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LAWFUL AND PEACEFUL REVOLUTION:
ARTICLE V AND CONGRESS' PRESENT DUTY
TO CALL A CONVENTION FOR
PROPOSING AMENDMENTS

The Honorable Bruce M. Van Sickle
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A LAWFUL AND PEACEFUL REVOLUTION: ARTICLE V AND CONGRESS' PRESENT DUTY TO CALL A CONVENTION FOR PROPOSING AMENDMENTS†

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The Constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to

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this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war. Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people.

James Iredell

North Carolina Ratifying Convention of 1787

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Preface

A lawful and peaceful revolution: that, and no less, is within the contemplation of Article V of the United States Constitution. The Article is short. It reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the 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 it's [sic] equal Suffrage in the Senate.²

Article V provides for two methods of proposing amendments to the Constitution. One method allows the Congress to propose amendments. The other allows a national convention called pursuant to petitions by two-thirds of the states to propose amendments. An amendment pro-

2. U.S. CONST. art. V, reprinted in 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 562-63 (1911)[hereinafter 1, 2, 3, or 4 FARRAND]; see also 4 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937)(containing corrections and a more detailed index). The authors are unable to determine why the possessive "its" at the end of Article V is spelled "it's" while the immediately preceding "its" is spelled correctly. However, upon review of the folio of the Constitution, it is clear that Professor Farrand's text is accurate.

posed by either method becomes a part of the Constitution when three-fourths of the legislatures of the several states, or three-fourths of the states in separate ratifying conventions, ratify it. Congress is given the duty of selecting which of these two modes of ratification shall be used, regardless of how the amendment was proposed.

Our special interest in this article is the provision for "a Convention for proposing Amendments."³ On that point, Article V provides that "[t]he Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments"⁴

This article focuses on the proper interpretation of Article V. In Part I of this article, we review the history of Article V at the constitutional convention of 1787, and the subsequent discussions concerning the Article during the debates on the ratification of the Constitution. This historical information sheds light on the proper interpretation of the convention method for proposing amendments. Part II contains a brief review of the role that the convention method of Article V has played in our political history, despite the fact that no convention has ever been called. Part III contains criticism of proposed federal legislation that would improperly assert sweeping congressional control over Article V conventions, and effectively emasculate the convention method of proposing amendments. In this regard, we analyze the scope of authority granted to Congress in the calling of an Article V convention, concluding, in light of the history of Article V presented in Part I, that Congress' authority is extremely narrow. In Part IV we discuss the similar constraints on the states' ability to limit Article V and any convention called pursuant to that Article. In Part V we set forth the principles which apply to the counting of the applications submitted by the states for an Article V convention. Part VI contains a summary of the applications that the states have made for a convention for proposing amendments to the Constitution. In Part VII we reach the startling but unavoidable conclusion, based on the previous sections, that Congress is constitutionally obligated to call a convention at this time. Finally, Part VIII contains our suggestions on what preparations can be made by the states for the pending convention in order to avoid confusion and conflict, and promote the successful operation of this little-understood constitutional institution.

3. U.S. CONST. art. V.

4. *Id.*

I. THE FIRST CONSTITUTIONAL CONVENTION AND THE PASSAGE OF ARTICLE V

A. Introduction

The Articles of Confederation and Perpetual Union, drafted by John Dickinson and altered by the Continental Congress, were adopted in November 1777.⁵ Under them each state had one vote in the national legislature, and nine of the thirteen had to agree on such important matters as the declaration of war, the conclusion of treaties, and the borrowing of money.⁶ The Articles provided for a Committee of the States to act between sessions of Congress, exercising all powers except those requiring agreement by nine of the thirteen states.⁷ The Articles did outline a federal system, but it was a system hopelessly crippled by a lack of federal power.⁸ By 1786, national leaders, including George Washington and John Adams, had concluded that the union of the states could not endure unless the Articles were extensively revised.⁹ The thirteen states were suffering under a depression no state could handle alone; Great Britain had refused to negotiate with the Confederation because of the United States' impotence internationally,¹⁰ and Shay's rebellion had demonstrated its impotence internally.¹¹

Meanwhile, because the states were quarreling over matters of commerce, Virginia invited the states to send delegates to a convention at Annapolis to "take into consideration the trade of the United States."¹² The convention met in September 1786, but only five states sent delegates.¹³ They were too few to reach meaningful decisions, so the convention, under the leadership of Alexander Hamilton, 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."¹⁴

5. S. MORRISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 107 (2d ed. 1983).

6. *Id.*

7. *Id.* at 107-08.

8. *See id.* at 108.

9. *Id.* at 114.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

B. *The Beginning of the Convention and the Great Compromise*

Although the convention was supposed to begin on May 14, 1787, a majority of states did not arrive until May 25.¹⁵ Twelve states, all but Rhode Island, sent a total of fifty-five delegates to the convention.¹⁶ Following the election of George Washington as presiding officer and the appointment of a rules committee,¹⁷ the work of the convention began. As a starting point for engendering discussion, on May 29 Governor Edmund Randolph of Virginia submitted a set of resolutions generally describing the principles upon which the Virginia delegation believed the new government should be based.¹⁸ This set of fifteen resolutions is known as the Virginia Plan.¹⁹

The Virginia Plan, which was generally supported by the large states, contained the basic framework of our Constitution as finally adopted,²⁰ 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.²¹ New Jersey led the resistance to the Virginia plan with its own plan which largely followed the existing Articles of Confederation.²² The two groups deadlocked on the issue of the representation of the states in the national legislature.²³ In July the deadlock was broken by a suggestion from Connecticut that one house of the national legislature be apportioned according to population, and the other house, the Senate, provide an equal vote for each state.²⁴ This was the "Great Compromise" so often referred to in the histories of the Constitution. The importance of the compromise is demonstrated by the last clause in Article V, which provides "that no State, without its Consent, shall be deprived of its equal

15. 1 FARRAND, *supra* note 2, at 1. For the convenience of the reader who may only have access to some other compilation of the various notes of the Convention, reference to the date of the entry and author, when appropriate, is supplied parenthetically at each citation to Professor Farrand's comprehensive work. Because the convention was held entirely during 1787, the date listed does not include reference to the year. Where a date is not given in a listing of several sources, reference is implicitly made to the immediately preceding date.

