures of every state."³³⁴
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10 According to convention delegate Charles Pinckney of South Carolina,
11 "[I]t is to this unanimous consent, the depressed situation of the Union is
12 undoubtedly owing."³³⁵ The best demonstration of the futility of amending the
13 Articles of Confederation under the existing provision was the fact that Rhode
14 Island did not even send a delegate to the Philadelphia convention.³³⁶

15 The delegates took a realistic, rather than an idealistic, approach in
16 constructing their new Constitution, and this realistic approach extended to
17 the development of its amendatory article. Dickinson struck the keynote of the
18 entire Convention with his statement that:

19 "[e]xperience must be our only guide. Reason may mislead us. It was not
20 Reason that discovered the singular & admirable mechanism of the English
21 Constitution. It was not Reason that discovered or ever could have discovered
22 the odd & in the eye of those who are governed by reason, the absurd mode of
23 trial by Jury. Accidents probably produced these discoveries, and experience
24 has give [sic] a sanction to them. This then is our guide."³³⁷

25 There are two basic differences between the final version of Article V
26 of the new Constitution and the old Article XIII of the Articles of

³³³ See generally *Id.* at 359-60.

³³⁴ Martig, *Amending the Constitution, Article V; The Keystone of the Arch*, 35
Mich. L. Rev. 1253, 1255 (1937) (citing DOCUMENTS ILLUSTRATIVE OF THE
FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong.,
1st Sess. 35 (1927)).

³³⁵ 3 FARRAND, *supra* note 2, at 120.

³³⁶ See 4 *Id.* at 18-20.

³³⁷ 2 *Id.* at 278.

1 Confederation.³³⁸ First, a power is reserved to the states to call a convention
2 for proposing amendments, in addition to Congress' power to propose
3 amendments. The reason for this change was the desire by the delegates to
4 retain in the several states the power to circumvent a recalcitrant or abusive
5 Congress by initiating a convention to propose amendments,³³⁹ reflecting the
6 opinion that "the assent of the National Legislature ought not to be required"
7 to an amendment to the Constitution.³⁴⁰ The second major difference between
8 Article V and Article XIII is that proposed amendments do not require
9 unanimous consent by the several states. As was noted with the Pinckney
10 comment,³⁴¹ the poor economic conditions existing in the United States at that
11 time, which were directly attributable to the unanimous ratification provision
12 of the Articles of Confederation, made the adoption of an amending process *not*
13 requiring unanimous consent almost inevitable.

14 In reaching the final result as reflected in Article V, the delegates at
15 the Convention spent considerable discussion as to whether the assent of the
16 national legislature to amendments should be required. The final version of
17 Article V does allow Congress to propose amendments, but any such proposal
18 must still be ratified by the states, and only by the states. Thus, under *both*

³³⁸ Compare U.S. CONST., art. V, *supra* text accompanying note 2 with Articles of Confederation art. XIII, *supra* text accompanying note 334.

³³⁹ 1 FARRAND, *supra* note 2, at 203 (Madison-June 11)(Madison's comments); 2 *Id.* at 629 (Madison-Sept. 15)(Mason's comments); See also 3 *Id.* at 127 (Randolph's comments to the Virginia House of Delegates), 367-68 (Mason's account as told to Thomas Jefferson) 575 n.6 (Letter from George Read to John Dickinson of Jan. 17, 1787); 4 *Id.* at 61 (Mason's notes).

³⁴⁰ 1 *Id.* at 22 (quoting Resolution 13 of the Virginia Plan).

³⁴¹ See *supra* text accompanying notes 334-335.

1 the Articles of Confederation and the United States Constitution, Congress has
2 never been granted the power to propose *and* ratify amendments.³⁴²

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THE AMENDATORY PROVISION: THE RECORD

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May 29---June 11: The Virginia Plan

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10 As noted previously, the Virginia Plan served as the starting point for
11 discussion at the Convention.³⁴³ This plan prescribed in general terms the
12 principles on which the Virginia delegation believed the new government should
13 be based.³⁴⁴ Resolution 13 of the Virginia plan addressed the issue of future
14 amendments to the new Constitution:

15 "13. Resd. that provision ought to be made for the amendment of the
16 Articles of Union whensoever it shall seem necessary, and that the assent of
17 the National Legislature ought not be required thereto."³⁴⁵

18 The significance of this early statement was the demonstration that a
19 major purpose of the amendatory article was to provide a means for amending
20 the Constitution *despite* congressional inaction or opposition. This fact is
21 especially significant because much of the final text of the Constitution was
22 derived from the principles enunciated in the Virginia Plan.³⁴⁶

³⁴² See *supra* text accompanying notes 2,334.

³⁴³ 1 FARRAND, *supra* note 2, at 16 (Journal-May 29), 20 (Madison), 23 (Yates),
27 (McHenry), 27 (Patterson).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 22 (Madison-May 29).

³⁴⁶ 3 *Id.* at 593.

1 However, the Virginia Plan was not the only plan submitted for
2 discussion by the delegates. Charles Pinckney of South Carolina submitted a
3 proposed constitution,³⁴⁷ a copy of which no longer exists.³⁴⁸ Insofar as can be
4 determined, the Pinckney Plan provided little in the direction of the
5 amendment process:
6 "[XVI] The assent of the Legislature of States shall be sufficient to
7 invest future additional Powers in U.S. in C. Ass. and shall bind the whole
8 confederacy."³⁴⁹

9 Pinckney later maintained that his plan envisioned Congress as the
10 proponent of amendments,³⁵⁰ but there is nothing in the text of his amendatory
11 provision to indicate how amendments were to be proposed.

12 Another proposal, distributed to several members of the Convention but
13 never formally put before it,³⁵¹ was written by Alexander Hamilton. Unlike the
14 Virginia Plan which made it clear that Congress was not to have any power to
15 interfere with the process, Hamilton's draft delegated the ability to propose
16 amendments to the national legislature:

17 "This Constitution may receive such alterations and amendments as may be
18 proposed by the Legislature of the United States, with the concurrence of two-
19 thirds of the members of both Houses, and ratified by the Legislatures of, or
20 by Conventions of deputies chosen by the people in, two-thirds of the States
21 composing the Union."³⁵²

22 While there was disagreement between those delegates favoring the
23 exclusion of Congress from the amendment process (as demonstrated by the

³⁴⁷ 1 *Id.* at 16 (Journal-May 29), 23(Madison), 24 (Yates).

³⁴⁸ 3 *Id.* at 595. There is great confusion by the lack of a correct copy of the so-called Pinckney Plan. *See generally Id.* at 595, 601-04. The information quoted is from the combination of all the sources of information available in 1911 when Professor Farrand combined to reconstruct what he believed to be the Pinckney Plan in its original form. *See Id.* at 604.

³⁴⁹ *Id.* at 609. The words "in C. ass." apparently stand for "in Congress assembled."

³⁵⁰ *Id.* at 120.

³⁵¹ *Id.* at 617.

³⁵² *Id.* at 630.

1 Virginia Plan), and those delegates who wanted Congress to originate all
2 amendments (as called for in Hamilton's plan), it is clear even at this early
3 state in the creation of Article V, that the subject matter of the amendment
4 was immaterial. What concerned the Framers was the *process of amendment* which,
5 from the earliest concept to completion, remained a *numeric count causing the*
6 *amendment process to occur, rather than the subject matter of the amendment*
7 *being the basis upon which an amendment was processed.*³⁵³

8 On May 30, the delegates began their discussions focusing on the
9 resolutions presented in the Virginia Plan.³⁵⁴ On June 5, the discussion
10 reached Resolution 13, Virginia's proposal regarding the amendment process.³⁵⁵

11 As stated above, the Virginia Plan provided that:

12 "[a] provision ought to be made for amendment of the Article of Union
13 whensoever it shall seem necessary, and the assent of the National Legislature
14 ought not to be required thereto."³⁵⁶

15 The first delegate to address the issue was Charles Pinckney who stated
16 quite simply he "doubted the propriety or necessity of it."³⁵⁷ However,

17 Elbridge Gerry spoke in favor of the resolution, stating:

18 "The novelty & difficulty of the experiment requires periodical
19 revision. The prospect of such a revision would also give intermediate
20 stability to the Govt. Nothing has yet happened in the States where this
21 provision existed to proves [sic] its impropriety."³⁵⁸

³⁵³ See *infra* text accompanying note 513.

³⁵⁴ 1 *Id.* at 30 (Journal-May 30), 33 (Madison), 38 (Yates), 40 (McHenry).

³⁵⁵ *Id.* at 117 (Journal-June 5), 121 (Madison), 126 (Yates).

³⁵⁶ *Id.* at 22 (Madison-May 29). Although Madison's notes of June 5 show a slightly different wording of Resolution 13, it is apparent-by the return to the original language of the Resolution when quoted later in the Journal and by Madison-that Madison was paraphrasing the content of the resolution in his June 5 notes. See *Id.* at 22 (Madison-May 29), [2] (Madison-June 5), and 194 (Journal-June 11), 227 (Journal-June 13), 231 (Journal-June 13), 237 (Madison-June 13); 2 *Id.* at 84 (Journal-July 23), 133 (Comm. Detail, Doc. I).

³⁵⁷ 1 *Id.* at 121 (Madison-June 5).

³⁵⁸ *Id.* at 122 (Madison-June 5).

1 Following these comments, the delegates postponed the matter for further
2 discussion.³⁵⁹

3 On June 11, the delegates again discussed Resolution 13.³⁶⁰ According to
4 Madison's notes, "several members did not see the necessity of the
5 [Resolution] at all, nor the propriety of making the consent of the Natl.
6 Legisl. unnecessary."³⁶¹ However, Colonel Mason, "urged the necessity of such a
7 provision"³⁶² stating:

8 "The plan now to be formed will certainly be defective, as the
9 confederation has been found on trial to be. Amendments therefore will be
10 necessary, at it will be better to provide for them, in an easy, regular and
11 constitutional way than to trust to chance and violence. It would be improper
12 to require the consent of the Natl. Legislature, because they may abuse their
13 power, and refuse their consent on that very account. The opportunity for such
14 an abuse, may be the fault of the Constitution calling for amendmt."³⁶³
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16 Governor Randolph "enforced" Colonel Mason's arguments.³⁶⁴ At this point
17 the delegates unanimously agreed to the portion of Resolution 13 stating that
18 "provision ought to be made for the amendment of the Articles of the Union
19 whensoever it shall seem necessary,"³⁶⁵ but they postponed a decision on
20 whether the assent of the national legislature would be required.³⁶⁶ Thus, when
21 Governor Randolph reported on the state of the resolutions several days later,

³⁵⁹ *Id.* at 117 (Journal-June 5), 122 (Madison), 126 (Yates).

³⁶⁰ *Id.* at 194 (Journal-June 11), 202-03 (Madison), 206 (Yates).

