CONSTITUTIONAL CONVENTION HISTORY

INTRODUCTION

Any interpretation of the meaning and intent of Article V must be based on careful scrutiny of the Constitutional Convention of 1787. Indeed, as far as this constitutional provision, it is the only source of construction. There has been no direct judicial or legislative action in this matter since that time. The record of 1787 is therefore pristine and uncontaminated by succeeding generations. The Framers’ intent thus comes through loud and clear.

The very essence of the Constitutional Convention of 1787 is embedded in Article V. As the history of the Convention demonstrates, the main reason for the Convention was the fact that the Articles of Confederation did not allow for change (except by unanimous consent of the states, which proved to be almost impossible to achieve), and thus the national government could not cope with the nation’s problems as they arose. The Framers saw to it the Constitution did allow for change, and as a result it has remained a credible blueprint describing a form of government that has remained viable for over two hundred years.

If the Constitution is a living document, then its ability, as provided for in Article V, to be altered in a peaceful, thoughtful and deliberate fashion, is its heartbeat. This flexibility satisfies the most basic need of

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310 See infra text accompanying note 335.
democratic government: the ability of that government to alter itself to meet
the changing needs of those governed.

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

EVENTS LEADING UP TO THE CONVENTION OF 1787

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

\begin{footnotes}
\item[311] S. Morison, H. Commager & Leuchtenburg, A CONCISE HISTORY OF THE AMERICAN
REPUBLIC 107 (2d ed. 1983).
\item[312] Id.
\item[313] Id. at 107-08
\end{footnotes}
Confederation, the system lacked actual federal power. By 1786, it was clear to such national leaders as George Washington and John Adams that the union of the states could not endure unless the Articles were extensively revised.

The thirteen states were suffering an economic depression that no single state could handle alone, Great Britain had refused to negotiate with the Confederation because of the United States’ impotence internationally, and Shay’s Rebellion had demonstrated its impotence domestically.

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

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314 See Id. at 108.
315 Id. at 114.
316 Id.
317 Id.
318 Id.
319 Id.
320 Id.
The Constitutional Convention was scheduled to begin May 14, 1787 in Philadelphia, but a majority of states did not arrive until May 25. In all, twelve states sent a total fifty-five delegates to the Convention with Rhode Island the single exception. After the Convention elected George Washington as presiding officer and appointed a rules committee, its real work began. On May 29, as a starting point for discussion, Governor Edmund Randolph of the Commonwealth of Virginia submitted a set of resolutions generally outlining the principles on which the Virginia delegation believed the new government should be based. This set of fifteen resolutions is known as the Virginia Plan.

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

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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.
327 See generally Id.
1 Articles of Confederation. The two groups deadlocked on the issue of the
2 representation of the states in the national legislature. 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. 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.” 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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13 INTRODUCTION TO THE AMENDATORY PROVISION

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

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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
334 AMENDING OF THE FEDERAL CONSTITUTION 1 (1942)).

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

"And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alterations be agreed to in a Congress of the united states, and be afterwards confirmed by the legislatures of every state."\(^{334}\)

According to convention delegate Charles Pinckney of South Carolina, "[I]t is to this unanimous consent, the depressed situation of the Union is undoubtedly owing."\(^{335}\) The best demonstration of the futility of amending the Articles of Confederation under the existing provision was the fact that Rhode Island did not even send a delegate to the Philadelphia convention.\(^{336}\)

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

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

There are two basic differences between the final version of Article V of the new Constitution and the old Article XIII of the Articles of Confederation.\(^{333}\) 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.
Confederation. First, a power is reserved to the states to call a convention for proposing amendments, in addition to Congress’ power to propose amendments. The reason for this change was the desire by the delegates to retain in the several states the power to circumvent a recalcitrant or abusive Congress by initiating a convention to propose amendments, reflecting the opinion that “the assent of the National Legislature ought not to be required” to an amendment to the Constitution. The second major difference between Article V and Article XIII is that proposed amendments do not require unanimous consent by the several states. As was noted with the Pinckney comment, the poor economic conditions existing in the United States at that time, which were directly attributable to the unanimous ratification provision of the Articles of Confederation, made the adoption of an amending process not requiring unanimous consent almost inevitable.

