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# Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V

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# Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V

by KURT T. LASH<sup>1</sup>

## INTRODUCTION

In 1787, the idea of placing an amending provision in a constitution was uncontroversial. Popular sovereignty was an assumed doctrine in the colonies; the people retained the unalienable right “to alter or abolish” their system of government whenever they so pleased. How this unquestionable right was to be incorporated into the new federal Constitution, however, was another matter. The delegates who faced each other at Philadelphia had very different views about which body should be entrusted with the power to propose amendments, when that power should be used, and how that power should be defined.

Article V, like the rest of the Constitution, reflects a mixture of compromise and ingenuity. The delegates sought a national government strong enough to overcome the problems of the Articles of Confederation, yet with enough of a federal structure to placate Antifederalist fears of de facto “consolidation” of the states. By creating a dual triggering mechanism, one that could be “pulled” by either the states or the federal government, Article V satisfied both nationalist and statist that “amendments of the proper kind” would be put before the people.

The polarities in the convention, however, were more than nationalist versus statist, or large state versus small. The debates that swirled within and around Philadelphia reveal competing conceptions of government: Classical Republicanism which presumed a virtuous citizenry who could be expected to sacrifice parochial concerns in the pursuit of a common good, versus the emerging Liberal assumption that society was composed of factions whose competitions could be, and must be, structured so as to achieve a stable form of government.

This clash between Liberal and Republican assumptions became especially acute in the debates surrounding the first attempted use of Article V: the Antifederalist call to a second convention. Seeing only “discord and ferment” coming from a second convention, the Federalists

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articulated a new and darker view of conventions: Is there any guaranty that a national convention will result in the considered judgment of the people? How can the assembly avoid being dominated by faction and demagoguery? The shadow thus cast over the convention clause of Article V has extended far beyond the Founding. It has obscured from view what was to Eighteenth Century Americans the fundamental expression of the "language of democracy," the people's right to assemble apart from established institutions and determine their own form of government.

## II CREATING ARTICLE V

### *A. Constitutions and Conventions*

The 18th century English conception of a constitution was "that Assemblage of Laws, Institutions and Customs . . . that compose the General System, according to which the Community hath agreed to be governed."<sup>2</sup> A constitution, however, was not considered superior to the government or ordinary enactments of Parliament.<sup>3</sup>

In America, constitutions came to mean much more. By 1678, the colonies regarded constitutions as written codes of government apart from legislative enactment.<sup>4</sup> The hallmark for distinguishing constitutional from legislative acts was the use of a specially designated body for generating constitutional law—the convention.<sup>5</sup> Although out of the legislature's reach under ordinary conditions, the output of these conventions was never out of reach of the people themselves. In eighteenth century America, the sovereignty of the people was taken for granted—the people might "alter or abolish" their system of government whenever and however they saw fit.<sup>6</sup> According to James Wilson, "[a]s our constitutions are

2. Henry St. John (Viscount Bolingbroke), *A Dissertation upon Parties* 108 (3rd ed., London, 1735), cited in Russell L. Caplan, *Constitutional Brinkmanship: Amending the Constitution by National Convention* 3 (Oxford 1988) (hereinafter cited as "CAPLAN").

3. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 260-261 (1969) (hereinafter cited as "WOOD"). "The constitution is one principal division, head, section, or title of the code of publick laws, distinguished from the rest only by the particular nature, or superiour importance of the subject, of which it treats. Therefore the terms *constitutional* and *unconstitutional*, mean *Legal* and *illegal*." William Paley, *The Principles of Moral and Political Philosophy* (Philadelphia, 1788).

4. CAPLAN *supra* note 2, at 4.

5. Taking their cue from the English Convention Parliaments of the mid to late 1600s, the colonists rehabilitated a term that had originally meant an "irregular assembly" into a body whose purpose was to establish fundamental law. See WOOD, *supra* note 3, at 318-19 (1969). See also CAPLAN, *supra* note 2, at 16. According to Thomas Jefferson, "to render a form of government unalterable by ordinary acts of assembly, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments. Thomas Jefferson, *Notes on the State of Virginia* 125 (Peden ed.), cited in WOOD, *supra* note 3, at 309.