³⁶¹ *Id.* at 202 (Madison-June 11). Madison did not state which convention members spoke against the resolution. But based on comments made regarding this provision at other points in the convention, the most like opponent was Charles Pinckney. See *Id.* at 121 (Madison-June 5).

³⁶² *Id.* at 202 (Madison-June 11).

³⁶³ *Id.* at 202-03.

³⁶⁴ *Id.* at 203.

³⁶⁵ *Id.* at 194 (Journal-June 11), 203 (Madison), 206 (Yates); *Id.* at 22 (Madison-text of resolution).

³⁶⁶ *Id.* at 194 (Journal-June 11), 203 (Madison), 206 (Yates).

1 the text of the resolution concerning the amendment process (now numbered as
2 Resolution 17) was as follows:

3 "Resolved that provision ought to be made for the amendment of the
4 articles of union whensoever it shall seem necessary."³⁶⁷
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7 *June 29----July 23: Miscellaneous Concerns*

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10 On June 29, the issue of the appropriate amendment process was discussed
11 during the debate on whether each state should have an equal vote in the
12 second house (i.e., the Senate).³⁶⁸ During the discussion of this issue, Judge
13 Oliver Ellsworth of Connecticut stated he would not be surprised if the new
14 Constitution should require amendment in the future, even though "we made the
15 general government the most perfect in our opinion..."³⁶⁹ "Let a strong
16 Executive, a Judiciary & Legislative power be created," Judge Ellsworth said,
17 "but Let not too much be attempted; by which all may be lost."³⁷⁰ Ellsworth
18 described himself as "not in general a half-way man, yet [I] prefer[] doing
19 half the good we could, rather than do nothing at all. The other half may be
20 added, when the necessity shall be more fully experienced."³⁷¹

³⁶⁷ *Id.* at 227 (Journal-June 13), 231 (Journal-slight changes in punctuation and capitalization), 237 (same). It is at this point in the convention that the committee that had been working on the resolutions rose, with the resolution now being considered by the entire convention sitting as a committee of the whole House. *Id.* at 224 (Journal-June 13), 241 (Journal-June 15).

³⁶⁸ *Id.* at 469 (Madison-June 29), 474-75 (Yates), 478 (King).

³⁶⁹ *Id.* at 475 (Yates-June 29).

³⁷⁰ *Id.* at 469 (Madison-June 29).

³⁷¹ *Id.*

1 James Madison spoke in response to Judge Ellsworth regarding the need to
2 continually strive for the best plan of government and the difficulty other
3 governments had experienced in changing their form of government once it was
4 in place:

5 "I would always exclude inconsistent principles in framing a system of
6 government. The difficulty of getting its defects amended are great and
7 sometimes insurmountable. The Virginia state government was the first which
8 made, and through its defects are evident to every person, we cannot get it
9 amended. The Dutch have made four several attempts to amend their system
10 without success. The few alterations made in it were by tumult and faction,
11 and for the worse."³⁷²

12 Another delegate who recorded Madison's comments used them to
13 demonstrate a concern about the potential danger of relying on future
14 amendments, arguing the delegates should continue to struggle to create the
15 best possible structure of government:

16 "The Gentleman from Connecticut has proposed doing as much at this Time
17 as is prudent, and leavg. Future amendments to posterity--this a dangerous
18 Doctrine--the Defects of the Amphictionick League were acknowledged, but they
19 never cd. Be reformed. The U Netherlands have attempted four several Times to
20 amend their Confederation, but have failed in each Attempt--The fear of
21 Innovation, and the Hue & Cry in favor of the Liberty of the people will
22 prevent the necessary Reforms--[.]"³⁷³

23 Despite these expressed concerns, Resolution 17--"That provision ought to
24 be made for the amending of the articles of union, whensoever it shall seem
25 necessary"--³⁷⁴ was considered by the entire Convention for the first time on
26 July 23.³⁷⁵ The Resolution was passed unanimously, apparently without
27 discussion.³⁷⁶

³⁷² *Id.* at 475-76 (Yates--June 29).

³⁷³ *Id.* at 478 (King--June 29). Madison did not record his own version of his
comments, apparently due to the adjournment of the convention for the day
immediately after Madison spoke. *Id.* at 476 (Yates--June 29).

³⁷⁴ 2 *Id.* at 84 (Journal--July 23), 87 (Madison).

³⁷⁵ *Id.*

³⁷⁶ 2 *Id.* at 84 (Journal--July 23), 87 (Madison).

1 The resolution was discussed, however, in relation to another resolution
2 that "the legislative, Executive, and Judiciary Powers within the several
3 States, and of the national Government, ought to be bound by oath to support
4 the articles of union."³⁷⁷ During the discussion, James Wilson of Pennsylvania
5 said, "he was never fond of oaths" and that "[h]e was afraid they might too
6 much trammel the...Members of the Existing Govt in case future alterations
7 should be necessary; and prove an obstacle to Resol: 17, just agd. to."³⁷⁸
8 Nathaniel Gorham of Massachusetts said he could not see how taking an oath
9 would hinder future changes to the Constitution:
10 "Mr. Ghorum [sic] did not know that oaths would be of much use; but
11 could see no inconsistency between them and the 17. Resol: or any regular
12 amendt. Of the Constitution. The oath could only require fidelity to the
13 existing Constitution. A constitutional alteration of the Constitution, could
14 never be regarded as a breach of the Constitution, or of any oath to support
15 it."³⁷⁹
16 Elbridge Gerry of Massachusetts agreed with Gorham and added that he
17 considered oaths as having value by impressing upon the officers of the new
18 government the fact that the state and federal governments were not distinct
19 governments but were instead components of a general system, thereby
20 preventing the preference that existed in favor of the state governments.³⁸⁰
21 The resolution relating to oaths was then passed without objection.³⁸¹

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³⁷⁷ 2 *Id.* at 84 (Journal–July 23); 1 *Id.* at 227 (Journal–13)(original text of resolution), 231 (Journal) (changes in capitalization), 237 (Journal)(changes in capitalization and abbreviations); 2 *Id.* at 87 (Madison–July 23)(changes in capitalization and abbreviations).

³⁷⁸ 2 *Id.* at 87 (Madison–July 23).

³⁷⁹ 2 *Id.* at 87–88 (Madison–July 23).

³⁸⁰ 2 *Id.* at 88 (Madison–July 23).

³⁸¹ *Id.*; See also *Id.* at 84 (Journal–July 23).

July 26----August 6: Committee of Detail

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On July 26, the resolutions voted on by the convention were submitted to the Committee of Detail³⁸² whose job it was to transform the principles set out in the resolutions into a detailed and workable constitution. The committee, consisting of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania,³⁸³ took approximately one week to complete their work.³⁸⁴ During this week, the committee had before it numerous proposals relating to the amendment process,³⁸⁵ including the proposals contained in the Virginia Plan³⁸⁶ and the Pinckney Plan.³⁸⁷

The language of the Virginia proposal remained the same as its May 20 introductory version, which was as follows: "Resolved That Provision ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary."³⁸⁸ The original Virginia proposal ended this quote with the proviso

³⁸² *Id.* at 117 (Journal–July 26).
³⁸³ *Id.* at 97 (Journal–July 24), 106 (Madison).
³⁸⁴ *See generally Id.* at 117 (Journal–July 26), 175 (McHenry–Aug. 4), 176 (Journal–Aug. 6).
³⁸⁵ *See generally Id.* at 133, 136, 148, 152, 159, 174; 3 *Id.* at 609.
³⁸⁶ 2 *Id.* at 133 (Comm. Of Detail, Doc. I).
³⁸⁷ *Id.* at 136 (Comm. Of Detail, Doc. III); *See also Id.* at 98 (Journal–July 24) 3 *Id.* at 609 (Pinckney Plan). The New Jersey Plan, also known as the Patterson Proposals, 2 *Id.* at 98 (Journal–July 24), was also before the committee. *Id.* at 98, 134 n. 3 (Comm. Of Detail, Doc. III) However, the New Jersey Plan did not contain a provision for future amendments to the proposed constitution. *See* 1 *Id.* at 242–45 (Madison–June 15), 247 (King); *See also* 3 *Id.* at 611–13, 615–16.
³⁸⁸ 2 *Id.* at 133 (Comm. Of Detail, Doc. I); *See also* 1 *Id.* at 22 (Madison–May 29), 194 (Journal–June 11), 203 (Madison–June 11), 227, 231 (Journal–June 13); 237 (Madison–June 13); 2 *Id.* at 84 (Journal–July 23), 87 (Madison–July 23).

1 "that the assent of the National Legislature ought not to be required
2 thereto."³⁸⁹ The convention had voted to adopt the first part of the Virginia
3 Resolution,³⁹⁰ but discussion on the second part of the Resolution was
4 postponed.³⁹¹

5 Due to missing documentation, Professor Farrand was forced to attempt a
6 reconstruction of the original text of the Pinckney amendatory provision. He
7 determined the text most likely read:

8 "The assent of the Legislature of States shall be sufficient to invest
9 future additional Powers in the U.S. in C. ass. and shall bind the whole
10 confederacy."³⁹²

11 The only surviving document of the portion of the Pinckney Plan before
12 the Committee of Detail is an outline of that Plan,³⁹³ containing only the
13 following reference to amendment:

14 "24. The Articles of Confederation shall be inviolably observed, and the
15 Union shall be perpetual; unless altered as before directed."³⁹⁴

16 It is unclear what was meant by the term "unless altered as before
17 directed," but it is reasonable to assume this language referred to some other
18 reference in the Plan now lost to history.

19 The next relevant document that does exist in the records of the
20 Committee of Detail is a draft copy of portions of the Constitution before the
21 Committee. This draft reveals substantial information on the thought processes
22 of the Committee through the editing process contained in the document itself,

³⁸⁹ 1 *Id.* at 22 (Madison–May 29), 121 (Madison–June 5), 194 (Journal–June 11),
202–03 (Madison–June 11).

³⁹⁰ *Id.* at 194 (Journal–June 11), 203 (Madison), 206 (Yates); 2 *Id.* at 84
(Journal–July 23), 87 (Madison).

³⁹¹ 1 *Id.* at 194 (Journal–June 11), 203 (Madison).

³⁹² 3 *Id.* at 609.

³⁹³ 2 *Id.* at 129, 134 (Comm. Of Detail. Doc. III); *See generally* 3 *Id.* at 595,
601–09.

³⁹⁴ 2 *Id.* at 136 (Comm. Of Detail, Doc. III).

1 especially editing related to the introduction of the idea of a convention to
2 propose amendments for proposing amendments to the Constitution. These
3 references also demonstrate the thought processes surrounding whether changes
4 to the Constitution by amendment would be made only one at a time.