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

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

THE AMENDATORY PROVISION: THE RECORD

May 29----June 11: The Virginia Plan

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

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

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

See supra text accompanying notes 2,334.  
1 FARRAND, supra note 2, at 16 (Journal—May 29), 20 (Madison), 23 (Yates), 27 (McHenry), 27 (Patterson).  
Id.  
Id. at 22 (Madison—May 29).  
3 Id. at 593.
However, the Virginia Plan was not the only plan submitted for discussion by the delegates. Charles Pinckney of South Carolina submitted a proposed constitution,¹ a copy of which no longer exists.² Insofar as can be determined, the Pinckney Plan provided little in the direction of the amendment process:

"[XVI] The assent of the Legislature of States shall be sufficient to invest future additional Powers in U.S. in C. Ass. and shall bind the whole confederacy."³

Pinckney later maintained that his plan envisioned Congress as the proponent of amendments,⁴ but there is nothing in the text of his amendatory provision to indicate how amendments were to be proposed.

Another proposal, distributed to several members of the Convention but never formally put before it,⁵ was written by Alexander Hamilton. Unlike the Virginia Plan which made it clear that Congress was not to have any power to interfere with the process, Hamilton’s draft delegated the ability to propose amendments to the national legislature:

"This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two-thirds of the members of both Houses, and ratified by the Legislatures of, or by Conventions of deputies chosen by the people in, two-thirds of the States composing the Union."⁶

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

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¹ Id. at 16 (Journal—May 29), 23(Madison), 24 (Yates).
² 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.
³ Id. at 609. The words “in C. ass.” apparently stand for “in Congress assembled.”
⁴ Id. at 120.
⁵ Id. at 617.
⁶ Id. at 630.
Virginia Plan), and those delegates who wanted Congress to originate all
amendments (as called for in Hamilton’s plan), it is clear even at this early
state in the creation of Article V, that the subject matter of the amendment
was immaterial. What concerned the Framers was the process of amendment which,
from the earliest concept to completion, remained a numeric count causing the
amendment process to occur, rather than the subject matter of the amendment
being the basis upon which an amendment was processed.\(^\text{353}\)

On May 30, the delegates began their discussions focusing on the
resolutions presented in the Virginia Plan.\(^\text{354}\) On June 5, the discussion
reached Resolution 13, Virginia’s proposal regarding the amendment process.\(^\text{355}\)

As stated above, the Virginia Plan provided that:

> “[a] provision ought to be made for amendment of the Article of Union
whensoever it shall seem necessary, and the assent of the National Legislature
ought not to be required thereto.”\(^\text{356}\)

The first delegate to address the issue was Charles Pinckney who stated
quite simply he “doubted the propriety or necessity of it.”\(^\text{357}\) However,

Elbridge Gerry spoke in favor of the resolution, stating:

> “The novelty & difficulty of the experiment requires periodical
revision. The prospect of such a revision would also give intermediate
stability to the Govt. Nothing has yet happened in the States where this
provision existed to proves [sic] its impropriety.”\(^\text{358}\)

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\(^{353}\) 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).
Following these comments, the delegates postponed the matter for further
discussion.\footnote{Id. at 117 (Journal—June 5), 122 (Madison), 126 (Yates).}

On June 11, the delegates again discussed Resolution 13.\footnote{Id. at 194 (Journal—June 11), 202-03 (Madison), 206 (Yates).} According to
Madison’s notes, “several members did not see the necessity of the
[Resolution] at all, nor the propriety of making the consent of the Natl.
Legisl. unnecessary.”\footnote{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).} However, Colonel Mason, “urged the necessity of such a
provision”\footnote{Id. at 202 (Madison—June 11).} stating:

“The plan now to be formed will certainly be defective, as the
confederation has been found on trial to be. Amendments therefore will be
necessary, at it will be better to provide for them, in an easy, regular and
constitutional way than to trust to chance and violence. It would be improper
to require the consent of the Natl. Legislature, because they may abuse their
power, and refuse their consent on that very account. The opportunity for such
an abuse, may be the fault of the Constitution calling for amendmt.”\footnote{Id. at 202-03.}