16. *Id.*

17. 1 FARRAND, *supra* note 2, at 2 (Journal—May 25).

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

19. *Id.* at 20-22 (Madison—May 29); 3 *id.* at 593.

20. See generally S. MORISON, H. COMMAGER & W. LEUCHTENBURG, *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 115 (2d ed. 1983).

21. See generally *id.*

22. See generally *id.* at 115-16.

23. See generally *id.* at 116.

24. See generally *id.*

Suffrage in the Senate."²⁵ This language, placed as it is in Article V, seeks to ensure that the results of the "Great Compromise" will never be disturbed.

C. *The Amendatory Provision: An Introduction*

One topic of discussion and concern was the matter of future amendments to the constitution that was being drafted. A commentator has noted that "[t]he idea of amending the organic instrument of a state is peculiarly American."²⁶ The concept was not new to the delegates in Philadelphia. Several of the state constitutions included procedures for amendments.²⁷ The Articles of Confederation had its amendatory 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 alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.²⁸

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."²⁹ Nothing better demonstrated the futility of seeking an amendment under such a provision than the fact that Rhode Island did not even send a delegate to the Philadelphia convention.³⁰

A realistic, rather than idealistic, approach was followed by the delegates in hammering out the terms of the new Constitution, including the development of its amendatory article. Dickinson had struck the keynote of the entire convention with his statement that "[e]xperience must be our only guide. Reason may mislead us."³¹

25. U.S. CONST. art. V.

26. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D.L. REV. 355, 359 (1979) [hereinafter Voegler] (quoting L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION I* (1942)).

27. See generally *id.* at 359-60.

28. 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)).

29. 3 FARRAND, *supra* note 2, at 120.

30. See 4 *id.* at 18-20.

31. 2 *id.* at 278. A more extensive quotation of Dickinson's comments is both appropriate and enlightening:

Experience 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

The final version of Article V of the new Constitution differs in two basic respects from the old Article XIII of the Articles of Confederation.³³ First, a power is reserved in the states to call a convention for proposing amendments, in addition to Congress' power to propose amendments. The delegates wanted to retain in the several states the power to circumvent a recalcitrant or abusive Congress by initiating a constitutional convention,³⁴ reflecting the opinion that "the assent of the National Legislature ought not to be required" to an amendment to the Constitution.³⁵ The second difference from Article XIII is that proposed amendments do not require unanimous approval by the separate states. As the Pinckney comment illustrates, the dismal economic condition of the United States was attributed to the unanimous ratification provision of the Articles of Confederation.³⁶ Thus, the adoption of an amending process which did not require unanimous approval by the states was almost inevitable.

In reaching this final result, there was substantial discussion as to whether the assent of the national legislature to amendments ought to be required. The final version does allow Congress to propose amendments, but any proposed amendment still has to be ratified by the states, and only by the states. That is, under both the Articles of Confederation and the Constitution, Congress has never been given the power to propose *and* ratify amendments.

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.

Id. In his famous quotation, Dickinson was apparently alluding to one of David Hume's essays, entitled "The rise of arts and sciences," wherein Hume stated the following:

To balance a large state or society (says he), whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labour; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments.

1 HUME'S ESSAYS, quoted in THE FEDERALIST No. 85 (A. Hamilton) (emphasis added).

32. Compare U.S. CONST. art. V, *supra* text accompanying note 2 with Articles of Confederation art. XIII, *supra* text accompanying note 28.

33. 1 FARRAND, *supra* note 2, at 203 (Madison—June 11)(Mason'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).

34. 1 *id.* at 22 (quoting Resolution 13 of the Virginia Plan).

35. See *supra* text accompanying notes 28-29.

D. *The Amendatory Provision: The Record*

1. *May 29 — June 11: The Virginia Plan*

As noted above, The Virginia Plan served as the starting point for discussion at the convention.³⁶ This plan described, in a general manner, the principles upon which the Virginia delegation believed the new government should be based.³⁷ Resolution 13 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 to be required thereto.³⁸

This early statement demonstrates that a major purpose of the amendatory article was to provide a means for amending the Constitution despite congressional inaction or opposition. This fact holds special significance because much of the final text of the Constitution was derived from the principles enunciated in the Virginia Plan.³⁹

Upon receipt by the convention of the Virginia Plan, Charles Pinckney of South Carolina submitted a proposed constitution which he had prepared,⁴⁰ a copy of which no longer exists.⁴¹ As far as can be determined, the Pinckney Plan provided little direction on 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

36. 1 FARRAND, *supra* note 2, at 16 (Journal—May 29), 20 (Madison), 23 (Yates), 27 (McHenry), 27 (Patterson).

37. *Id.*

38. *Id.* at 22 (Madison—May 29).

39. 3 *id.* at 593.

40. 1 *id.* at 16 (Journal—May 29), 23 (Madison), 24 (Yates).