5 The document, initially in the handwriting of Edmund Randolph, read:
6 "An alteration may be effected in the articles of union, on the
7 application of two-thirds of the state legislatures."³⁹⁵

8 Randolph subsequently struck out the words "two-thirds" and replaced
9 them with the word "nine",³⁹⁶ then apparently allowed John Rutledge to make
10 suggestions and changes on the document. Rutledge changed the language back to
11 two-thirds of the state legislatures and then, significantly, added the first
12 reference to the use of a convention as part of the amendment process.³⁹⁷

13 Rutledge's version now read as follows:

14 "An alteration may be effected in the articles of union, on the
15 application of 2/3d of the state legislatures by a Covn."³⁹⁸

16 Rutledge then crossed out the entire language quoted above and replaced
17 it with the following:

18 "on appln. of 2/3ds of the State Legislatures to the Natl. Leg. They
19 call a Convn. To revise or alter ye. Articles of union."³⁹⁹

20 Rutledge's revisions were included in the subsequent drafts (now in
21 Wilson's handwriting) created by the Committee of Detail, but now with an
22 important addition:

23 "This Constitution ought to be amended whenever *such Amendment* shall be
24 necessary; and on Application of the Legislatures of two-thirds of the Sates

³⁹⁵ *Id.* at 137 n.6, 148 (Comm. Of Detail, Doc. IV)(emphasis added).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* (emphasis added).

³⁹⁹ *Id.*

1 of the Union, the Legislature of the United States shall call a Convention for
2 that Purpose."⁴⁰⁰

3 On August 6, the first draft of the Constitution was submitted to the
4 Convention by the Committee of Detail.⁴⁰¹ The amendatory process contained in

5 Article XIX of the draft provided:

6 "On the application of the Legislatures of two-thirds of the States of
7 the Union, for an amendment of this Constitution, the Legislature of the
8 United States shall call a Convention for that purpose."⁴⁰²

9 Once again reference was made to "an amendment" and a convention "for
10 that purpose."

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August 30----September 10: Article XIX

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20 On August 30, the convention took up the matter of Article XIX.⁴⁰³ On

21 this date, there was little discussion on the proposal. Gouverneur Morris of

22 Pennsylvania suggested "that the Legislature should be left at liberty to call

⁴⁰⁰ *Id.* at 152 n. 14, 159 & n.16 (Comm. Of Detail, Doc. VIII) (emphasis added),
174 (a similarly worded draft proposed by the Committee of Detail).

⁴⁰¹ *Id.* at 176 (Journal-August 6), 177 (Madison), 190 (McHenry).

⁴⁰² *Id.* at 188 (Madison-Aug. 6)(emphasis added).

⁴⁰³ *Id.* at 461 (Journal-Aug. 30), 467-68 (Madison).

1 a Convention, whenever they please."⁴⁰⁴ The proposal was passed as submitted
2 without objection with this suggestion by Morris being turned down by the
3 delegates.⁴⁰⁵

4 As passed, the amendatory article allowed only the states to initiate
5 the amendment process, and the representatives of the states to draft the
6 amendment on that issue at a convention. The terms of the August 30 version
7 left Congress without the ability to propose amendments; instead, Congress was
8 given the ministerial duty to call a convention on the application or request
9 of two-thirds of the state legislatures. Also, Article XIX did not explicitly
10 require ratification of the proposed amendment.

11 On September 10, Elbridge Gerry of Massachusetts moved to reconsider
12 Article XIX.⁴⁰⁶ Gerry expressed concern that a majority of States could,
13 through the convention process, "bind the Union to innovations that may
14 subvert the State-Constitutions altogether."⁴⁰⁷ Alexander Hamilton of New York
15 seconded the motion to reconsider, rejecting Gerry's concerns, but asserting
16 Congress should also have the power to call a convention:

17 "[Hamilton] did not object to the consequences stated by Mr. Gerry—There
18 was no greater evil in subjecting the people of the U.S. to the major voice
19 than the people of a particular State—It had been wished by many and was much
20 to have been desired that an easier mode for introducing amendments had been
21 provided by the articles of Confederation. It was equally desirable now that
22 an easy mode should be established for supplying defects which will probably
23 appear in the new System. The mode proposed was not adequate. The State
24 Legislatures will not apply for alterations but with a view to increase their
25 own powers—The National Legislature will be the first to perceive and will be
26 most sensible to the necessity of amendments, and ought also to be empowered,
27 whenever two-thirds of each branch should concur to call a Convention--- There

⁴⁰⁴ *Id.* at 468 (Madison—Aug. 30).

⁴⁰⁵ *Id.* at 461 (Journal—Aug 30), 468 (Madison—Aug 30).

⁴⁰⁶ *Id.* at 555 (Journal—Sept. 10), 557 (Madison—Sept. 10).

⁴⁰⁷ *Id.* at 557-58 (Madison---Sept 10.)

1 could be no danger in giving this power, as the people would finally decide in
2 the case."⁴⁰⁸

3 James Madison next spoke on the subject stating his concerns on the lack
4 of specificity in the terms employed in Article XIX: "Mr. Madison remarked on
5 the vagueness of the terms 'call a Convention for the purpose' as sufficient
6 reason for reconsidering the article. How was a Convention to be formed? By
7 what rule decide? What the force of its acts?"⁴⁰⁹

8 The Convention then voted to reconsider the amendatory provision.⁴¹⁰ Many
9 delegates were persuaded by Alexander Hamilton's argument that the national
10 legislature should be able to propose amendments directly, without the need
11 for calling a convention to propose amendments.⁴¹¹ Roger Sherman of Connecticut
12 then moved to add the following italicized words to Article XIX:

13 "On the application of the Legislatures of two-thirds of the States of
14 the Union, for an amendment of this Constitution, the Legislature of the
15 United States shall call a Convention for that purpose *or the Legislature may*
16 *propose amendments to the several States for their approbation, but no*
17 *amendments shall be binding until consented to by the several States.*"⁴¹²

18 By this change, the states continued to have the right to apply for a
19 convention for proposing "an amendment" to the Constitution, but now Congress
20 would be given the power to directly propose "amendments" to the states for
21 ratification. Sherman's motion was seconded by Elbridge Gerry of
22 Massachusetts.⁴¹³

⁴⁰⁸ *Id.* at 558 (Madison---Sept. 10).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 555 (Journal), 558 (Madison-Sept 10).

⁴¹¹ *Id.* at 558-59 (Madison--Sept. 10).

⁴¹² *Id.* at 555 (Journal---Sept. 10), 558 (Madison---Sept. 10),188 (Madison---
Aug. 6)(previous text of art. XIX)(emphasis added).

⁴¹³ *Id.* at 558 (Madison---Sept. 10).

1 However, the delegates quickly realized the language of this addition
2 would result in a return to the requirement contained in the Articles of
3 Confederation requiring unanimous approval of the states in order to
4 effectuate a change in the new Constitution. James Wilson therefore
5 immoderately moved for the insertion of the words "two-thirds," so that
6 amendments would be binding upon the consent of two-thirds of the several
7 states.⁴¹⁴ Wilson's motion was narrowly defeated (by a vote of five states in
8 favor and six opposed).⁴¹⁵ Wilson then moved to alter the Resolution by
9 inserting the words "three-fourths" of the several states, which was passed
10 without objection.⁴¹⁶

11 Now, Article XIX read as follows:

12 "On the application of the Legislatures of two-thirds of the States in
13 the Union, for *an amendment* of this Constitution, the Legislature of the
14 United States shall call a Convention *for that purpose* or the Legislature may
15 propose *amendments* to the several States for their approbation, but no
16 amendments shall be binding until consented to by three-fourths of the several
17 States."⁴¹⁷

18 Under this version, either the national legislature or a convention
19 could propose an amendment to the Constitution (though it could be technically
20 argued at this point the States only had the power to propose *an amendment*
21 while the Congress had the power to propose *amendments*), with all such
22 amendments having to be approved by three-fourths of the states.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 558-59.

⁴¹⁶ *Id.* at 555 (Journal---Sept. 10), 559(Madison---Sept 10).

⁴¹⁷ *Id.* at 188 (Madison---Aug. 6)(previous text of art. 19), 555 (Journal-Sept. 10)(added language), 558-59 (Madison---Sept 10)(same)(emphasis added).

1 James Madison next proposed a change in the content of the amendatory
2 provision, moving to postpone consideration of the Article presently before
3 the convention as amended and to instead take up the following proposal:
4 "The Legislature of the U--- S---- whenever two-thirds of both Houses
5 shall deem necessary, or on the application of two-thirds of the Legislatures
6 of the several States, shall propose *amendments* to this Constitution which
7 shall be valid to all intents and purposes as part thereof, when the same
8 shall have been ratified by three-fourths at least of the Legislatures of the
9 several States, or by Conventions in three-fourths thereof, as one or the
10 other mode of ratification may be proposed by the Legislature of the U.S[.]"⁴¹⁸

11 This version of the amendatory process marks the first appearance of the
12 provision charging Congress with the duty to choose between the two methods of
13 ratification, either by three-fourths of the state legislatures or by three-
14 fourths of conventions held in each state for that purpose.

15 More significantly, Madison's new version deleted all reference to a
16 convention for proposing "an amendment," thus making it necessary for all
17 proposals for "amendments" to come from the national legislature.

18 There was, apparently, no discussion on this significant change in the
19 amendatory process. This may be somewhat surprising, especially in the light
20 of the second clause of the Virginia Plan: "the assent of the National
21 Legislature ought not to be required."⁴¹⁹ The discussion of this assent had
22 been repeatedly postponed by the delegates,⁴²⁰ despite Colonel Mason's previous
23 statements opposing the requirement for the consent of the national
24 legislature.⁴²¹

⁴¹⁸ *Id.* at 555 (Journal---Sept. 10), 559 (Madison---Sept. 10)(emphasis added).

⁴¹⁹ 1 *Id.* at 22 (Madison-May 29).

⁴²⁰ *Id.* at 117 (Journal---June 5), 122 (Madison---June 5), 126 (Yates---June 5), 194 (Journal---June 11), 194 (Madison---June 11).

⁴²¹ *Id.* at 202-03 (Madison---June 11). See *supra* text accompanying note 363.