Governor Randolph “enforced” Colonel Mason’s arguments.\footnote{Id. at 203.} At this point
the delegates unanimously agreed to the portion of Resolution 13 stating that
“provision ought to be made for the amendment of the Articles of the Union
whenever it shall seem necessary,”\footnote{Id. at 194 (Journal—June 11), 203 (Madison), 206 (Yates); Id. at 22
(Madison—text of resolution).} but they postponed a decision on
whether the assent of the national legislature would be required.\footnote{Id. at 194 (Journal—June 11), 203 (Madison), 206 (Yates).} Thus, when
Governor Randolph reported on the state of the resolutions several days later,
the text of the resolution concerning the amendment process (now numbered as Resolution 17) was as follows:

"Resolved that provision ought to be made for the amendment of the articles of union whenever it shall seem necessary."367

June 29----July 23: Miscellaneous Concerns

On June 29, the issue of the appropriate amendment process was discussed during the debate on whether each state should have an equal vote in the second house (i.e., the Senate).368 During the discussion of this issue, Judge Oliver Ellsworth of Connecticut stated he would not be surprised if the new Constitution should require amendment in the future, even though “we made the general government the most perfect in our opinion...”369 “Let a strong Executive, a Judiciary & Legislative power be created,” Judge Ellsworth said, "but Let not too much be attempted; by which all may be lost."370 Ellsworth described himself as “not in general a half-way man, yet [I] prefer[] doing half the good we could, rather than do nothing at all. The other half may be 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.
James Madison spoke in response to Judge Ellsworth regarding the need to continually strive for the best plan of government and the difficulty other governments had experienced in changing their form of government once it was in place:

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

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

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

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

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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).
The resolution was discussed, however, in relation to another resolution that “the legislative, Executive, and Judiciary Powers within the several States, and of the national Government, ought to be bound by oath to support the articles of union.” During the discussion, James Wilson of Pennsylvania said, “he was never fond of oaths” and that “[h]e was afraid they might too much trammel the... Members of the Existing Govt in case future alterations should be necessary; and prove an obstacle to Resol: 17, just agd. to.”

Nathaniel Gorham of Massachusetts said he could not see how taking an oath would hinder future changes to the Constitution:

“Mr. Ghorum [sic] did not know that oaths would be of much use; but could see no inconsistency between them and the 17. Resol: or any regular amendt. Of the Constitution. The oath could only require fidelity to the existing Constitution. A constitutional alteration of the Constitution, could never be regarded as a breach of the Constitution, or of any oath to support it.”

Elbridge Gerry of Massachusetts agreed with Gorham and added that he considered oaths as having value by impressing upon the officers of the new government the fact that the state and federal governments were not distinct governments but were instead components of a general system, thereby preventing the preference that existed in favor of the state governments.

The resolution relating to oaths was then passed without objection.

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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

On July 26, the resolutions voted on by the convention were submitted to the Committee of Detail 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, took approximately one week to complete their work. During this week, the committee had before it numerous proposals relating to the amendment process, including the proposals contained in the Virginia Plan and the Pinckney Plan.

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, whencesoever it shall seem necessary.” The original Virginia proposal ended this quote with the proviso

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382 Id. at 177 (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).
“that the assent of the National Legislature ought not to be required
thereto.”\footnote{389} The convention had voted to adopt the first part of the Virginia
Resolution,\footnote{390} but discussion on the second part of the Resolution was
postponed.\footnote{391}

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

“The assent of the Legislature of States shall be sufficient to invest
future additional Powers in the U.S. in C. ass. and shall bind the whole
confederacy.”\footnote{392}

The only surviving document of the portion of the Pinckney Plan before
the Committee of Detail is an outline of that Plan,\footnote{393} containing only the
following reference to amendment:

“24. The Articles of Confederation shall be inviolably observed, and the
Union shall be perpetual; unless altered as before directed.”\footnote{394}

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

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

\footnote{389} 1 \textit{Id.} at 22 (Madison—May 29), 121 (Madison—June 5), 194 (Journal—June 11),
202-03 (Madison—June 11).
\footnote{390} \textit{Id.} at 194 (Journal—June 11), 203 (Madison), 206 (Yates); 2 \textit{Id.} at 84
(Journal—July 23), 87 (Madison).
\footnote{391} 1 \textit{Id.} at 194 (Journal—June 11), 203 (Madison).
\footnote{392} 3 \textit{Id.} at 609.
\footnote{393} 2 \textit{Id.} at 129, 134 (Comm. Of Detail. Doc. III); See generally 3 \textit{Id.} at 595,
601-09.
\footnote{394} 2 \textit{Id.} at 136 (Comm. Of Detail, Doc. III).
especially editing related to the introduction of the idea of a convention to
propose amendments for proposing amendments to the Constitution. These
references also demonstrate the thought processes surrounding whether changes
to the Constitution by amendment would be made only one at a time.