41. 3 *id.* at 595. Great confusion has been caused by the lack of a correct copy of the so-called Pinckney Plan. See generally *id.* at 595, 601-04. In 1818 Secretary of State John Quincy Adams was given the task of organizing and printing the public Journal of the convention. Because he could not locate the original Pinckney Plan in the official documents of the convention or among James Madison's papers, Adams asked Pinckney to send him a copy of the original plan submitted to the convention. See *id.* at 426-27. Pinckney found several rough drafts of what he claimed was his original plan — "although they differed in some measure from each other in the wording & arrangement of the articles — yet they were all substantially the same . . ." *Id.* Pinckney went on to tell Adams that his plan "was substantially adopted." *Id.* at 426-28. However, in light of thorough research by numerous individuals and Madison's clear rejection of Pinckney's assertion as to the original plan Pinckney submitted before the convention, it is clear that the copy sent to Adams was not the same as the original Pinckney Plan submitted at the convention. See *id.* 501-15, 531, 534-37, 595-609. In order to clear up the mystery, Professor Farrand combined all of the sources of information available in 1911 and reconstructed what he believed to be the Pinckney Plan in its original form. See *id.* at 604.

whole confederacy.⁴²

Although Pinckney later asserted that his plan envisioned Congress as the proponent of amendments,⁴³ there is nothing in the text of his amendatory provision to indicate how amendments were to be proposed.

While Resolution 13 of the Virginia Plan made it clear that Congress was not to have any power to interfere with the amendment process, Alexander Hamilton's proposed draft of the new constitution, which was distributed to several members of the convention but never formally before the convention,⁴⁴ 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.⁴⁵

Not surprisingly, the tension between those delegates that desired to exclude Congress from the amendment process (as demonstrated in Resolution 13 of the Virginia Plan) and those delegates that wanted all amendments to originate from Congress (as exemplified in Hamilton's version of the amendatory provision) created substantial discussion and occasional animosity; but as is often the case in politics, it was this same tension that served as a catalyst to the compromise that resulted in the final language adopted by the convention.

The convention delegates began their discussions on May 30 by focusing on the resolutions presented in the Virginia Plan.⁴⁶ It was not until June 5 that the discussion reached Resolution 13, Virginia's proposal regarding the amendment process.⁴⁷ 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."⁴⁸

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

43. *Id.* at 120.

44. *Id.* at 617.

45. *Id.* at 630.

46. 1 *id.* at 30 (Journal—May 30), 33 (Madison), 38 (Yates), 40 (McHenry).

47. *Id.* at 117 (Journal—June 5), 121 (Madison), 126 (Yates).

48. *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), 121

Charles Pinckney first spoke on the issue, stating quite simply that he "doubted the propriety or necessity of it."⁴⁹ Elbridge Gerry, on the other hand, was in favor of the resolution, stating as follows: "The novelty & difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt. Nothing had yet happened in the States where this provision existed to prove [sic] its impropriety."⁵⁰ The delegates thereupon postponed the matter for further consideration.⁵¹

About a week later, on June 11th, the delegates again discussed Resolution 13.⁵² 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."⁵³ Colonel Mason, however, "urged the necessity of such a provision"⁵⁴ stating as follows:

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, and 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.⁵⁵

Governor Randolph "enforced" Colonel Mason's arguments.⁵⁶ The delegates then unanimously agreed to the portion of Resolution 13 that stated that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary,"⁵⁷ but postponed the decision on whether the assent of the national legislature would be required.⁵⁸ Thus, when Governor Randolph reported on the state of the

(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. of Detail, Doc. 1).

49. 1 *id.* at 121 (Madison—June 5).

50. *Id.* at 122 (Madison—June 5).

51. *Id.* at 117 (Journal—June 5), 122 (Madison), 126 (Yates).

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

53. *Id.* at 202 (Madison—June 11). Madison does not state which members of the convention spoke against the resolution. Based on the comments made regarding this provision at other points in the convention, the most likely opponent to speak against Resolution 13 would be Charles Pinckney. See *id.* at 121 (Madison—June 5).

54. *Id.* at 202 (Madison—June 11).

55. *Id.* at 202-03.

56. *Id.* at 203.

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

58. *Id.* at 194 (Journal—June 11), 203 (Madison), 206 (Yates).

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 whensoever it shall seem necessary."⁵⁹

2. 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).⁶⁰ While discussing this issue, Judge Oliver Ellsworth of Connecticut stated that 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"⁶¹ "Let a strong Executive, a Judiciary & Legislative power be created" Judge Ellsworth argued, "but Let not too much be attempted; by which all may be lost."⁶² Ellsworth went on to describe 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."⁶³

In response to Judge Ellsworth's comments, James Madison spoke about the need to continue to strive to create the best plan of government possible and the difficulty other governments have experienced in changing their form of government once it is 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 was made, and though 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.⁶⁴

Another delegate recorded Madison's comments as demonstrating a concern about the potential dangerousness of relying on future

59. *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 resolutions 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).

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

61. *Id.* at 475 (Yates—June 29).

62. *Id.* at 469 (Madison—June 29).

63. *Id.*

64. *Id.* at 475-76 (Yates—June 29).

amendments, arguing that 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 od. 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 —[.]⁶⁵

Resolution 17 — “That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary”⁶⁶ — was considered by the entire delegation of the convention for the first time on July 23.⁶⁷ The Resolution was passed unanimously, apparently without any discussion.⁶⁸

Resolution 17 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.”⁶⁹ In this discussion, James Wilson of Pennsylvania stated that “he was never fond of oaths” and that “[h]e was afraid they might too much trammel the the [sic] Members of the Existing Govt in case future alterations should be necessary; and prove an obstacle to Resol: 17. just agd. to.”⁷⁰ Nathaniel Gorham of Massachusetts failed to discern how the taking of 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.⁷¹

65. *Id.* at 478 (King—June 29). Unfortunately 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).

66. 2 *Id.* at 84 (Journal—July 23), 87 (Madison).

67. *Id.*

68. 2 *Id.* at 84 (Journal—July 23), 87 (Madison).

69. 2 *Id.* at 84 (Journal—July 23); 1 *Id.* at 227 (Journal—June 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).

70. 2 *Id.* at 87 (Madison—July 23).