1 As the delegates were in the process of finishing consideration of the
2 few remaining proposals submitted to them by the Committee of Detail, the job
3 of putting together the completed work of the Convention into a cohesive draft
4 Constitution was given to the Committee of Style (also known as the Committee
5 of Revision),⁴²⁶ consisting of William Johnson of Connecticut, Alexander
6 Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of
7 Virginia, and Rufus King of Massachusetts.⁴²⁷ On September 12, the Committee of
8 Style delivered its report of the Constitution as revised and arranged.⁴²⁸ It
9 was here that the amendatory provision was renumbered Article V.⁴²⁹ The revised
10 article read as follows:

11 "V. *The Congress*, whenever two-thirds of both houses shall deem
12 necessary, or on the application of two-thirds of the legislatures of
13 the several states, *shall propose amendments* to this constitution, which
14 shall be valid to all intents and purposes, as part thereof, when the
15 same shall have been ratified by three-fourths at least of the
16 legislatures of the several states, or by conventions in three-fourths
17 thereof, as the one or the other mode of ratification may be proposed by
18 the Congress; Provided, that no amendment which may be made prior to the
19 year 1808 shall in any manner affect the and sections of article..."⁴³⁰

20 The Committee had made minor stylistic changes, but otherwise had
21 followed the last version (Madison's) approved by the delegates.⁴³¹ This new
22 version required all amendments to be proposed by Congress.

23 On September 15, the convention reached discussion of Article V after
24 discussing the first four articles.⁴³² Roger Sherman began the discussion by

⁴²⁶ *Id.* at 582 (Journal---Sept. 12).

⁴²⁷ *Id.* at 547 (Journal---Sept. 8), 553 (Madison---Sept. 8).

⁴²⁸ *Id.* at 582 (Journal---Sept. 12), 585 (Madison---Sept. 12).

⁴²⁹ *Id.* at 602 (Comm. On Style).

⁴³⁰ *Id.*(footnotes omitted)(emphasis added). *See infra* text accompanying note 418.

⁴³¹ *Compare Id.* at 555 (Journal---Sept. 10), 559 (Madison---Sept. 10) *with Id.* at 602 (Comm. on Style).

⁴³² *Id.* at 629 (Madison---Sept. 15).

1 reiterating Elbridge Gerry's⁴³³ fear that a majority of states might use

2 Article V to the detriment of other states objecting to the amendment:

3 "Mr. Sherman expressed his fears that three-fourths of the States might
4 be brought to do things fatal to particular States, as abolishing them
5 altogether or depriving them of their equality in the Senate. He thought it
6 reasonable that the proviso in favor of the State importing slaves should be
7 extended so as to provide that no States should be affected in its internal
8 police, or deprived of its equality in the Senate."⁴³⁴

9 Colonel Mason also spoke against the amendatory article. He focused on
10 his concern that Congress could prevent the proposing of amendments. On the
11 back of his copy of the draft Constitution, Mason wrote the following:

12 "Article 5th. By this Article Congress only have the Power of proposing
13 Amendments at any future time to this constitution, & shou'd it prove ever so
14 oppressive, the whole people of America can't make, or even propose
15 Alterations to it; a Doctrine utterly subversive of the fundamental Principles
16 of the Rights & Liberties of the people[.]"⁴³⁵

17 Mason's notes served as the basis for the comments he gave on the
18 convention floor, which were recorded by Madison:

19 "Col. Mason thought the plan of amending the Constitution exceptionable
20 & dangerous. As the proposing of amendments is in both the modes to depend,
21 the first immediately, and in the second, ultimately, on Congress, no
22 amendments of the proper kind would ever be obtained by the people, if the
23 Government should become oppressive, as he verily believed would be the
24 case."⁴³⁶

25 As a result of these concerns, Gouverneur Morris of Pennsylvania and
26 Elbridge Gerry of Massachusetts "moved to amend the article so as to *require a*
27 *Convention on application of 2/3 of the Sts...*"⁴³⁷

28 James Madison then addressed the motion:

29 "Mr. Madison did not see why Congress would not be as much bound to
30 propose amendments applied for by two-thirds of the States as to call a
31 Convention on the like application. He saw no objection however against

⁴³³ *Id.* at 557-58 (Madison----Sept. 10), 629 (Madison---Sept. 15).

⁴³⁴ *Id.* at 629 (Madison---Sept. 15).

⁴³⁵ 4 *Id.* at 59 n.1, 61; 2 *Id.* at 637 n. 21 (stating that the quoted language "was written by Mason on the blank pages of his copy of the draft of September 12").

⁴³⁶ 2 *Id.* at 629 (Madison---Sept. 15). *See infra* text accompanying notes 363,418,430,435.

⁴³⁷ *Id.* (*emphasis added*).

1 providing for a Convention for the purpose of amendments, except only that
2 difficulties might arise as to the form, the quorum &c. which in
3 Constitutional regulations ought to be as much as possible avoided."⁴³⁸

4 The Convention unanimously agreed to the motion by Morris and Gerry,⁴³⁹
5 thus acceding to Mason's request to re-insert the convention method of
6 amending the constitution into Article V.

7 There is further evidence supporting the desire of the delegates to have
8 a convention provision within the Constitution. This involves the attempt by a
9 minority of delegates to remove the provision from the proposed draft
10 constitution. The account was provided by Thomas Jefferson as told to him
11 years later by George Mason:

12
13 "Anecdote. The constn. As agreed at first was that amendments might be
14 proposed either by Congr. or the legislatures a commee was appointed to digest
15 & redraw. Gov. Morris & King were of the commee. One mornng. Gov. M. Moved an
16 instrn for certain alterns (not ½ the members yet come in) in a hurry &

⁴³⁸ *Id.* at 629-30. In his comments, Madison made a distinct difference as to the meaning of Article V as a result of the Gerry-Morris amendment. *Previous* to the amendment by Gerry-Morris, Madison interpreted Article V to mean that Congress was bound to propose *amendments* when applied for by two-thirds of the states. ("Congress would be as much bound to *propose amendments applied for* by two-thirds of the States") *After* the Gerry-Morris amendment, Congress was bound to call a convention on two-thirds applications by the states. ("as to call a Convention on the like application") It is clear Madison realized the intent and purpose of the applications by the states had changed from the states having the power to propose *amendments* to *applying for a convention which then proposed amendments*. Thus, the convention *acquired the power to propose amendments, and the states acquired the power to apply for a convention*. Further, Madison also realized that "Congress [was] bound..." to call a convention upon two-thirds applications of the states. *See infra* text accompanying note 514.

As to any change in language made to Gerry's language, the Supreme Court has addressed this issue. The Court said:

"[R]espondents' argument misrepresents the function of the committee of Style. It was appointed only 'to revise the stile of and arrange the articles which had been agreed to.... 2 Farrand 553.' '[T]he Committee...had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so, and certainly the Convention had no belief...that any important change was, in fact, made....'" Powell v. McCormack, 395 U.S. 486 (1969).

⁴³⁹ 2 Farrand at 630.

1 without understanding it was agreed to. The Commee reported so that Congr. shd
2 have the exclusive power of proposg. Amendmts. G. Mason observd it on the
3 report & opposed it. King denied the constrn. Mason demonstrated it, & asked
4 the Commee by what authority they had varied what had been agreed. G. Morris
5 then impudently got up & said by authority of the convention & produced the
6 blind instruction beforementd, which was unknown by ½ of the house & not till
7 then understood by the other. They then restored it as it stood originally."⁴⁴⁰

8 According to Jefferson's retelling of Mason's recollection, a minority
9 of delegates almost succeeded in deleting the convention from the
10 Constitution, but their attempt was foiled by the vigilance of several other
11 delegates.

12 The point of the anecdote is obvious. The Constitutional Convention
13 desired a method whereby the states could amend the Constitution absent
14 Congress' participation or permission. And, as they "restored it as it stood
15 originally," clearly this includes the Morris-Gerry amendment "requiring a
16 Convention on application of 2/3 of the Sts..."⁴⁴¹ Thus, the convention to
17 propose amendments was essentially approved *twice* by the delegates *prior* to
18 final approval of the document. The language of the motion is unequivocal:⁴⁴² a
19 convention is *required* on the application of two-thirds of the states, and
20 these applications *must* be considered as an expression of intent to hold a
21 *convention, not* to offer an amendment to Congress for its potential veto. The
22 portion of Article V that contained the convention was reinserted into the
23 draft constitution on September 15.

24 Roger Sherman, as he had attempted five days earlier,⁴⁴³ again tried to
25 require the unanimous consent of all the states to any amendments, and once

⁴⁴⁰ 3 *Id.* at 367-68 (footnote omitted).

⁴⁴¹ See *supra* text accompanying note 437.

⁴⁴² See *supra* text accompanying notes 435-437.

⁴⁴³ 2 *Id.* at 555 (Journal---Sept. 10), (Madison---Sept. 10).

1 more his proposal was turned down by the Convention.⁴⁴⁴ Elbridge Gerry then
2 moved to strike the language that allowed ratification to occur by the
3 convention method, which also failed.⁴⁴⁵

4 Roger Sherman then moved to prohibit any amendment that would affect the
5 internal police of a state or would deprive a state "its equal suffrage in the
6 Senate."⁴⁴⁶ James Madison, speaking against the motion, cautioned the
7 following: "Begin with these special provisos, and every State will insist on
8 them, for their boundaries, exports & c."⁴⁴⁷ The membership agreed with Madison
9 and voted down Sherman's motion, three states to eight.⁴⁴⁸ Sherman then moved
10 to strike Article V altogether, but this motion also failed.⁴⁴⁹ However,
11 Sherman's point on the need to keep the suffrage of the Senate equal gathered
12 support from delegates representing the small states. Gouverneur Morris of
13 Pennsylvania (a state which had previously voted against Sherman's two
14 motions)⁴⁵⁰ then moved "to annex a further proviso---`that no State, without
15 its consent shall be deprived of its equal suffrage in the Senate'"⁴⁵¹
16 According to Madison, the motion had been "dictated by the circulating murmurs
17 of the small States..."⁴⁵² As a result, the motion "was agreed to without
18 debate, no one opposing it, or in the question, saying no."⁴⁵³

⁴⁴⁴ 2 *Id.* at 630 (Madison---Sept. 15).

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 630-31.

⁴⁵⁰ *Id.* at 630.

⁴⁵¹ *Id.* at 631

⁴⁵² *Id.*

⁴⁵³ *Id.*

1 expressed fear that the proposed amending provision could be used as a means
2 by which the rights of some states could be subverted by a majority of other
3 states.⁴⁶⁰ However, most of the delegates realized the plan of government
4 created by the Convention would not be perfect and would require, from time to
5 time, amendments to correct imperfections and the changing needs of America.⁴⁶¹
6 Several delegates, especially Colonel Mason, strongly believed the amendment
7 process was absolutely necessary, not only to correct defects in the new
8 system,⁴⁶² but also to protect the people and the states from an abusive or
9 oppressive national legislature.⁴⁶³ In response to these fears, the Convention
10 acceded to the request to create a process of proposing amendments by a
11 convention method.⁴⁶⁴

12
13

14 *Role of the States and Congress in Proposing Amendments*

15

16 The Virginia Plan, while calling for an amendment process, did not
17 specify whether the states or the national legislature would propose
18 amendments, but it did specify "that the assent of the National Legislature
19 ought not be required thereto."⁴⁶⁵ Both the Pinckney and Hamilton plans
20 envisioned the national legislature as the initiator of proposed amendments,

⁴⁶⁰ See *supra* text accompanying notes 407, 434-436.