The document, initially in the handwriting of Edmund Randolph, read:

"An alteration may be effected in the articles of union, on the
application of two-thirds of the state legislatures."\textsuperscript{395}

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

Rutledge’s version now read as follows:

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

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

"on appln. of 2/3ds of the State Legislatures to the Natl. Leg. They
call a Covn. To revise or alter ye. Articles of union."\textsuperscript{399}

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

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

\textsuperscript{395} Id. at 137 n.6, 148 (Comm. Of Detail, Doc. IV)(emphasis added).
\textsuperscript{396} Id.
\textsuperscript{397} Id.
\textsuperscript{398} Id. (emphasis added).
\textsuperscript{399} Id.
of the Union, the Legislature of the United States shall call a Convention for that Purpose."  

On August 6, the first draft of the Constitution was submitted to the Convention by the Committee of Detail. The amendatory process contained in Article XIX of the draft provided:

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

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

August 30----September 10: Article XIX

On August 30, the convention took up the matter of Article XIX. On this date, there was little discussion on the proposal. Gouverneur Morris of Pennsylvania suggested "that the Legislature should be left at liberty to call

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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).
The proposal was passed as submitted without objection with this suggestion by Morris being turned down by the delegates.\(^{405}\)

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

On September 10, Elbridge Gerry of Massachusetts moved to reconsider Article XIX.\(^{406}\) Gerry expressed concern that a majority of States could, through the convention process, “bind the Union to innovations that may subvert the State-Constitutions altogether.”\(^{407}\) Alexander Hamilton of New York seconded the motion to reconsider, rejecting Gerry’s concerns, but asserting Congress should also have the power to call a convention:

“[Hamilton] did not object to the consequences stated by Mr. Gerry—There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State—It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, 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.)
could be no danger in giving this power, as the people would finally decide in
the case.”  

James Madison next spoke on the subject stating his concerns on the lack
of specificity in the terms employed in Article XIX: “Mr. Madison remarked on
the vagueness of the terms ‘call a Convention for the purpose’ as sufficient
reason for reconsidering the article. How was a Convention to be formed? By
what rule decide? What the force of its acts?”

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

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

By this change, the states continued to have the right to apply for a
convention for proposing “an amendment” to the Constitution, but now Congress
would be given the power to directly propose “amendments” to the states for
ratification. Sherman’s motion was seconded by Elbridge Gerry of

Massachusetts.

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\footnote{408}{Id. at 558 (Madison--Sept. 10).}
\footnote{409}{Id.}
\footnote{410}{Id. at 555 (Journal), 558 (Madison--Sept 10).}
\footnote{411}{Id. at 558-59 (Madison--Sept. 10).}
\footnote{412}{Id. at 555 (Journal--Sept. 10), 558 (Madison--Sept. 10), 188 (Madison--Aug. 6) (previous text of art. XIX) (emphasis added).}
\footnote{413}{Id. at 558 (Madison--Sept. 10).}
However, the delegates quickly realized the language of this addition would result in a return to the requirement contained in the Articles of Confederation requiring unanimous approval of the states in order to effectuate a change in the new Constitution. James Wilson therefore immoderately moved for the insertion of the words “two-thirds,” so that amendments would be binding upon the consent of two-thirds of the several states. Wilson’s motion was narrowly defeated (by a vote of five states in favor and six opposed). Wilson then moved to alter the Resolution by inserting the words “three-fourths” of the several states, which was passed without objection.

Now, Article XIX read as follows:

“On the application of the Legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by three-fourths of the several States.”