6. The principle was written into the Declaration of Independence: "[W]henver any Form of Government becomes destructive of these ends, it is the Right of the People to alter

superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in the last instance, is much greater, for the people possess over our constitutions control in act, as well as right.”<sup>7</sup> Therefore, “a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions.”<sup>8</sup>

This “constitutional road” avoids the dilemma of choosing between violence or acquiescence should the existing government be found wanting.<sup>9</sup> The alternative being civil war,<sup>10</sup> thus, providing a means for amending their constitution was “a principle of melioration, contentment, and peace.”<sup>11</sup>

### B. Precursors of Article V

#### 1. State Constitution Amendment Provisions

The idea of providing for a constitution’s amendment within the text itself was not an idea that had existed from the earliest days of the colonies. The first American constitutions were based on the theory that governments once created were immutable.<sup>12</sup> For instance, John Locke’s 1669 constitution for the Carolinas stated that it “shall be and remain the sacred and unalterable form and rule of government of Carolina forever.”<sup>13</sup>

William Penn drafted the first constitutional amendment provision for his colony in 1682.<sup>14</sup> Following the lead of the Declaration of Independence,<sup>15</sup> eight of the twelve state constitutions written in the first

or abolish it, and to institute a new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.” *The Declaration of Independence* para. 2 (U.S. 1776). See also John R. Vile, *The Constitutional Amending Process in American Political Thought* 24 (1992) (hereinafter cited as “VILE”); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 143 (Norton 1988).

7. 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 432 (Jonathan Elliot ed., 1836) (hereinafter ELLIOT’S DEBATES) (remarks of James Wilson at Pennsylvania Ratifying Convention).

8. *The Federalist Papers* No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

9. “[I]t will be better to provide for [constitutional amendments], in an easy, regular and Constitutional way than to trust to chance and violence.” I *The Records of the Federal Convention of 1787* 202-03 (Max Farrand ed., Yale, rev. ed. 1937) (hereinafter FARRAND) (remarks of George Mason at Philadelphia Constitutional Convention).

10. 4 Elliot’s Debates, *supra* note 7, 176-77 (remarks of James Iredell in North Carolina Ratifying Convention).

11. James Wilson, “Lectures on Law,” I Works of Wilson 21 (Wilson ed.), cited in WOOD, *supra* note 3, at 614.

12. CAPLAN, *supra* note 2, at 14.

13. *The Fundamental Constitutions of Carolina of 1669*, Sec 120, reprinted in 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1408 (B. Poore ed., 2d ed. 1878).

14. See CAPLAN, *supra* note 2, at 14.

15. VILE, *supra* note 6, at 24.

months of independence specified procedures for their own alteration. Five permitted amendment by convention; three—those of Delaware, Maryland, and South Carolina—by legislature.<sup>16</sup>

Pennsylvania's Constitution of 1776 provided for a convention to be called by the Council of Censors, the members of which would be elected every seven years to inquire into the conduct of government and to determine whether "there appear to them an absolute necessity of amending any article of the constitution which may be defective."<sup>17</sup> The Council only met twice, in 1783 and 1784, both times failing to achieve the two-thirds majority needed for calling a convention.<sup>18</sup>

Delaware's Constitution specified certain articles immune from any alteration and made the consent of five-sevenths of the Assembly and seven members of the legislative Council necessary for any amendment of the remainder of the Constitution.<sup>19</sup> The Maryland Constitution could only be altered by the acts of two consecutively elected legislatures.<sup>20</sup> In Georgia, the Constitution could only be altered by a special convention called by the assembly after receiving petitions from the voters of a majority of the counties of the state.<sup>21</sup> According to Gordon Wood, the above constitutions were all "rudimentary efforts to make effective the distinction between the fundamental principles of the constitution and positive law."<sup>22</sup>

## 2. The Articles of Confederation

Article XIII of the Articles of Confederation provided for their own amendment, but only if the alteration "be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."<sup>23</sup> Unfortunately, the unanimity requirement made the Articles almost impossible to amend<sup>24</sup> and impeded what was widely regarded as

16. CAPLAN, *supra* note 2, at 14.

17. *Id.*

18. *Id.* The Vermont Constitution of 1786 was patterned after Pennsylvania's and provided for a Council of Censors who were to meet every seven years and "have power to call a Convention . . . if there appears to them an absolute necessity of amending any article of this Constitution which may be defective. . . and of adding such as are necessary for the preservation of the rights and happiness of the people." *Vermont Constitution of 1786*, ch. 2, art. 40, reprinted in 4 *The Founders' Constitution* 576 (Philip B. Kurland & Ralph Lerner eds., Chicago 1987) (hereinafter "The Founders' Constitution").

19. *Delaware Constitution of 1776*, reprinted in, 2 *Sources and Documents of the United States Constitutions* 204 (William F. Swindler ed., 1973) (hereinafter "SWINDLER").

20. *Maryland Constitution of 1776*, reprinted in 4 SWINDLER, *supra* note 19, at 383.

21. *Georgia Constitution of 1777*, reprinted in 2 SWINDLER, *supra* note 19, at 449.

22. WOOD, *supra* note 3, at 309.

23. *The Articles of Confederation* (1781) reprinted in 1 *The Documents of American Constitutional & Legal History* 75-76 (Melvin I. Urofsky ed., 1989).