⁴⁶¹ See *supra* text accompanying notes 358, 362-364, 369-371, 408.

⁴⁶² See *supra* text accompanying notes 345, 349, 358, 362-365, 367, 369.

⁴⁶³ See *supra* text accompanying notes 363-364, 435-436.

⁴⁶⁴ See *supra* text accompanying notes 437-440.

⁴⁶⁵ See *supra* text accompanying notes 344-345.

1 and neither called for a convention to *propose* amendments, but Hamilton's plan
2 did allow for a state convention to *ratify* amendments proposed by the national
3 legislature.⁴⁶⁶ When the amendatory provision emerged from the Committee of
4 Detail, it provided that state legislatures could apply to the national
5 legislature for an amendment, and that the national legislature would then be
6 required to call a convention for that purpose.⁴⁶⁷ The amendatory article was
7 later amended to also allow the national legislature to propose amendments,⁴⁶⁸
8 and then subsequently revised further to provide that the states could apply
9 to the national legislature for amendments they desired, rather than for a
10 convention, with the national legislature then being required to actually
11 propose the desired amendments.⁴⁶⁹ At this time, the reference to the national
12 legislature calling a convention upon the application of two-thirds of the
13 states was dropped.⁴⁷⁰ Therefore, when the amendatory provision emerged from
14 the Committee of Style, only the national legislature was authorized to
15 propose amendments.⁴⁷¹ When this change was discovered, the provision was
16 amended a final time, permitting either the national legislature, or a
17 convention applied for by two-thirds of the states, to propose amendments *and*
18 *requiring* the national legislature to call a convention "on application of 2/3
19 of the Sts."⁴⁷²

⁴⁶⁶ See *supra* text accompanying notes 349-352.

⁴⁶⁷ See *supra* text accompanying note 402.

⁴⁶⁸ See *supra* text accompanying note 412.

⁴⁶⁹ See *supra* text accompanying notes 418,430.

⁴⁷⁰ See *supra* text accompanying notes 418,430.

⁴⁷¹ See *supra* text accompanying note 430.

⁴⁷² See *supra* text accompanying notes 437,458.

1 This series of revisions and proposals to Article V was the product of
2 the dispute between those in the Convention who believed the federal
3 government would be in the best position to perceive the need for particular
4 amendments, and those who believed the amending process of the Constitution
5 should contain language to thwart or redress the actions or excesses of an
6 unresponsive or corrupt national governing body. It was clearly a
7 confrontation between those wishing a powerful national government and those
8 fearing that result. In the end, both sides got what they sought: the national
9 legislature could propose amendments it felt were needed, and the national
10 legislature could be circumvented by the states through the convention process
11 when the state legislatures considered such circumvention necessary.

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Ratification: Method and Number of States Required.

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Under the Articles of Confederation, the state legislatures were
empowered to ratify amendments proposed by the national legislature.⁴⁷³ The
Pinckney Plan used this approach,⁴⁷⁴ while the Hamilton Plan included
ratification by a convention held in each state.⁴⁷⁵ The Convention paid little

⁴⁷³ See *supra* text accompanying note 334.

⁴⁷⁴ See *supra* text accompanying note 349.

⁴⁷⁵ See *supra* text accompanying note 352.

1 attention to the details of ratification until nearly the end, at which time
2 Madison proposed his revision of the amendatory article which left it to the
3 national legislature to actually propose all amendments. In doing so, he
4 resurrected Hamilton's proposal that ratification could be either by the
5 consent of the state legislatures or by state conventions called for that
6 purpose.⁴⁷⁶ This change in ratification was carried forward by the delegates in
7 the final version of Article V.⁴⁷⁷

8 Hamilton's initial plan also envisioned ratification by two-thirds of
9 the states.⁴⁷⁸ During the convention, there were attempts by some delegates to
10 revert back to the unanimity requirement found in the Articles of
11 Confederation.⁴⁷⁹ But the real debate centered on whether ratification would
12 occur upon the consent of two-thirds or three-fourths of the states. When the
13 matter was finally voted, ratification by two-thirds was narrowly defeated,⁴⁸⁰
14 and the delegates then agreed to ratification of amendments by three-fourths
15 of the states.⁴⁸¹

16
17 *Amendment (Singular) vs. Amendments (Plural)*

18
19 The Articles of Confederation only allowed for one amendment to be
20 proposed at any one time, referring to "any alteration" and requiring

⁴⁷⁶ See *supra* text accompanying note 418.

⁴⁷⁷ See *supra* text accompanying note 458.

⁴⁷⁸ See *supra* text accompanying note 352.

⁴⁷⁹ See *supra* text accompanying notes 412,444.

⁴⁸⁰ See *supra* text accompanying notes 414-415.

⁴⁸¹ See *supra* text accompanying note 416.

1 ratification by the states of "such alteration."⁴⁸² While the Virginia Plan
2 did not specify any details of an amendment process,⁴⁸³ the Hamilton Plan did
3 allow for more than one amendment to be proposed at a time, providing that the
4 Constitution "may receive such alterations and amendments" as proposed by the
5 states and agreed to by both houses of the national legislature.⁴⁸⁴ Despite
6 this, when the amendatory article emerged from the Committee of Detail, the
7 provision allowed that the states could apply for "an amendment" to the
8 constitution, and that the national legislature would call a convention "for
9 that purpose."⁴⁸⁵

10 The subsequent amendment to Article XIX by Roger Sherman retained the
11 language for a single amendment when proposed by a convention, but then added
12 that the national legislature could "propose *amendments*" and that "no
13 *amendments*" could be binding until consented to by the states.⁴⁸⁶ Soon after
14 the adoption of Sherman's amendment, Madison succeeded in having the delegates
15 delete any reference to the states proposing single (or any) amendments by the
16 convention method, leaving the amended version of Article XIX to refer solely
17 to the national legislature being able to "propose amendments."⁴⁸⁷ The concept
18 of singular amendments was never again considered by the delegates. Instead,

⁴⁸² See *supra* text accompanying note 334.

⁴⁸³ See *supra* text accompanying notes 344-345.

⁴⁸⁴ See *supra* text accompanying note 352.

⁴⁸⁵ See *supra* text accompanying note 402.

⁴⁸⁶ See *supra* text accompanying note 412. Thus, from approximately July 26 until September 10, proposals were before the Convention that envisioned single amendments proposed to the states. See *supra* text accompanying notes 395,398,400,402,412. On September 10, the Convention delegates accepted a proposal that allowed the national legislature to propose multiple amendments to the states. See *supra* text accompanying note 412.

⁴⁸⁷ See *supra* text accompanying notes 418,430.

1 when supporters of the convention method succeeded in reinserting the
2 provision, the drafters continued to follow Madison's multiple amendments
3 language, allowing the national legislature to "propose amendments" (plural)
4 or the states to demand a convention "for proposing Amendments" (plural).⁴⁸⁸

5 Therefore, the plain language of Article V is clear and decisive:
6 Congress shall call a "Convention for proposing *Amendments*," not a convention
7 for proposing *an amendment*. It is therefore clear than an Article V convention
8 has the power to consider various issues (plural) and the right to submit
9 various amendments (plural) to the states for consideration and ratification,
10 just as Congress has done in the past.⁴⁸⁹ In addition, the language in Article
11 V does not authorize the states to apply for *an amendment*; rather they are
12 only authorized to apply for a *convention* for proposing *amendments*. The states
13 have *no* authority under the article to propose an amendment. That power rests
14 solely with the Congress and the convention to propose amendments. Were it to
15 the contrary, the entire concept of separation of powers would be defeated, as
16 the states would have unlimited control of the Constitution, and a small

⁴⁸⁸ See *supra* text accompanying notes 437,439,458.

⁴⁸⁹ See S. & H.R.J. Res. 3 1st Cong., 1st Sess., 1 Stat. 97-98 (1789). In submitting the first set of proposed amendments, Congress forwarded twelve proposed amendments to the state for ratification. *Id.* Of those twelve, ten were adopted (now known as the Bill of Rights) on Dec. 15, 1791. An eleventh proposal was adopted on May 7, 1992 as Amendment 27 to the United States Constitution leaving only one proposal not ratified.

The text of the rejected article is as follows:

Art. I After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less then one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifth thousand persons.

1 minority of states could easily deflect any effort by the Congress to amend
2 the Constitution.

3 The focus of Article V is clearly on the ability of the states to demand
4 a convention, and not on the subjects to be considered by such a convention.
5 In fact, nowhere in the discussion of the delegates at the Constitutional
6 Convention is there demonstrated the slightest inclination toward regulating
7 the subjects of amendments. Rather, the focus is on the *process* of amendment,
8 and the language of Convention delegates Morris and Gerry who "moved to amend
9 the article so as to *require* a Convention on *application* of 2/3 of the
10 Sts...",⁴⁹⁰ leaves no doubt as to the intent of the Founding Fathers in regard
11 to the language of Article V. Article V does *not* require Congress to call a
12 convention when two-thirds of the states call for the same *amendment*, rather
13 it requires Congress to call a convention when two-thirds of the states call
14 for a *convention*.

15 The precise reason the convention alternative was included in Article V
16 was to provide a means for proposing amendments *despite* any opposition or
17 inaction by the national legislature. Therefore, the terms of Article V cannot
18 be construed to defeat that purpose by granting Congress *any* authority to
19 obstruct a convention in *any* manner it might attempt, including failing to
20 call in a timely fashion as it is required to do.

21 Thus, if any action of Congress demonstrates the slightest impediment to
22 a convention to propose amendments--- either during the application process by

⁴⁹⁰ See *supra* text accompanying note 437.

1 the state legislatures, the required calling, the actual operation of the
2 convention, or in forwarding whatever amendment proposals the convention to
3 the states for ratification--- that action, impediment or inaction *must* be
4 unconstitutional.

5
6
7 POST-CONVENTION DISCUSSION OF ARTICLE V
8

9 While some Constitutional Convention delegates had expressed little
10 support for an amendatory article during the Convention, saying that such an
11 article wasn't needed,⁴⁹¹ the fact the proposed Constitution was subject to
12 amendment became an important point in support of the adoption of the
13 Constitution, and public debate began as soon as the text of the proposed
14 Constitution became public. Not all views were favorable concerning the
15 amendatory proposal.⁴⁹²

⁴⁹¹ 1 FARRAND, *supra* note 2, at 121 (Madison---June 5), 202 (Madison---June 11). See *supra* text accompanying notes 357,361,373.