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

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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).
James Madison next proposed a change in the content of the amendatory provision, moving to postpone consideration of the Article presently before the convention as amended and to instead take up the following proposal:

"The Legislature of the U. S. whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S[.]"[418]

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

More significantly, Madison’s new version deleted all reference to a convention for proposing “an amendment,” thus making it necessary for all proposals for “amendments” to come from the national legislature.

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

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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.
Instead, the discussion turned to a completely different matter. After receiving a second from Alexander Hamilton, John Rutledge of South Carolina objected to giving a majority of states the ability to amend the Constitution on the topic of slavery. Madison acceded to Rutledge’s suggestion to add a proviso which provided that “no amendments which may be made prior to the year 1808, shall in any manner affect the 4 & 5 sections of the VII article[.]

The fourth and fifth sections of Article VII contained the requirement that no prohibition would be allowed “on the migration and importation of such persons as the several States shall think proper to admit,” that such migration and importation shall not be prohibited, and that no per capita tax would be levied except in proportion to the Census, which counted blacks as three-fifths their number. With this proviso ensuring the continuation of slave trade in the United States until at least the year 1808, the revised amendatory article was passed.

September 12----September 17: Article V

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422 “Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it.” 2 Id. at 559 (Madison---Sept. 10).
423 Id. at 555 (Journal---Sept. 10), 559 (Madison---Sept. 10).
424 Id. at 182-83 (Madison---Aug. 6).
425 Id. at 555-56 (Journal---Sept. 10), 559 (Madison---Sept. 10).
As the delegates were in the process of finishing consideration of the few remaining proposals submitted to them by the Committee of Detail, the job of putting together the completed work of the Convention into a cohesive draft Constitution was given to the Committee of Style (also known as the Committee of Revision), consisting of William Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts. On September 12, the Committee of Style delivered its report of the Constitution as revised and arranged. It was here that the amendatory provision was renumbered Article V. The revised article read as follows:

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

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

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

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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).
reiterating Elbridge Gerry’s reiterating Elbridge Gerry’s\footnote{Id. at 557-58 (Madison----Sept. 10), 629 (Madison---Sept. 15).} fear that a majority of states might use reiterating Elbridge Gerry’s fear that a majority of states might use
1 Article V to the detriment of other states opposing to the amendment:
2 “Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the State importing slaves should be extended so as to provide that no States should be affected in its internal police, or deprived of its equality in the Senate.”\footnote{Id. at 629 (Madison---Sept. 15).}

3 Colonel Mason also spoke against the amendatory article. He focused on
4 his concern that Congress could prevent the proposing of amendments. On the
5 back of his copy of the draft Constitution, Mason wrote the following:
6 “Article 5\textsuperscript{th}. By this Article Congress only have the Power of proposing Amendments at any future time to this constitution, & shou’d it prove ever so oppressive, the whole people of America can’t make, or even propose Alterations to it; a Doctrine utterly subversive of the fundamental Principles of the Rights & Liberties of the people[.]”\footnote{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”).}

7 Mason’s notes served as the basis for the comments he gave on the
8 convention floor, which were recorded by Madison:
9 “Col. Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.”\footnote{2 Id. at 629 (Madison---Sept. 15). See infra text accompanying notes 363,418,430,435.}

10 As a result of these concerns, Gouverneur Morris of Pennsylvania and
11 Elbridge Gerry of Massachusetts “moved to amend the article so as to require a
12 Convention on application of 2/3 of the Sts...”\footnote{Id. (emphasis added).}

13 James Madison then addressed the motion:
14 “Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a Convention on the like application. He saw no objection however against
providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."

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

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

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

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

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

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

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

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3 Id. at 367-68 (footnote omitted).
41 See supra text accompanying note 437.
42 See supra text accompanying notes 435-437.
43 2 Id. at 555 (Journal---Sept. 10), (Madison---Sept. 10).
more his proposal was turned down by the Convention. Elbridge Gerry then
moved to strike the language that allowed ratification to occur by the
convention method, which also failed.