24. The procedural hurdle in the Articles was widely criticized. At the Philadelphia Convention, Charles Pinckney noted the necessity of "destroy[ing] that unanimity which upon these occasions the present System has unfortunately made necessary . . . it is this unanimous consent, the depressed situation of the Union is undoubtedly owing." *Observations on*

necessary expansion of the Confederation's authority to regulate foreign and domestic trade.<sup>25</sup> For example, measures proposed in 1781 and 1783, giving Congress the power to tax imports, were both killed by the veto of one state.<sup>26</sup> Constant deadlocks arose from, "sectional jealousies and a reluctance by Congress to alienate the states by forcing them to surrender powers."<sup>27</sup>

The crisis involved more than mere political stalemate. The economic depression which followed the Revolutionary War deeply affected farmers in the Northeast who were no longer able to repay their creditors in crops. The resultant forced-sales of land and livestock to raise currency created widespread resentment and, eventually, mob action designed to intimidate courts which executed actions against debtors.<sup>28</sup> In Virginia, mobs closed the courts and burned courthouses and prisons.<sup>29</sup> One of these uprisings, Shay's Rebellion in Massachusetts, came to symbolize the need for stronger central government and hastened the appointment of delegates to Philadelphia.<sup>30</sup> In fact, it was more than the intractable Articles and an impotent national government that fueled the drive to Philadelphia.<sup>31</sup> It was the "corruption and mutability of the legislative Councils of the States"<sup>32</sup> — the "evils operating in the States"<sup>33</sup> — that convinced a reluctant Congress to finally accede to the rising call for a

*the Plan of Government Submitted to the Federal Convention, reprinted in III FARRAND, supra note 9, at 120. See also II FARRAND, supra note 9, at 558 (remarks of Alexander Hamilton at the Philadelphia Constitutional Convention) ("It had been wished by many and was much to be desired that an easier mode for introducing amendments had been provided by the Articles of Confederation."); The Virginia Ratification Debates (remarks of James Madison) reprinted in 3 ELLIOT'S DEBATES, supra note 7, at 89 ("The inconveniences resulting from this requisition, of unanimous concurrence in alterations in the Confederation, must be known to every member in this Convention.")*

25. CAPLAN, *supra* note 2, at 25.

26. *Id.* at 30 (Rhode Island and New York, respectively). *See also The Virginia Ratification Debates* (remarks of James Madison) *reprinted in 3 ELLIOT'S DEBATES, supra note 7, at 89* (reminding the convention of the numerous times amendments of the Articles were defeated by "the smallest state in the Union," and "[w]ould 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?").

27. CAPLAN, *supra* note 2, at 25.

28. *Id.*

29. MORGAN, *supra* note 6, at 266.

30. *See* WOOD, *supra* note 3, at 465; CAPLAN, *supra* note 2, at 25.

31. Soon after the Philadelphia Convention, James Madison wrote:

[These vices coming out of state governments], so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. . . . contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

James Madison to Thomas Jefferson, Oct 24, 1787, XII *Jefferson Papers* 276 (Boyd ed.), cited in WOOD, *supra* note 3, at 467.

32. II FARRAND, *supra* note 9, at 288 (remarks of John Francis Mercer).

33. I FARRAND, *supra* note 9, at 291 (remarks of Alexander Hamilton).

national convention.<sup>34</sup>

### *C. The Philadelphia Convention and The Generation of the Text*

On May 29, 1787, the governor of Virginia, Edmund Randolph, presented the following proposal to the Constitutional Convention in Philadelphia:

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.<sup>35</sup>

On June 5, there was a brief discussion of the proposal which now read “that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the Natl. Legislature.”<sup>36</sup> Charles Pinckney of South Carolina “doubted the propriety or necessity of it.”<sup>37</sup> Elbridge Gerry of Massachusetts responded that such a provision would provide “intermediate stability to the government,” and pointed out that “[n]othing had yet happened in the States where this provision existed to prove its impropriety.”<sup>38</sup> Since the convention was divided, discussion was postponed “for further consideration.”<sup>39</sup>

On June 11, the resolution came up again, this time delegates questioned not only the congressional assent clause, but also the need for an amending provision at all.<sup>40</sup> In response, George Mason of Virginia

urged the necessity of such a provision. 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 consent of the Natl. legislature, because they may abuse their

34. The resolution read in full:

Whereas there is provision in the Articles of Confederation and Perpetual Union for making alterations therein by the Assent of a Congress of the United States and of the Legislatures of the several states. . . . *Resolved* that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.