⁴⁹² S. MORISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 121 (2nd ed. 1983); W. Peters, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONST.ITUTION 219-20 (1987). On October 10, 1787, Edmund Randolph presented at length his views on the proposed Constitution in a letter to the Speaker of the Virginia House of Delegates. 3 FARRAND, *supra* note 2, at 123. Randolph specifically discussed his preference that the states should have been allowed to propose amendments to the proposed Constitution, as opposed to either accepting it in its entirety or rejecting it in its entirety:

"I was afraid that if the constitution was to be submitted to the people, to be wholly adopted or wholly rejected by them, they would not only reject it, but bid a lasting farewell to the union. This formidable event I wished to avert, by keeping myself free to propose amendments, and thus, if possible, to remove the obstacles to an effectual government."
Id. at 126. In defending his view, Randolph described why the amendment process contained in the proposed Constitution was not sufficient to alleviate his concerns:

(Footnote Continued Next Page)

1 On October 27, 1787, several writers favoring the Constitution, using
2 the pseudonym "Publius", began publishing arguments in favor of the

"Again, may I be asked, why the mode pointed out in the constitution for its amendments, may not be a sufficient security against its imperfections, without now arresting it in its progress? My answers are --- 1. That it is better to amend, while we have the constitution in our power, while the passions of designing men are not yet enlisted, and while a bare majority of the States may amend than to wait for the uncertain assent of three-fourths of the States. 2. That a bad feature in government, becomes more and more fixed every day. 3. That frequent changes of a constitution, even if practicable, ought not to be wished, but avoided as much as possible. And 4. That in the present case, it may be questionable, whether, after the particular advantages of its operation shall be discerned, three-fourths of the States can be induced to amend."

Id. at 126-27 Two days later, the fourth installment of the *Federalist Farmer* was published, criticizing the proposed constitution and particularly focusing on the amendatory provision:

"It may also be worthy our examination, how far the provision for amending this plan, when it shall be adopted, is of any importance. No measures can be taken towards amendments, unless two-thirds of the Congress, or two-thirds of the legislatures of the several states shall agree. Every man of reflection must see, that the change now proposed, is a transfer of power from the many to the few, and the probability is, artful and ever active aristocracy, will prevent all peaceable measures for changes, unless when they shall discover some favourable moment to increase their own influence. I am sensible, thousands of men in the United States are disposed to adopt the proposed constitution, though they perceive it to be essentially defective, under an idea that amendment of it, may be obtained when necessary. This is a pernicious idea..." THE FEDERALIST FARMER No. 4, Storing 2.8.58 (Oct. 12, 1787).

"...[A]fter the constitution is once ratified, it must remain fixed until two-thirds of both the houses of Congress shall deem it necessary to propose amendments; or the legislatures of two-thirds of the several states shall make application to Congress for the calling a convention for proposing amendments..."

"Two-thirds of both houses of congress, or the legislatures of two-thirds of the states, must agree *in desiring a convention to be called.*" ANTIFEDERALIST No. 49 printed in The Massachusetts Gazette, January 29, 1788. (emphasis added).

Clearly, in these passages, the concern of the opponents was that a small *numeric* number of states could prevent the passage of an amendment desired by the majority of states or members of Congress. It is important to realize that nowhere in this passage, *nor in any other argument presented by the opponents of the convention was any other standard but a numeric total of states causing a convention used as an argument. Obviously, if such powers as the Congress now claims by its refusal to call a convention were understood as powers of Congress, clearly the opponents would have used them.*

1 Constitution, which were later republished as THE FEDERALIST.⁴⁹³ James Madison
2 focused particularly on Article V in THE FEDERALIST No. 43. He discussed the
3 great value of allowing both Congress *and* the states to proposed changes in
4 the Constitution:

5 "``[t]o provide for amendments to be ratified by three-fourths of the
6 States, under two exceptions only.' That useful alterations will be suggested
7 by experience, could not but be foreseen. It was requisite therefore that a
8 mode for introducing them should be provided. The mode preferred by the
9 Convention seems to be stamped with ever mark of propriety. It guards equally
10 against that extreme facility which would render the Constitution too mutable;
11 and that extreme difficulty which might perpetuate its discovered faults. *It*
12 *moreover equally enables the general and the state governments to originate*
13 *the amendment of errors as they may be pointed out by the experience on one*
14 *side or on the other.*"⁴⁹⁴

⁴⁹³ THE FEDERALIST No. 1 (A. Hamilton) See generally S. MORISON, H. COMMAGER & W. LEUCHTENBUR, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 121 (2nd ed. 1983). ON January 16, 1788, James Madison, in THE FEDERALIST No. 39, argued that the plan of government reported by the Convention, including the method of amending the proposed Constitution, had the character of being federal as opposed to nation, but that the amendatory provision was a combination of both:

"If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither whole *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character."

THE FEDERALIST No. 39 (J. Madison) (Jan. 16, 1788)(emphasis in original).

⁴⁹⁴ THE FEDERALIST No. 43 (J. Madison)(emphasis added). Madison then went onto state the basis for the two exceptions contained in Article V relating to equal suffrage in the senate and slavery:

"The exception in favour of the equality of suffrage in the senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by the principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it." See *infra* text accompanying note 1620.

Id. One week later, on January 30, the delegates to the Massachusetts Ratifying convention discussed Article V of the proposed Constitution. 2 ELLIOT'S DEBATES 116 (1937). Rufus King began the discussion by responding to

(Footnote Continued Next Page)

1 In THE FEDERALIST No. 49, Madison discussed whether the people should be
2 called upon to resolve conflicts between the various branches of government,
3 or to correct breaches of one branch of government against the other branches
4 of government.⁴⁹⁵ While Madison said he did not refer "the proposed recurrence
5 to the people, as a provision in all cases for keeping the several departments
6 of power within their constitutional limits," he nevertheless stated that "a
7 constitutional road to the decision of the people, ought to be marked out, and

the opponents to the new constitution, stating that "many of the arguments of (the) gentlemen were founded on the idea of future amendments being impracticable." *Id.* No other nation's constitution, King opined, "had so fair an opportunity to correct any abuse which might take place in the future administration of the government under it." *Id.*

A Dr. Jarvis next spoke on the value of the amendatory provision:

"Whatever may have been my private opinion of any other part, or whatever faults or imperfections I have remarked, or fancied I have seen, in any other instance, here, sir, I have found complete satisfaction: this has been a resting place on which I have reposed myself in the fullest security, whenever a doubt has occurred, in considering any other passage in the proposed Constitution."

Id. Dr. Jarvis especially noted the fact that Article V created an opportunity for peaceful change:

"In other countries, sir---unhappily for mankind,---the history of their respective revolutions has been written in blood... When we shall have adopted the Constitution before us, we shall have in this article an adequate provision for all the purposes of political reformation. If, in the course of its operation, this government shall appear to be too severe, here are the means by which this severity may be assuaged and corrected. If, on the other hand, it shall become too languid in its movements, here, again, we have a method designated, by which a new portion of health and spirit may be infused into the Constitution."

Id. at 116-17. Noting the weakness of the Massachusetts own amendatory provision, which limited the operation of the article for alteration to a given time, Dr. Jarvis state that "in the present Constitution, the article is perfectly at large, unconfined to any period, and may admit of measure being taken in any moment after it is adopted.": *Id.* at 117. Dr. Jarvis then concluded his argument in favor of the proposed constitution by asserting the following:

"[A]s it is clearly more difficult for twelve states to agree to another convention, than for nine to unite in favor of amendments, so it is certainly better to receive the present Constitution, in the hope of its being amended, than it would be to reject it altogether, with, perhaps, the vain expectation of obtain another more agreeable than the present."

Id. The Massachusetts Ratifying Convention ratified the proposed national Constitution on February 6, 1788. *Id.* at 162, 181.

⁴⁹⁵ THE FEDERALIST No. 49 (J. Madison)(Feb 2, 1788).

1 kept open, for certain great and extraordinary occasions."⁴⁹⁶ The proposed
2 Article V would serve this important task.

3 The documentation is clear. By these comments it is obvious the Founding
4 Fathers saw that limits on governmental powers were clearly required, either
5 by the originators of the Constitution working on the document until they got
6 it right, as Mr. Randolph proposed, or by the use of the amendment system
7 contained within the document as Madison and others proposed. But all held a
8 common theme that government powers required checks which that government
9 could neither avoid, deny, regulate nor otherwise blunt in order to limit
10 governmental power. Clearly, therefore, a convention to propose amendments was
11 intended as a check to regulate excesses of the national government, and it
12 was not intended that the national government could avoid, deny, regulate or
13 otherwise blunt this constitutional check for its own self-interest.

14 During the public debate on the adoption of the proposed Constitution,
15 calls such as Randolph's, urging corrections on the document before adoption,
16 led to discussion of calling of a second convention to amend the proposed
17 Constitution. On May 28, in THE FEDERALIST No. 85, Alexander Hamilton argued
18 against this idea. In his writing, Hamilton said he believed numerous problems
19 would result from attempts to amend the proposed Constitution prior to its
20 adoption. He preferred therefore to correct the faults in the Constitution
21 through the amendment process already provided for within the document.

22 Hamilton stated:

⁴⁹⁶ *Id.*

1 "[E]very amendment to the constitution, if one established, would be a
2 single proposition, and might be brought forward singly. There would then be
3 no necessity for management or compromise, in relation to any other point, no
4 giving nor taking. The will of the requisite number would at once bring the
5 matter to a decisive issue. And consequently whenever nine, or rather ten
6 states, were united in the desire of a particular amendment, that amendment
7 must infallibly take place. There can therefore be no comparison between the
8 facility of effecting an amendment, and that of establishing the first
9 instance a complete constitution." ⁴⁹⁷

10 Many proponents of the view that any convention for proposing
11 constitutional amendments must be limited to a single issue often refer to
12 this passage as supporting their position.⁴⁹⁸ However, it is clear these
13 proponents read more into the passage than is actually there, to the point of
14 blatant misconstruement.

15 First, only when three-quarters of the states (ten states) are "united
16 in the desire of a particular amendment,[must] that amendment must infallibly
17 take place." Two-thirds of the states (nine) will not accomplish the matter,
18 whether the issue is brought by the Congress or a convention, because it does
19 not reflect "the will of the requisite number." Until a proposal is ratified,
20 it has no effect and thus cannot "infallibly take place". Therefore, the only
21 logical conclusion to the meaning of this passage is that Hamilton was
22 speaking of amendment ratification, not proposal.⁴⁹⁹

23 Hamilton's goal in this passage is an attempt to assure people that if
24 changes to the national government were desired, the national government would
25 not be able to block them. His argument was also directed against the current

⁴⁹⁷ THE FEDERALIST No. 85 (A. Hamilton)(May 28, 1788).

⁴⁹⁸ *Id.*

⁴⁹⁹ In FEDERALIST No. 85, Hamilton added a footnote that clearly explained his intent regarding the phrase "nine, or rather ten, states". He wrote:

"It may rather be said TEN, for though two-thirds may set on foot the measure, three fourths must ratify."