Roger Sherman then moved to prohibit any amendment that would affect the
internal police of a state or would deprive a state “its equal suffrage in the
Senate.” James Madison, speaking against the motion, cautioned the
following: “Begin with these special provisos, and every State will insist on
them, for their boundaries, exports & c.” The membership agreed with Madison
and voted down Sherman’s motion, three states to eight. Sherman then moved
to strike Article V altogether, but this motion also failed. However,
Sherman’s point on the need to keep the suffrage of the Senate equal gathered
support from delegates representing the small states. Gouverneur Morris of
Pennsylvania (a state which had previously voted against Sherman’s two
motions) then moved “to annex a further proviso---’that no State, without
its consent shall be deprived of its equal suffrage in the Senate’”

According to Madison, the motion had been “dictated by the circulating murmurs
of the small States...” As a result, the motion “was agreed to without
debate, no one opposing it, or in the question, saying no.”

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2 Id. at 630 (Madison---Sept. 15).
Id.
Id.
Id.
Id.
Id. at 630-31.
Id. at 630.
Id. at 631
Id.
Id.
The debate on the Constitution ended September 15, at which time the Constitution as amended was agreed to unanimously.\(^{454}\) The Convention ordered that the Constitution be engrossed,\(^{455}\) and two days later, on September 17, the engrossed Constitution was read\(^{456}\) and signed.\(^{457}\) The final version of Article V read as follows:

\section*{ARTICLE V.}

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.\(^{458}\)

\section*{SUMMARY OF RECORD REGARDING PRIMARY ISSUES}

\subsection*{Need for an Amendment Process and the Convention Method}

Some delegates to the Constitutional Convention questioned the need for providing a procedure for amending the new Constitution.\(^{459}\) Some delegates even

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\textsuperscript{454} 2 \textit{Id.} at 633 (Madison---Sept. 15), 634 (McHenry---Sept. 15).  \\
\textsuperscript{455} \textit{Id.}  \\
\textsuperscript{456} \textit{Id.} at 641 (Madison---Sept. 17), 649 (McHenry).  \\
\textsuperscript{457} \textit{Id.} at 648-49 (Madison---Sept. 17), 649 (McHenry).  \\
\textsuperscript{458} \textit{Id.} at 662-63.  \\
\textsuperscript{459} See supra text accompanying notes 357,361,449.
\end{flushright}
expressed fear that the proposed amending provision could be used as a means by which the rights of some states could be subverted by a majority of other states. However, most of the delegates realized the plan of government created by the Convention would not be perfect and would require, from time to time, amendments to correct imperfections and the changing needs of America. Several delegates, especially Colonel Mason, strongly believed the amendment process was absolutely necessary, not only to correct defects in the new system, but also to protect the people and the states from an abusive or oppressive national legislature. In response to these fears, the Convention acceded to the request to create a process of proposing amendments by a convention method.

Role of the States and Congress in Proposing Amendments

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

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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.
and neither called for a convention to propose amendments, but Hamilton’s plan
did allow for a state convention to ratify amendments proposed by the national
legislature.\textsuperscript{466} When the amendatory provision emerged from the Committee of
Detail, it provided that state legislatures could apply to the national
legislature for an amendment, and that the national legislature would then be
required to call a convention for that purpose.\textsuperscript{467} The amendatory article was
later amended to also allow the national legislature to propose amendments,\textsuperscript{468}
and then subsequently revised further to provide that the states could apply
to the national legislature for amendments they desired, rather than for a
convention, with the national legislature then being required to actually
propose the desired amendments.\textsuperscript{469} At this time, the reference to the national
legislature calling a convention upon the application of two-thirds of the
states was dropped.\textsuperscript{470} Therefore, when the amendatory provision emerged from
the Committee of Style, only the national legislature was authorized to
propose amendments.\textsuperscript{471} When this change was discovered, the provision was
amended a final time, permitting either the national legislature, or a
convention applied for by two-thirds of the states, to propose amendments and
requiring the national legislature to call a convention “on application of 2/3
of the Sts.”\textsuperscript{472}

\textsuperscript{466} See supra text accompanying notes 349-352.
\textsuperscript{467} See supra text accompanying note 402.
\textsuperscript{468} See supra text accompanying note 412.
\textsuperscript{469} See supra text accompanying notes 418,430.
\textsuperscript{470} See supra text accompanying notes 418,430.
\textsuperscript{471} See supra text accompanying note 430.
\textsuperscript{472} See supra text accompanying notes 437,458.
This series of revisions and proposals to Article V was the product of the dispute between those in the Convention who believed the federal government would be in the best position to perceive the need for particular amendments, and those who believed the amending process of the Constitution should contain language to thwart or redress the actions or excesses of an unresponsive or corrupt national governing body. It was clearly a confrontation between those wishing a powerful national government and those fearing that result. In the end, both sides got what they sought: the national legislature could propose amendments it felt were needed, and the national legislature could be circumvented by the states through the convention process when the state legislatures considered such circumvention necessary.