71. 2 *Id.* at 87-88 (Madison—July 23). It is unclear why Madison consistently wrote

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.⁷² The resolution relating to oaths was then passed without objection.⁷³

3. July 26 — August 6: Committee of Detail

On July 26, the resolutions were submitted to the Committee of Detail,⁷⁴ consisting of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania.⁷⁵ The committee spent approximately one week transforming the principles set out in the resolutions that had been adopted by the convention into a detailed and workable constitution.⁷⁶ During that week, the committee had before it numerous proposals relating to the amendment process,⁷⁷ including the proposals contained in the Virginia Plan⁷⁸ and the Pinckney Plan.⁷⁹

"Ghorum" instead of "Gorham" during the first few months of the convention. See 1 *id.* at 10 (May 28), 215, 219 (June 12), 372, 375 (June 22), 404, 405, 408 (June 25), 421 (June 26); 2 *id.* at 15, 17 (July 16), 41, 42, 43, 44, 46, 48 (July 18), 73, 79 (July 21), 87, 90, 94 (July 23), 106 (July 24), 122, 125, 127 (July 26), 196, 198 (Aug. 7), 215, 221, 224 (Aug. 8), 240 (Aug. 9), 251, 255 (Aug. 10), 270 (Aug. 13), 293 (Aug. 14), 297, 300 (Aug. 15), 309 (Aug. 16), 314 (Aug. 17), 329 (Aug. 18), 357 (Aug. 21). On August 22, Madison finally employed "Gorham" as the spelling, *id.* at 374, but he then reverted back to "Ghorum." *Id.* at 392, 293 (Aug. 23), 401, 402 (Aug. 24), 415, 416, 418 (Aug. 25), 439 (Aug. 28). During August 29 and September 8, Madison alternated between "Ghorum" and "Gorham." *Id.* at 447 (Aug. 29—Ghorum), 448 (Aug. 29—Gorham), 453 (Aug. 29—Gorham), 476 (Aug. 31—Ghorum), 480 (Aug. 31—Gorham), 499 (Sept. 4—Gorham), 526 (Sept. 6—Gorham), 540 (Sept. 7—Gorham), 549 (Sept. 8—Ghorum). Finally, beginning on September 10, Madison used "Gorham" throughout the rest of his notes. *Id.* at 560 (Sept. 10), 587 (Sept. 12), 589 (Sept. 12), 614 (Sept. 14), 628 (Sept. 15), 643 (Sept. 17). In addition, when Madison went back to amend his completed Journal, he inserted Gorham's correct spelling. 1 *id.* at 335 (June 20); see *id.* at xix. See generally *id.* at xvi-xix.

72. 2 *id.* at 88 (Madison—July 23).

73. *Id.*; see also *id.* at 84 (Journal—July 23).

74. *Id.* at 117 (Journal—July 26).

75. *Id.* at 97 (Journal—July 24), 106 (Madison).

76. See generally *id.* at 117 (Journal—July 26), 175 (McHenry—Aug. 4), 176 (Journal—Aug. 6).

77. See generally *id.* at 133, 136, 148, 152, 159, 174; 3 *id.* at 609.

78. 2 *id.* at 133 (Comm. of Detail, Doc. I).

79. *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

The language of the Virginia amendatory proposal remained the same as its May 29 introductory version, which was as follows: "Resolved That Provision ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary."⁸⁰ Of course, the original Virginia proposal ended the above-quoted language with the proviso "that the assent of the National Legislature ought not to be required thereto."⁸¹ As discussed above, the first part of the Virginia Resolution was adopted⁸² but the discussion on the second part of the Resolution was postponed.⁸³

Professor Farrand, in his attempt to reconstruct the Pinckney Plan, determined that the following is most probably the original text of the Pinckney amendatory provision: "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."⁸⁴ Unfortunately, the only surviving document of the portion of the Pinckney Plan before the Committee of Detail is an outline of that Plan,⁸⁵ which contains only the following reference to future amendments: "24. The Articles of Confederation shall be inviolably observed, ^x and the Union shall be perpetual; ^x unless altered as before directed."⁸⁶ It is unclear what was meant by the language "unless altered as before directed," although it is reasonable to assume from this language that the version of the Pinckney Plan used by the Committee of Detail included some other reference to the amendment process.

The next relevant document extant in the records of the Committee of Detail is a draft copy of portions of the constitution before the Committee. Substantial information on the thought processes of the Committee is revealed by the editing contained on the document itself, especially editing related to the introduction of the idea of a convention

proposed constitution. See 1 *id.* at 242-45 (Madison—June 15), 247 (King); see also 3 *id.* at 611-13, 615-16.

80. 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).

81. 1 *id.* at 22 (Madison—May 29), 121 (Madison—June 5), 194 (Journal—June 11), 202-03 (Madison—June 11).

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

83. 1 *id.* at 194 (Journal—June 11), 203 (Madison).

84. 3 *id.* at 609.

85. 2 *id.* at 129, 134 (Comm. of Detail, Doc. III); see generally 3 *id.* at 595, 601-09.

86. 2 *id.* at 136 (Comm. of Detail, Doc. III)(footnotes omitted). Professor Farrand has concluded that "[t]he crosses are evidently intended to indicate that the last two clauses should be reversed." *Id.* n.5.

for the purpose of proposing amendments to the Constitution. References to these early drafts also demonstrate the thought processes surrounding whether the changes to the Constitution by the amendment process would be made only one at a time.