1 system of change in government, that of the Confederation, which required
2 *unanimous* consent to amend its provisions.⁵⁰⁰ He was attempting to show an
3 *advantage* in the new system, that it only required *ten* states in the
4 Constitution to effect change as opposed to the *unanimous* situation required
5 at the time under the Confederation.

6 When Hamilton's remarks are considered in their context, the
7 interpretation that any convention for proposing constitutional amendments
8 must be limited to a single issue is clearly incorrect.⁵⁰¹ Hamilton's comments
9 do not address the question of whether a convention would be limited to a
10 single subject. Instead, his language is clearly focused on his opposition to
11 calling a second convention prior to the adoption of the proposed
12 Constitution, a convention that could rewrite the document from scratch and

⁵⁰⁰ See *supra* text accompanying note 334.

⁵⁰¹ Prefacing the quoted remarks of this suit, Hamilton stated:

"It appears to me susceptible of absolute demonstration, that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan, it becomes, *to the purpose of adoption*, a new one, and must undergo a new decision of each State. To it complete establishment throughout the Union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system." Footnote omitted; see *supra* text accompanying note 499.

"This is not all. Every Constitution of the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question, may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all the parties to the compact, and to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties."

1 place the whole of its work before the state legislatures *again*. His language
2 argues that any defects in the proposed Constitution should be repaired by
3 post-ratification amendments targeting specific problems, and that the states
4 could review and ratify the proposed amendments one at a time.

5 It should be remembered, as indicated by the Randolph comments,⁵⁰² that
6 not all Americans favored adoption of the Constitution. Certainly the calling
7 of a second convention would have played into the hands of the document's
8 opponents.

9 Obviously, Hamilton used arguments that he intended would prevent this
10 by demonstrating the advantages and strengths of the proposed Constitution. It
11 would be illogical to assume he would therefore propose an amendment system
12 for the states that could be vetoed by Congress or was limited in use by the
13 states to a single subject as defined by Congress, thus rendering the states
14 virtually impotent to amend the Constitution.

15 Further, Hamilton did not state that the scope of the subjects
16 considered by a convention called for proposing amendments would be limited to
17 a single issue. Rather, he was merely stating that once Congress or the
18 convention determined what amendments should be made to the Constitution,
19 every proposed amendment "would be a single proposition, and might be brought
20 forward singly."⁵⁰³ By such a method, each amendment would be considered by the
21 states singly and without the turmoil associated with the rewriting and
22 adopting of a completely new constitution each time a change was required.

⁵⁰² See *supra* text accompanying note 492.

⁵⁰³ *Id.*

1 This method would also prevent the "all or nothing" result that would occur if
2 a block of amendments were presented as one unit.

3 It must be remembered that Hamilton was addressing the idea of
4 amendments generally, and that his remarks were not addressed specifically to
5 the convention method of proposing amendments, any more than they were
6 addressed specifically to the identical amendment power of Congress. It is
7 only common sense to assume amendments proposed by either Congress or a
8 convention would be submitted to the states as individual proposals. Congress,
9 after all, submitted the Bill of Rights to the states as a package of twelve
10 separate proposals, of which eleven were ratified, but nevertheless each
11 separate amendment required individual ratification.⁵⁰⁴ By this action, the
12 matter of single subject is silenced as Congress itself simultaneously
13 submitted twelve different *amendments*, all on various subjects, to the states
14 for ratification. Therefore, like Congress, a convention for proposing
15 amendments can draft and simultaneously propose several amendments on
16 different subjects that the states could ratify or reject, each on its own
17 merits. Hamilton was only pointing out the preferability of this approach to
18 starting over again with another pre-ratification convention of the originally
19 proposed Constitution.

20 This point of view especially makes sense when one considers Hamilton's
21 concern, which he had just previously discussed in his text, that a second

⁵⁰⁴ 4 FARRAND, *supra* note 2, at 93 n.3. The ten amendments received ratification from the states on Dec. 15, 1791. The eleventh proposal was ratified in 1992. See *supra* text accompanying note 489.

1 convention for the purpose of adding amendments to the proposed Constitution
2 would doubtlessly not succeed because of:
3 "the necessity of moulding and arranging all the particulars which are
4 to compose the whole in such a manner as to satisfy all the parties to the
5 compact; and hence also an immense multiplication of difficulties and
6 casualties in obtaining the collective assent to a final act."⁵⁰⁵

7 Thus, any assertion based on Hamilton's words that a convention is
8 limited to a single issue is without merit, as clearly Hamilton was discussing
9 holding another general convention prior to the original Constitution being
10 ratified.

11 Hamilton next addressed the assertion that the national government would
12 be able to block the amendment process:

13 "In opposition to the probability of subsequent amendments, it has been
14 urged, that the persons delegated to the administration of the national
15 government, will always be disinclined to yield up any portion of the
16 authority of which they were once possessed. For my own part I acknowledge a
17 thorough conviction that any amendments which may, upon mature consideration,
18 be thought useful, will be applicable to the organization of the government,
19 not the mass of its powers; and on this account alone, I think there is no
20 weight in the observation just stated. I also think there is little weight in
21 it on another account. The intrinsic difficulty of governing THIRTEEN STATES
22 at any rate, independent of calculations upon an ordinary degree of public
23 spirit and integrity, will, in my opinion, constantly *impose* on the national
24 rulers the *necessity* of a spirit of accommodation to the reasonable
25 expectations of their constituents. But there is yet a further consideration,
26 which proves beyond the possibility of doubt, that the observation is futile.
27 It is this, that the national rulers, whenever nine states concur, will have
28 no option upon the subject. By the fifth article of the plan the Congress will
29 be *obliged* 'on the application of the legislatures of two-thirds of the
30 states, (which at present amounts to nine) to call a convention for proposing
31 amendments, which *shall be valid* to all intents and purposes, as part of the
32 constitution, when ratified by the legislatures of three-fourths of the
33 states, or by conventions in three-fourths thereof.' The words of this article
34 are peremptory. The Congress '*shall call a convention.*' Nothing in this
35 particular is left to the discretion of that body. And of consequence all the
36 declamation about their disinclination to a change, vanishes in air. Nor
37 however difficult it may be supposed to unite two-thirds or three-fourths of
38 the states legislatures, in amendments which may affect local interest, can
39 there be any room to apprehend any such difficulty in a union on points which
40 are merely relative to the general liberty or security of the people. We may

⁵⁰⁵ THE FEDERALIST No. 85, *supra* note 497, 501. (A. Hamilton).

1 safely rely on the disposition of the state legislatures to erect barriers
2 against the encroachments of the national authority."⁵⁰⁶

3 It is totally illogical to maintain that Hamilton, in the same article,
4 would propose a convention that would have such sweeping power as to leave:
5 "[T]he national rulers...no option upon the subject... By the fifth
6 article of the plan the Congress will be *obliged* 'on the application of the
7 legislatures of two-thirds of the states, (which at present amounts to nine)
8 to call a convention for proposing amendments, which shall be valid to all
9 intents and purposes, as part of the constitution, when ratified by the
10 legislatures of three-fourths of the states, or by conventions in three-
11 fourths thereof.' The words of this article are *peremptory*. The Congress
12 'shall call a convention.' *Nothing in this particular is left to the*
13 *discretion of that body. And of consequence all the declamation about their*
14 *disinclination to a change, vanishes in air.*"⁵⁰⁷

15 and then try to maintain that he believed the same convention system would be
16 limited to a single subject in the proposal of amendments. The idea of using
17 Hamilton's words to argue for a single subject convention simply collapses in
18 the face of Hamilton's own words.

19 It is also clear from Hamilton's language that he believed that once the
20 minimum number of states applied for a convention to propose amendments for
21 proposing amendments, Congress was required to call such a convention:
22 "...national rulers, whenever nine states concur, will have no option
23 upon the subject... The words of this article (V)are *peremptory*. The Congress
24 'shall call a convention.' *Nothing in this particular is left to the*
25 *discretion of that body.*"⁵⁰⁸

26 Hamilton clearly points out that the applications by the states are *for*
27 *applying for a convention to propose amendments, not for a specific amendment.*

28 It is also clear that even Hamilton, the preeminent proponent of national
29 power,⁵⁰⁹ believed that Congress' role in calling a convention was extremely

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* (emphasis added).

⁵⁰⁸ *Id.*

⁵⁰⁹ Hamilton was the major proponent of *national* government and so favored a broad interpretation of implied powers for the federal government. As such, when Hamilton said the government had no discretion in calling a convention to propose amendments, it must be eminently clear he was leaving absolutely no

(Footnote Continued Next Page)

1 limited, as shown by his comment, "[n]othing...is left to the discretion of
2 that body."⁵¹⁰ As Hamilton, and Morris, one of the originators of the Gerry-

room for the government to maneuver out of the obligation. Had there been any intent on the part of the Founders that Congress possessed even the tiniest speck of discretion in issuing a convention call, Hamilton, *as the author of the final language inserted into the Constitution*, would have found that speck and expanded it into a mountain. Instead, Hamilton is emphatic as only Hamilton could be. Congress shall have no discretion in the matter.

⁵¹⁰ *Id.* On June 5 the delegates of the Virginia Ratifying Convention began discussing Article V of the proposed Constitution. Concerned that the method of amending the proposed Constitution would prove too difficult, Patrick Henry stated:

"The way to amendment is, in my conception, shut... However uncharitable it may appear, yet I must tell my opinion---that the most unworthy characters may get into power, and prevent the introduction of amendments. Let us suppose---for the case is supposable, possible, and probable---that you happen to deal those powers to unworthy hands; will they relinquish powers already in their possession, or agree to amendments? Two-thirds of the Congress, or of the state legislature, are necessary even to propose amendments. If one-third of these be unworthy men, they may prevent the application for amendments; but what is destructive and mischievous, is, that three-fourths of the state legislatures, or of the state conventions, must concur in the amendments when proposed! In such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous. It would indeed be miraculous that they should concur in the same amendments..."

3 ELLIOT'S DEBATES 49 (1937). According to Patrick Henry, "a most despicable minority" could prevent amendment if the government should prove to be oppressive. *Id.* at 55.

The next day, James Madison responded to Patrick Henry's concerns. Madison argued that it was better to adopt a constitution that allows amendment by three-fourths of the states rather than to continue with the unanimity requirement contained in the Articles of Confederation. Madison stated:

"He [Patrick Henry] complains of this Constitution, because it requires the consent of at least three-fourths of the states to introduce amendments which shall be necessary for the happiness of the people. The assent of so many he urges as too great an obstacle to the admission of salutary amendments, which, he strongly insists, ought to be at the will of a bare majority... Does not the thirteenth article of the Confederation expressly require that no alteration shall be made without the unanimous consent of all the states?!... Would the honorable gentleman agree to continue the most radical defects in the old system, because the petty state of Rhode Island would not agree to remove them?"