Ratification: Method and Number of States Required.

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

\textsuperscript{473} See supra text accompanying note 334.\textsuperscript{474} See supra text accompanying note 349.\textsuperscript{475} See supra text accompanying note 352.
attention to the details of ratification until nearly the end, at which time
Madison proposed his revision of the amendatory article which left it to the
national legislature to actually propose all amendments. In doing so, he
resurrected Hamilton’s proposal that ratification could be either by the
consent of the state legislatures or by state conventions called for that
purpose. This change in ratification was carried forward by the delegates in
the final version of Article V.

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

Amendment (Singular) vs. Amendments (Plural)

The Articles of Confederation only allowed for one amendment to be
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.
ratification by the states of “such alteration.” While the Virginia Plan did not specify any details of an amendment process, the Hamilton Plan did allow for more than one amendment to be proposed at a time, providing that the Constitution “may receive such alterations and amendments” as proposed by the states and agreed to by both houses of the national legislature. Despite this, when the amendatory article emerged from the Committee of Detail, the provision allowed that the states could apply for “an amendment” to the constitution, and that the national legislature would call a convention “for that purpose.”

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

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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.
when supporters of the convention method succeeded in reinserting the provision, the drafters continued to follow Madison’s multiple amendments language, allowing the national legislature to “propose amendments” (plural) or the states to demand a convention “for proposing Amendments” (plural). Therefore, the plain language of Article V is clear and decisive: Congress shall call a “Convention for proposing Amendments,” not a convention for proposing an amendment. It is therefore clear than an Article V convention has the power to consider various issues (plural) and the right to submit various amendments (plural) to the states for consideration and ratification, just as Congress has done in the past. In addition, the language in Article V does not authorize the states to apply for an amendment; rather they are only authorized to apply for a convention for proposing amendments. The states have no authority under the article to propose an amendment. That power rests solely with the Congress and the convention to propose amendments. Were it to the contrary, the entire concept of separation of powers would be defeated, as 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.
minority of states could easily deflect any effort by the Congress to amend the Constitution.

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

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

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

[^490]: See supra text accompanying note 437.
the state legislatures, the required calling, the actual operation of the
convention, or in forwarding whatever amendment proposals the convention to
the states for ratification--- that action, impediment or inaction must be
unconstitutional.

POST-CONVENTION DISCUSSION OF ARTICLE V

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

\textsuperscript{491} 1 FARRAND, supra note 2, at 121 (Madison---June 5), 202 (Madison---June 11). See supra text accompanying notes 357,361,373.
\textsuperscript{492} S. MORISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE
AMERICAN REPUBLIC 121 (2\textsuperscript{nd} ed. 1983); W. Peters, A MORE PERFECT UNION: THE
MAKING OF THE UNITED STATES CONSTITUTION 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)
On October 27, 1787, several writers favoring the Constitution, using 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.
Constitution, which were later republished as THE FEDERALIST.\(^{493}\) James Madison focused particularly on Article V in THE FEDERALIST No. 43. He discussed the great value of allowing both Congress and the states to proposed changes in the Constitution:

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


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."


\(^{494}\) 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
In THE FEDERALIST No. 49, Madison discussed whether the people should be
called upon to resolve conflicts between the various branches of government,
or to correct breaches of one branch of government against the other branches
of government. 495 While Madison said he did not refer “the proposed recurrence
to the people, as a provision in all cases for keeping the several departments
of power within their constitutional limits,” he nevertheless stated that “a
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,
tan 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).
The documentation is clear. By these comments it is obvious the Founding Fathers saw that limits on governmental powers were clearly required, either by the originators of the Constitution working on the document until they got it right, as Mr. Randolph proposed, or by the use of the amendment system contained within the document as Madison and others proposed. But all held a common theme that government powers required checks which that government could neither avoid, deny, regulate nor otherwise blunt in order to limit governmental power. Clearly, therefore, a convention to propose amendments was intended as a check to regulate excesses of the national government, and it was not intended that the national government could avoid, deny, regulate or otherwise blunt this constitutional check for its own self-interest.