The document initially provided the following handwriting of Edmund Randolph: "*An alteration may be effected in the articles of union, on the application of two thirds of the state legislatures.*"⁸⁷ Randolph subsequently struck out the words "two thirds" and replaced them with the word "nine,"⁸⁸ and then apparently allowed John Rutledge to make suggestions and changes on the document. Rutledge returned the language 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.⁸⁹ Rutledge's new version read as follows: "*An alteration may be effected in the articles of union, on the application of $\frac{2}{3}$ d of the state legislatures by a Convn.*"⁹⁰

Rutledge next crossed out the entire language quoted immediately above, and replaced it with the following: "on appln. of $\frac{2}{3}$ ds of the State Legislatures to the Natl. Leg. they call a Convn. to revise or alter ye. Articles of Union."⁹¹ Thus, in this document we observe the origin of the concept of proposing amendments to the Constitution by a convention, as well as the suggestion that the applications for such a convention would be directed to the national legislature, which would then call the convention.

Rutledge's suggested changes were included in the subsequent drafts (now in Wilson's handwriting) created by the Committee of Detail, but with an important addition: "This Constitution ought to be amended whenever *such Amendment* shall become necessary; and on Application of the Legislatures of two thirds of the States of the Union, the Legislature of the United States shall call a Convention *for that Purpose.*"⁹² Wilson's expanded version of the amendatory article implied that amendments to the Constitution were to be made singly whenever "such Amendment" (singular) shall become necessary, a convention would be called "for that Purpose."

On August 6 the first draft of the Constitution was submitted to

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

88. *Id.*

89. *Id.*

90. *Id.* (emphasis added).

91. *Id.*

92. *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).

the convention by the Committee of Detail.⁹³ Article XIX of the draft provided the following: "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*."⁹⁴ Once again, reference was made to "an amendment" and a convention "for that purpose."

4. August 30 — September 10: Article XIX

Article XIX was taken up by the convention on August 30.⁹⁵ There was little discussion on the proposal, with just Gouverneur Morris of Pennsylvania suggesting "that the Legislature should be left at liberty to call a Convention, whenever they please."⁹⁶ Despite this suggestion, the proposal was passed as submitted without objection.⁹⁷ 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 merely ministerial duty to call a convention upon the request of two-thirds of the state legislatures. It is also interesting to note that Article XIX did not explicitly require ratification of the proposed amendment.

On September 10, Elbridge Gerry of Massachusetts moved to reconsider Article XIX.⁹⁸ Gerry was concerned that a majority of States could, through the convention process, "bind the Union to innovations that may subvert the State-Constitutions altogether."⁹⁹ Alexander Hamilton of New York seconded the motion to reconsider, rejecting Gerry's concerns but asserting that 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

93. *Id.* at 176 (Journal—August 6), 177 (Madison), 190 (McHenry).

94. *Id.* at 188 (Madison—Aug. 6)(emphasis added).

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

96. *Id.* at 468 (Madison—Aug. 30).

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

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

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

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 could be no danger in giving this power, as the people would finally decide in the case.¹⁰⁰

James Madison next spoke on the issue, 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?"¹⁰¹

The convention then voted to reconsider the amendatory provision.¹⁰² Many of the delegates had been persuaded by Alexander Hamilton's arguments that the national legislature should be able to propose amendments directly, without the need for calling a convention to propose amendments.¹⁰³ 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.*¹⁰⁴

By this addition, 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.¹⁰⁵

The delegates quickly perceived that this addition would result in a return to the requirement contained in the Articles of Confederation

100. *Id.* at 558 (Madison—Sept. 10).

101. *Id.*

102. *Id.* at 555 (Journal), 558 (Madison—Sept. 10).

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

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

105. *Id.* at 558 (Madison—Sept. 10).

of unanimous approval of the States in order to effectuate a change in the new Constitution. James Wilson therefore immediately moved for the insertion of the words "two thirds," so that the amendments would be binding upon the consent of two thirds of the several states.¹⁰⁶ Wilson's motion was narrowly defeated (by a vote of five in favor, six opposed).¹⁰⁷ Wilson then moved to alter the Resolution by inserting the words "three-fourths" of the several states, which was passed without objection.¹⁰⁸

Thus, Article XIX now 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.¹⁰⁹

Under this new version, either the national legislature or a convention could propose amendments to the Constitution, with all such amendments having to be approved by three fourths of the states.

James Madison next took the lead on 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[.]¹¹⁰

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

106. *Id.*

107. *Id.* at 558-59.

108. *Id.* at 555 (Journal—Sept. 10), 559.

109. *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).

110. *Id.* at 555 (Journal—Sept. 10), 559 (Madison—Sept. 10)(emphasis added).

however, is the fact that Madison's new version deleted all reference to a convention for proposing "an amendment," making it necessary for all proposals for "amendments" to come from the national legislature. The fact that there was apparently no discussion on this significant change is surprising, especially in light of the second clause of the Virginia Plan — "the assent of the National Legislature ought not to be required"¹¹¹ — which had been repeatedly postponed,¹¹² and Colonel Mason's previous statements opposing the requirement of the consent of the national legislature.¹¹³

The discussion instead centered on an entirely different matter. After receiving a second to the motion 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.¹¹⁴ 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[.]"¹¹⁵

The fourth and fifth sections of Article 7 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.¹¹⁶ With the addition of the proviso ensuring the continuation of the slave trade until at least 1808, the revised amendatory article was passed.¹¹⁷

5. *September 12 — September 17: Article V*

As the convention was in the process of completing its consideration of the few remaining proposals submitted by the Committee of Detail, the task of pulling together the completed work of the convention into a coherent draft constitution fell on the Committee of Style (also known as the Committee of Revision),¹¹⁸ consisting of William

111. 1 *Id.* at 22 (Madison—May 29).

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

113. *Id.* at 202-03 (Madison—June 11).

114. "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).

115. *Id.* at 555 (Journal—Sept. 10), 559 (Madison—Sept. 10).

116. *Id.* at 182-83 (Madison—Aug. 6).

117. *Id.* at 555-56 (Journal—Sept. 10), 559 (Madison—Sept. 10).

118. *Id.* at 582 (Journal—Sept. 12).

Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.¹¹⁹ On September 12, the Committee of Style delivered its report of the Constitution as revised and arranged.¹²⁰ It was at this point that the amendatory provision was renumbered Article V.¹²¹ 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 article¹²²

The Committee had made minor stylistic changes, but had otherwise followed the last version approved by the delegates.¹²³ This new version required all amendments to be proposed by Congress.

On September 15, the convention reached Article V after discussing the first four articles.¹²⁴ Roger Sherman began the discussion by reiterating Elbridge Gerry's¹²⁵ fear that a majority of states may use Article V to the detriment of other states that are in the minority and which object to the amendment:

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.¹²⁶

Colonel Mason also spoke against the amendatory article, focusing

119. *Id.* at 547 (Journal—Sept. 8), 553 (Madison—Sept. 8).
 120. *Id.* at 582 (Journal—Sept. 12), 585 (Madison—Sept. 12).
 121. *Id.* at 602 (Comm. on Style).
 122. *Id.* (footnotes omitted)(emphasis added).
 123. Compare *id.* at 555 (Journal—Sept. 10), 559 (Madison—Sept. 10) with *id.* at 602 (Comm. on Style).
 124. *Id.* at 629 (Madison—Sept. 15).
 125. *Id.* at 557-58 (Madison—Sept. 10), 629 (Madison— Sept. 15).
 126. *Id.* at 629 (Madison—Sept. 15).

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especially on his concern that Congress could prevent the proposing of amendments. On the back of his copy of the draft Constitution, Mason wrote the following:

Article 5th. 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 subsersive of the fundamental Principles of the Rights & Liberties of the people[.]¹²⁷

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

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in 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.¹²⁸

As a result of these concerns, Gouverneur Morris of Pennsylvania and Elbridge Gerry of Massachusetts "moved to amend the article so as to require a Convention on application of $\frac{2}{3}$ of the Sts"¹²⁹

James Madison rose to address the motion:

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.¹³⁰

The convention thereupon unanimously agreed to the motion of Morris and Gerry,¹³¹ thus acceding to Mason's request to re-insert the convention method of amending the Constitution into Article V.

Of special interest in this regard is Thomas Jefferson's account of this matter, as told to him years later by George Mason, which tells of the nefarious attempt by some delegates to delete reference to the convention process in the new constitution:

127. 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").

128. 2 *id.* at 629 (Madison—Sept. 15).

129. *Id.*

130. *Id.* at 629-30.

131. *Id.* at 630.

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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 mornng. Gov. M. moved an instrn for certain alterns (not ½ the members yet come in) in a hurry & 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.¹³²

According to Jefferson's retelling of Mason's recollection of these events, a minority of delegates almost succeeded in deleting from the Constitution all reference to the convention method, but their attempt was defeated by the vigilance of several delegates who feared the power of Congress as an instrument to thwart changes that may be needed in the future. In any event, the portion of Article V which contained the convention method of amendment was reinserted into the draft constitution on September 15.

As he had done some five days earlier,¹³³ Roger Sherman once again attempted to require the unanimous consent of all the states to any amendments, and once again his proposal was turned down by the convention.¹³⁴ Elbridge Gerry then moved to strike the language that allowed ratification to occur by convention method, which also failed.¹³⁵

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."¹³⁶ 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."¹³⁷ The members of the convention agreed with Madison, voting down Sherman's motion three states to eight.¹³⁸ Sherman thereupon moved to strike Article V altogether, but this motion failed also.¹³⁹ Nonetheless,

132. 3 *id.* at 367-68 (footnote omitted).

133. 2 *id.* at 555 (Journal—Sept. 10), 558 (Madison—Sept. 10).

134. 2 *id.* at 630 (Madison—Sept. 15).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 630-31.

Sherman's point on the need to keep the suffrage of the Senate equal started to gather adherents among the small states. Gouverneur Morris of Pennsylvania (a state which had previously voted against Sherman's two motions)¹⁴⁰ then moved "to annex a further proviso — 'that no State, without its consent shall be deprived of its equal suffrage in the Senate.'"¹⁴¹ The motion, according to Madison, had been "dictated by the circulating murmurs of the small States . . ."¹⁴² As a result, the motion "was agreed to without debate, no one opposing it, or in the question, saying no."¹⁴³

The debate on the Constitution ended on September 15, at which time the Constitution as amended was agreed to unanimously.¹⁴⁴ The convention ordered that the Constitution be engrossed,¹⁴⁵ and two days later, on September 17, the engrossed Constitution was read¹⁴⁶ and signed.¹⁴⁷ The final version of Article V read as follows:

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 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 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 it's [sic] equal Suffrage in the Senate.¹⁴⁸

140. *Id.* at 630.

141. *Id.* at 631.

142. *Id.*

143. *Id.* at 631, 634 (McHenry—Sept. 15).

144. 2 *id.* at 633 (Madison—Sept. 15), 634 (McHenry—Sept. 15).

145. *Id.*

146. *Id.* at 641 (Madison—Sept. 17), 649 (McHenry).

147. *Id.* at 648-49 (Madison—Sept. 17), 649 (McHenry).

148. *Id.* at 662-63.