Id. at 88-89. Wilson Nicholas also responded to the assertion that it would be difficult to obtain amendments to the new Constitution. Nicholas referred directly to the alternative of conventions for proposing amendments:

"The worthy member [Patrick Henry] has exclaimed, with uncommon vehemence, against the mode provided for securing amendments. He thinks amendments can never be obtained, because so great a number is required to

(Footnote Continued Next Page)

1 Morris amendment, were members of the committee⁵¹¹ that drafted the final
2 language of the Constitution, it is obvious Hamilton knew exactly what the
3 Constitution meant regarding the actions of the national government. His
4 answer is emphatic: no discretion.⁵¹² The only standard Hamilton recognized as
5 a limitation to a convention being called was that of the prerequisite number
6 of states applying for one;⁵¹³ after that things were automatic.⁵¹⁴

concur. Had it rested solely with Congress, there might have been danger. The committee will see that there is another mode provided, besides that which originates with Congress. On the application of the legislatures of two-thirds of the several states, a convention is to be called to propose amendments, which shall be part of the Constitution when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof. It is natural to conclude that those states who will apply for calling the convention will concur in the ratification of the proposed amendments."

Id. at 101-102. Nicholas added that the state ratifying conventions would be even more likely to agree to the proposed amendments because the proposals would be presented to the states singly. Nicholas stated:

"There are strong and cogent reasons operating on my mind, that the amendments, which shall be agreed to by those states, will be sooner ratified by the rest than any other that can be proposed. The conventions which shall be so called will have their deliberations confined to a few points; no local interest to divert their attention; nothing be the necessary alterations. They will have many advantages over the last Convention. No experiments to devise; the general and fundamental regulations being already laid down."

Id. at 102. Virginia ratified the Constitution on June 25, 1788. *Id.* at 627, 654-55.

⁵¹¹ See *supra* text accompanying note 426,427.

⁵¹² It is clear Hamilton's language not only discusses the *expressed* power of Congress but the *limits and extent of Congress' implied powers*. After all, the term "no discretion" is not used in Article V. Thus, the term must be meant to describe the implied powers of Congress in this matter. See *infra* text accompanying note 627.

⁵¹³ In the paragraph following the statement "Nothing in this particular is left to the discretion of that body" Hamilton continued:

"If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a *mathematical* demonstration." FEDERALIST No.85 (A. Hamilton)(emphasis added). See *infra* text accompanying note 1439.

⁵¹⁴ However his words have been misinterpreted, it is clear that James Madison also understood the intent of Article V, that the purpose of the applications by the states was not to favor a particular amendment proposal but to compel Congress to call a convention. In a letter written to George Eve, January 2, 1789, Madison wrote:

(Footnote Continued Next Page)

1 Hamilton's interpretation is repeated and even more defined by the
2 comments of Wilson Nicholas of Virginia:⁵¹⁵

"I have intimated that the amendments [referring to the yet to be written Bill of Rights] ought to be proposed by the first Congress. I prefer this mode to that of a General Convention. 1st. Because it is the expeditious mode. *A convention must be delayed, until 2/3 of the State Legislatures shall have applied for one; and afterwards the amendments must be submitted to the States:* whereas if the business be undertaken by Congress the amendments may be prepared and submitted in March next." (emphasis added) UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION (1989) (P. Weber, B. Perry).

The language is unequivocal. Madison clearly understood the purpose of the applications by the states was to cause a convention to be called, not to submit a subject to Congress for that body to approve. While he clearly recognized the congressional method of proposal was more "expeditious", nevertheless his words are clear and unambiguous regarding the purposes of applications to Congress for a convention.

This is not the only example where Madison's interpretation was expressed and agreed to by other Framers:

"Framer John Dickinson, in a newspaper essay, agreed: 'whatever their [Congress] sentiments may be, they [Congress] *must* call a convention for proposing amendments, on the applications of two-thirds of the legislatures of the several states.' (1)

"In a published letter, Madison wrote: 'the question concerning a General Convention, does not depend on the discretion of Congress. If two thirds of the States make application, Congress cannot refuse to call one; if not, Congress have no right to take the step.' (2) On May 5, 1789, when Virginia's convention application was resented to Congress, Madison informed his colleagues in the House of Representatives that when 'two-thirds of the State Legislatures concurred in such application, ... it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this natures.' From the words of article V 'it must appear that Congress have no deliberative power on this occasion.'" (3) Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention*, (1988) (emphasis in original). Footnotes as noted below:

- (1) 3 *Elliot* at 636; 4id. at 178; Letter No. 8 of "Fabius" (John Dickinson), in P. Ford, ed., *Pamphlets on the Constitution of the United States* 204, 210 (1888) (letters first published serially in the *Delaware Gazette* [Wilmington], 1788; first pamphlet ed., 1797).
- (2) James Madison to Thomas Mann Randolph, Jan. 13, 1789, in 11 *Madison Papers* at 417. The letter was published in the *Virginia Herald* on January 15, in the *Virginia Independent Chronicle* on January 28, and in other periodicals. R. Ketcham, *James Madison: A Biography* 276 (1971). Similarly, James Madison to George Eve, Jan. 2, 1789, in 11 *Madison Papers* at 405.
- (3) 1 *Annals of Cong.* 260 (1789). Similarly, id. at 260-61 (Reps. Boudinot, Bland, and Tucker); 5 id. at 498, 530 (1796) (Reps. Smith and Lyman).

⁵¹⁵ See *supra* text accompanying note 510.

1 "On the application of the legislatures of two-thirds of the several
2 states, a convention is to be called to propose amendments..."⁵¹⁶

3 Then, in reference to ratifying any proposed amendment, Nicholas
4 restates the proposition and clearly demonstrates the correct interpretation
5 of the power of the convention to propose *amendments*:
6 "...those states who will apply for calling the convention will concur
7 in the ratification of the proposed *amendments*."⁵¹⁷

8 In the North Carolina ratifying convention, James Iredell discussed the
9 manner in which amendments could be proposed, specifically referring to the
10 ability of the states to demand changes through the convention method of
11 proposing amendments. Iredell stated:

12 "Let us attend to the manner in which amendments may be made. The
13 proposition for amendments may arise from Congress itself, when two-thirds of
14 both house shall deem it necessary. If they should not, and yet *amendments* be
15 generally wished for by the people, *two-thirds of the legislatures of the*
16 *different states may require a general convention for the purpose, in which*
17 *case Congress are under the necessity of convening one.*"⁵¹⁸

18 Iredell's comments again serve to underscore the intent of the meaning
19 of the convention provision in Article V.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* (emphasis added).

⁵¹⁸ 4 ELLIOT'S DEBATES 177 (1937).(emphasis added). Earlier during his speech, Iredell spoke out on the importance of Article V:

"Mr. Chairman, this is a very important clause. In every other constitution of government that I have ever heard or read of, no provision is made for necessary amendments. The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution though with much more diffidence of their capacities; and undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. This, indeed, is one of the greatest beauties of the system, and should strongly recommend it to every candid mind."

Id. at 176. Iredell also perceived the ability of the amendment process to prevent bloodshed, as is shown by his language quoted at the beginning of this document. (see *Id.*; see *supra* text accompanying note 1). According to Iredell, it was "highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the states consented to them." 4 ELLIOT'S DEBATES 176 (1937).

1 "If...*amendments* [are]...generally wished...two-thirds of the
2 legislatures may *require* a *general* convention for the purpose, in which case
3 Congress are under the *necessity* of convening one."⁵¹⁹

4 Iredell words cannot be more plain. The purpose of Article V is allow
5 the states to apply for a *general convention*, not for an *amendment*. The
6 convention can propose *amendments*, and Congress *must* call a convention on the
7 application of the proper number of states.

8 If there is any further doubt, then the discussion between Iredell and a
9 Mr. Bass at the North Carolina ratifying convention ends it. Bass commented to
10 the ratifying convention that:

11 "[I]t was plain that the introduction of amendments depended altogether
12 on [the will of] Congress."⁵²⁰

13 Iredell responded to Bass by saying:

14 "[I]t was very evident that it did not depend on the will of Congress;
15 for that the legislatures of two-thirds of the states were authorized to make
16 application for calling a convention to propose amendments and, on such
17 application, it is provided that Congress *shall* call such a convention, so
18 that they will have no option."⁵²¹

⁵¹⁹ See *supra* text accompanying note 518. (emphasis added).

⁵²⁰ 4 ELLIOT'S DEBATES 178 (1937).

⁵²¹ *Id.* Although North Carolina's first ratifying convention refused either to adopt or reject the proposed Constitution, North Carolina's second ratifying convention finally ratified the Constitution on November 19, 1789, some seven months after the first Congress assembled and some six months after President Washington's inauguration. W. Peters, A MORE PERFECT UNION; THE MAKING OF THE UNITED STATES CONSTITUTION 234 (1987). Article V was also of great concern to President Washington. In his first inaugural address (1789), Washington said:

"Beside the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient...by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them."

43 THE HARVARD CLASSIC, AMERICAN HISTORICAL DOCUMENTS 1000-1904, at 225, 227 (C. Eliot ed. 1910)(reprinting Washington's First Inaugural Address (Apr. 30, 1789)). In his Farewell Address (1796), after eight years of service as president, Article V again occupied Washington's thoughts: "The basis of our political systems is the right of the People to make and to alter their Constitutions of Government---But the constitution which at any time exists, 'till changed by and explicit and authentic act of the whole People, is sacredly obligatory upon all." *Id.* at 233, 239 (reprinting Washington's Farewell Address (Sept. 19, 1796)). Washington further added: "If, in the opinion of the People, the distribution or modification of the Constitutional

(Footnote Continued Next Page)

1 It is clear from the various comments made at the ratifying conventions
2 that Article V was perceived as a viable method of correcting errors that
3 might be found in the new Constitution. It is also as clear that no one, not
4 even the opponents of the Constitution, interpreted Article V's convention
5 clause to mean that Congress had a right to regulate the convention, that the
6 convention could only propose a single subject, that two-thirds of the states
7 had to agree on this subject before a convention was called, or that Congress
8 had the power to interpret whether or not a single subject had been applied
9 for by the states.

10 Instead, the post-convention record demonstrates that the Founding
11 Fathers and those who ratified the Constitution believed that the convention
12 method contained in Article V was intended to provide a way to circumvent
13 Congress, that Congress had no choice but to call a convention upon the proper
14 number of states requesting a convention, that this convention was free and
15 independent of congressional control and regulation, and that it had the power
16 to propose more than one amendment for ratification to the states it choose to
17 do so.

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powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates---But let there be no change by usurpation..."*Id.* at 242. In these two famous orations, Washington referred more specifically to Article V than to any other provision of the Constitution.