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

Hamilton stated:

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

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

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

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

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.”
system of change in government, that of the Confederation, which required
unanimous consent to amend its provisions.\textsuperscript{500} He was attempting to show an
advantage in the new system, that it only required ten states in the
Constitution to effect change as opposed to the unanimous situation required
at the time under the Confederation.

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

\textsuperscript{500} See supra text accompanying note 334.
\textsuperscript{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.”
place the whole of its work before the state legislatures again. His language argues that any defects in the proposed Constitution should be repaired by post-ratification amendments targeting specific problems, and that the states could review and ratify the proposed amendments one at a time.

It should be remembered, as indicated by the Randolph comments,\(^{502}\) that not all Americans favored adoption of the Constitution. Certainly the calling of a second convention would have played into the hands of the document’s opponents.

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

Further, Hamilton did not state that the scope of the subjects considered by a convention called for proposing amendments would be limited to a single issue. Rather, he was merely stating that once Congress or the convention determined what amendments should be made to the Constitution, every proposed amendment “would be a single proposition, and might be brought forward singly.”\(^{503}\) By such a method, each amendment would be considered by the states singly and without the turmoil associated with the rewriting and adopting of a completely new constitution each time a change was required.

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\(^{502}\) See supra text accompanying note 492.

\(^{503}\) Id.
This method would also prevent the “all or nothing” result that would occur if a block of amendments were presented as one unit.

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

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

\textsuperscript{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.
convention for the purpose of adding amendments to the proposed Constitution would doubtlessly not succeed because of:

"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 hence also an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act."\(^{505}\)

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

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

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

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

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

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

Hamilton clearly points out that the applications by the states are for
applying for a convention to propose amendments, not for a specific amendment.
It is also clear that even Hamilton, the preeminent proponent of national
power, believed that Congress’ role in calling a convention was extremely

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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
limited, as shown by his comment, “[n]othing...is left to the discretion of
that body.” 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.

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...”

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?”

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

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.

See supra text accompanying note 426,427.

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.

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.

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)
Hamilton’s interpretation is repeated and even more defined by the comments of Wilson Nicholas of Virginia.\textsuperscript{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. 1\textsuperscript{st}. 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.’\textsuperscript{(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.’\textsuperscript{(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.’\textsuperscript{(3)} Caplan, Constitutional Brinksmanship: Amending the Constitution by National Convention, (1988)(emphasis in original). Footnotes as noted below:

\textsuperscript{(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).


\textsuperscript{(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).

\textsuperscript{515} See supra text accompanying note 510.
"On the application of the legislatures of two-thirds of the several states, a convention is to be called to propose amendments..."\textsuperscript{516}

Then, in reference to ratifying any proposed amendment, Nicholas restates the proposition and clearly demonstrates the correct interpretation of the power of the convention to propose amendments:

"...those states who will apply for calling the convention will concur in the ratification of the proposed amendments."\textsuperscript{517}

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

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

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

\textsuperscript{516} Id.
\textsuperscript{517} Id. (emphasis added).
\textsuperscript{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).
"If...amendments [are]...generally wished...two-thirds of the legislatures may require a general convention for the purpose, in which case Congress are under the necessity of convening one." 519

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

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

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

Iredell responded to Bass by saying:

"[I]t was very evident that it did not depend on the will of Congress; for that the legislatures of two-thirds of the states were authorized to make application for calling a convention to propose amendments and, on such application, it is provided that Congress shall call such a convention, so 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
It is clear from the various comments made at the ratifying conventions that Article V was perceived as a viable method of correcting errors that might be found in the new Constitution. It is also as clear that no one, not even the opponents of the Constitution, interpreted Article V’s convention clause to mean that Congress had a right to regulate the convention, that the convention could only propose a single subject, that two-thirds of the states had to agree on this subject before a convention was called, or that Congress had the power to interpret whether or not a single subject had been applied for by the states.

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

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.