E. Summary of Record Regarding Primary Issues

1. Need for an Amendment Process and the Convention Method

Some delegates of the constitutional convention questioned the need for providing a procedure for amending the new Constitution.¹⁴⁹ Indeed, a few delegates asserted 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 the other states.¹⁵⁰ However, most of the delegates realized that the plan of government created by the convention would not be perfect and would, at some point in time, need to be amended.¹⁵¹ Several delegates, especially Colonel Mason, strongly believed that the amendment process was absolutely necessary, not only to correct defects in the new system,¹⁵² but also to protect the people and the states from an abusive or oppressive national legislature.¹⁵³ In response to these fears, the convention acceded to the request to create a process of proposing amendments by a convention method.¹⁵⁴

2. Role of the States and Congress in Proposing Amendments

The Virginia Plan did not specify whether the states or the national legislature would propose amendments.¹⁵⁵ The Pinckney Plan and the Hamilton Plan, on the other hand, both envisioned the national legislature as the initiator of proposed amendments.¹⁵⁶ When the amendatory provision emerged from the Committee of Detail, it provided that the state legislatures could request the national legislature to call a convention for proposing amendments, and that the national legislature would then be required to call a convention for that purpose.¹⁵⁷ The provision was later amended to also allow the national legislature to propose amendments,¹⁵⁸ 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

149. See *supra* text accompanying notes 49, 53, 99, 126-28, 138.

150. See *supra* text accompanying notes 99, 126-28.

151. See *supra* text accompanying notes 50, 55-56, 61, 100.

152. See *supra* text accompanying notes 38, 42, 50, 54-57, and 61.

153. See *supra* text accompanying notes 55-56, 128-27.

154. See *supra* text accompanying notes 129-31.

155. See *supra* text accompanying notes 37-38.

156. See *supra* text accompanying notes 42, 45.

157. See *supra* text accompanying note 94.

158. See *supra* text accompanying note 104.

amendments.¹⁵⁹ Accordingly, the reference to the national legislature calling a convention upon the application of two-thirds of the states was dropped.¹⁶⁰ Thus, when the amendatory provision surfaced from the Committee of Style, only the national legislature was authorized to propose amendments.¹⁶¹ When this change was discovered, the provision was amended a final time, permitting either the national legislature or a convention called by two-thirds of the states to propose amendments.¹⁶²

This series of amendments and revisions was the product of the dispute between those who believed the federal government would be in the best position to perceive the need for particular amendments, and those who believed that the amending provision should provide a mechanism for thwarting an abusive or unresponsive national legislature. The dispute also can be seen as a demonstration of the tension between those delegates who desired a powerful national body, and those delegates that feared such a result. In any event, the final terms of the provision regarding how amendments would be proposed embodied a compromise that gave both factions what they sought: the national legislature could propose amendments it thought were needed, and the national legislature could be circumvented by the states through the convention process when the state legislatures considered it necessary to do so. It must be emphasized that the reason the convention alternative was included into Article V was to provide a means for proposing amendments *despite* the opposition or inaction of the national legislature. Thus, the terms of Article V cannot be construed to defeat that purpose by granting Congress any authority to limit or prevent the calling or operation of such a convention.

3. *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.¹⁶³ The Pinckney Plan followed this approach,¹⁶⁴ while the Hamilton Plan included ratification by conventions held in each state.¹⁶⁵ There was little concern for the details of ratification until near the end

159. See *supra* text accompanying notes 110, 117.

160. See *supra* text accompanying notes 110, 117.

161. See *supra* text accompanying note 122.

162. See *supra* text accompanying notes 129, 148.

163. See *supra* text accompanying note 28.

164. See *supra* text accompanying note 42.

165. See *supra* text accompanying note 45.

of the convention. When Madison proposed his revision of the amendatory provision — which left it to the national legislature to actually propose all amendments — he resurrected Hamilton's suggestion that ratification could be either by the consent of state legislatures or by state conventions called for that purpose.¹⁶⁶ This change was carried forward into the final version of Article V.¹⁶⁷

Hamilton's initial plan also envisioned ratification by two-thirds of the states.¹⁶⁸ Although there were occasional attempts to revert back to the requirement of unanimity found in the Articles of Confederation,¹⁶⁹ the real question was whether ratification would occur upon the consent of two-thirds or three-fourths of the states. When the matter came to a vote before the convention, ratification by two-thirds of the states was narrowly defeated,¹⁷⁰ and the delegates then agreed to ratification by three-fourths of the states.¹⁷¹

4. *Amendment (Singular) vs. Amendments (Plural)*

The Articles of Confederation only allowed amendments to be proposed one at a time, referring to "any alteration" and requiring ratification by the states of "such alteration."¹⁷² Although the Virginia Plan did not specify the details of the amendment process,¹⁷³ the Hamilton Plan allowed for more than one amendment to be proposed at a time, providing that the constitution "may receive such alterations and amendments" as may be proposed by the states and agreed to by both houses of the national legislature.¹⁷⁴ Nonetheless, when the amendatory provision emerged from the Committee of Detail, it provided that the states could apply for "an amendment" to the constitution, and that the national legislature would call a convention "for that purpose."¹⁷⁵

Roger Sherman's subsequent amendment to Article XIX 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

166. See *supra* text accompanying note 110.

167. See *supra* text accompanying note 148.

168. See *supra* text accompanying note 45.

169. See *supra* text accompanying notes 104, 134.

170. See *supra* text accompanying notes 106-07.

171. See *supra* text accompanying note 108.

172. See *supra* text accompanying note 28.

173. See *supra* text accompanying notes 37-38.

174. See *supra* text accompanying note 48.

175. See *supra* text accompanying note 94.

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172. See *supra* text accompanying note 28.

173. See *supra* text accompanying notes 37-38.

174. See *supra* text accompanying note 48.

175. See *supra* text accompanying note 94.

by the states.¹⁷⁶ Shortly after the adoption of Sherman's amendment, Madison succeeded in having the delegates delete 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."¹⁷⁷ The idea of single amendments never surfaced again. When the proponents of the convention method succeeded in reinserting the convention method of proposing amendments, 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).¹⁷⁸

Thus, the plain language of the Article itself is clear and decisive; Congress shall call a "Convention for proposing *Amendments*," not a convention for proposing *an amendment*. It is therefore clear that an Article V convention has the power to consider various issues (plural) and to submit various amendments (plural) to the states, just as Congress has done in the past.¹⁷⁹ In addition, Article V does not authorize the states to apply for *an amendment*, rather it authorizes the states to apply for a *convention* for proposing *amendments*. The focus is clearly on the ability of the states to demand a convention, and not on the topics to be considered by such a convention. Similarly, Article V does not require Congress to call a convention when two-thirds of the states

176. See *supra* text accompanying note 104. 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 87, 90, 92, 94, 104. 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 104.

177. See *supra* text accompanying notes 110, 117.

178. See *supra* text accompanying notes 129, 131, 148.

179. See S. & H.R.J. Res. 3, 1st Cong., 1st Sess., 1 Stat. 97-98 (1789). In submitting the first set of proposed articles, Congress forwarded twelve proposed articles to the states for ratification. *Id.* Of those twelve, ten were adopted (now known as the Bill of Rights) and two were rejected. The text of the two rejected articles 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 than 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 fifty thousand persons.

Art. II. No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

Id.

call for the same *amendment*, rather it requires Congress to call a convention when two-thirds of the states call for a *convention*. The significance of these points will be discussed below in relation to whether Congress or the states have the power to limit a convention for proposing amendments to a single issue.

F. Post-Convention Discussion of Article V

Although some delegates had stated during the convention that they saw little need for an amendatory article,¹⁸⁰ the fact that the proposed Constitution was subject to amendment became an important point in support of the adoption of the Constitution.¹⁸¹ The public debate on the ratification of the proposed Constitution began as soon as the convention closed and the text of the proposed Constitution became public.¹⁸²

180. 1 FARRAND, *supra* note 2, at 121 (Madison—June 5), 202 (Madison—June 11).

181. S. MORISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 121 (2d ed. 1963).

182. W. PETERA, 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:

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 *Federal 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, the

On October 27, 1787, several writers using the pseudonym "Publius" began publishing arguments in favor of the Constitution, which were later republished as *THE FEDERALIST*.¹⁸³ James Madison focused particularly on Article V in *THE FEDERALIST* No. 43. He noted the great value of allowing both Congress *and* the states to propose 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 every 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.*¹⁸⁴

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).

183. *THE FEDERALIST* No. 1 (A. Hamilton). See generally S. MORISON, H. COMMAGER & W. LEUCHTENBURG, *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 121 (2d ed. 1983). On January 16, 1788, James Madison, in *THE FEDERALIST* No. 39, argued that the plan of government reported by the Convention, including the method of amending the proposed Constitution, had the character of being federal as opposed to national, 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 wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character.

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

184. *THE FEDERALIST* No. 43 (J. Madison)(emphasis added). Madison then went on to 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 that

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.¹⁸⁵ Although Madison concluded that he did not prefer "the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits," Madison nonetheless stated that "a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."¹⁸⁶ The proposed Article V would serve this important task.

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.

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 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 national 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, or 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 stated that "in the present Constitution, the article is perfectly at large, unconfined to any period, and may admit of measures being taken in any moment after it is adopted." *Id.* at 117. Dr. Jarvis then concluded his argument in favor of the proposed constitution by asserting the following:

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

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

185. THE FEDERALIST NO. 49 (J. Madison)(Feb. 2, 1788).

186. *Id.*

On May 28, in THE FEDERALIST No. 85, Alexander Hamilton argued against the immediate calling of a second convention to amend the proposed Constitution. Hamilton believed that numerous problems would result from attempts to amend the proposed Constitution prior to its adoption. He therefore preferred to correct faults in the Constitution through the amendment process already provided within the document.¹⁸⁷

The 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.¹⁸⁸ When, however, Hamilton's remarks are considered in their context, that interpretation is clearly incorrect. Hamilton's comments do not address the question of whether a convention would be limited to a single subject. Hamilton, in arguing against a second convention that would be called prior to the adoption of the proposed constitution (a convention which would rewrite the constitution from scratch and place the whole of its work before the state legislatures), was pointing out that any defects in the proposed constitution could be cured by post-ratification amendments targeted at resolving specific problems, and that the states could review and ratify the proposed amendments one at a time. 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 for proposing amendments determined what amendments should be made to the Constitution, every proposed amendment "would be a single proposition, and might be brought forward singly."¹⁸⁹ 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 complete constitution. This method would also prevent the "all or nothing" result that would occur if a block of amendments were presented as one unit.

187. Hamilton stated:

[E]very amendment to the constitution, if once 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 in the first instance a complete constitution.

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

188. *Id.*

189. *Id.*

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. It is only common sense to assume that 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 ten were ratified.¹⁹⁰ Similarly, a convention for proposing amendments could draft and propose several amendments on different topics, which 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.

This view especially makes sense when one considers Hamilton's concern, which he had just previously discussed in his text, that a second 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."¹⁹¹ Thus, any assertion based upon Hamilton's words that a convention for proposing amendments to the constitution is limited to a single issue is without merit.

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 to 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

190. 4 FARRAND, *supra* note 2, at 93 n.3.

191. THE FEDERALIST No. 85, *supra* note 187 (A. Hamilton).

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 state legislatures, in amendments which may affect local interests, 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 safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.¹⁹²

It is clear from this language that Hamilton believed that once the minimum number of states applied for a constitutional convention for proposing amendments, Congress was required to call such a convention. It is also clear that even Hamilton, the preeminent proponent of national power, believed that Congress' role in calling a convention was extremely limited, as shown by his comment, "[n]othing . . . is left to the discretion of that body."¹⁹³

192. *Id.*

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

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

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

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 change 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 houses 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.¹⁹⁴

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 gentlemen agree to continue the most radical defects in the old system, because the petty state of Rhode Island would not agree to remove them?

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

The worthy member [Patrick Henry] has exclaimed, with uncommon vehemence, against the mode provided for securing amendments. He thinks amendments can never be obtained, because so great a number is required to 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 101-02. 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 but 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.

194. 4 ELLIOT'S DEBATES 177 (1937). Earlier during his speech, Iredell spoke out on the