5 ELLIOT'S DEBATES, *supra* note 7, at 96. *See also* CAPLAN, *supra* note 2, at 26.

35. I FARRAND, *supra* note 9, at 22.

36. *Id.* at 121. The so-called “Pinckney Plan” specifically provided for Congressional approval of proposed amendments. *See* III FARRAND, *supra* note 9, at 120. Congressionally approved amendments would become part of the Constitution upon being ratified by an unspecified number of states—there was no provision for state or national conventions. *Id.* *See also id.* at 609. The Articles of Confederation also required congressional approval of proposed amendments, as did the resolution calling for the Philadelphia Convention. *see supra* at notes 23 & 35 and accompanying text.

37. I FARRAND, *supra* note 9, at 121.

38. *Id.* at 122.

39. *Id.*

40. *Id.* at 202.

power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.<sup>41</sup>

The Convention voted to approve the general provision but discussion on the words “without requiring the consent of the Nat’l Legislature” was once again postponed.<sup>42</sup>

By the end of August, the Convention had agreed to the following language, known at this point as Article XIX:

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.<sup>43</sup>

On September 10, Elbridge Gerry moved to reconsider the article. Given that “[t]his Constitution . . . is to be paramount to the State Constitutions,” and “that two thirds of the States may obtain a Convention,” a majority of States could therefore “bind the Union to innovations that may subvert the State-Constitutions altogether.”<sup>44</sup> Alexander Hamilton of New York rejoined that “[t]here was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State.”<sup>45</sup> Hamilton, though, found the proposed article inadequate for a different reason:

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.<sup>46</sup>

James Madison was troubled by “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?”<sup>47</sup>

After the assembly voted to reconsider the amendment provision, Roger Sherman of Connecticut moved to add the language “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.”<sup>48</sup> Concerned that Sherman’s language would repeat the problem of the immutable Articles, James Wilson of Pennsylvania moved to

41. *Id.* at 202-03.

42. *Id.* at 203.

43. II FARRAND, *supra* note 9, at 468. The “two-thirds,” or nine states, may have been taken from Articles IX-XI of the Articles of Confederation, where that number was required for certain important actions relating to war and coinage. The Articles of Confederation (1781) reprinted in I *Documents of American Constitutional & Legal History*, *supra* note 23, at 72-75. See also CAPLAN, *supra* note 2, at 28.

44. II FARRAND, *supra* note 9, at 557-58.

45. *Id.* at 558.

46. *Id.* at 558.

47. *Id.*

48. *Id.* Thus responding to both Mr. Gerry’s concern about State consent, as well as Mr. Hamilton’s suggestion that the Legislature be given the power to propose amendments.



insert the words "three fourths of" before "the several States." The motion passed unanimously.<sup>49</sup>

At this point, Madison moved to postpone the consideration of the amended proposition in order to take up the following:

The Legislatures 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.<sup>50</sup>

John Rutledge, of South Carolina, declaring that "he could never agree to give a power by which the articles relating to slaves might be altered by States not interested in that property," moved to add "provided that no amendments which may be made prior to the year 1808 shall in any manner affect the fourth and fifth sections of the VII article."<sup>51</sup> The article was then postponed for further consideration of Madison's and Rutledge's

49. *Id.* at 559. Mr. Wilson had originally sought a ratification requirement of "two-thirds." The motion failed, 5 - 6. *Id.* at 558. It might be wondered why a simple majority was not considered sufficient for amending the Constitution. After all, the doctrine of popular sovereignty accepted the principle of "majority rule." See MORGAN, *supra* note 6, at 142-43; Thomas Jefferson, *Notes on the State of Virginia*, reprinted in *The Portable Thomas Jefferson* 23, 171 (Merrill Peterson ed., 1975) ("Lex majoris partis [is] founded in common law as well as common right. It is the natural law of every assembly of men . . ."). See also Akhil R. Amar, *Philadelphia Revisited: Amending The Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1060 (1988) (arguing that the principles of popular sovereignty enshrined in the Constitution would allow ratification by simple majority). *But see* David Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L. Rev. 1 (1990) (disagreeing with Amar that the Constitution can be amended by majority vote). The problem was a union of States with different sized populations. This created the possibility of amendment outcomes being controlled by a simple majority of states within which might reside only a minority of the total population. "If the States were of equal size and importance, a majority of the Legislatures might be sufficient for the grant of any new powers; but disproportioned as they are and must continue for a time; a larger number may now in prudence be required." Charles Pinckney, *Observations on the Plan of Government, 1787*, reprinted in 4 *Founders' Constitution*, *supra* note 18, at 578.

50. II FARRAND, *supra* note 9, at 559. This tracked the arrangement in the Articles of Confederation, with the significant addition of the option to ratify by state Convention: See *supra* note 23 and accompanying text. Madison thus sought congressional monopoly of the proposing mechanism. His proposal also removed the provision for a national convention.

51. II FARRAND, *supra* note 9, at 559. The clause Rutledge was working so hard to protect was Sec. 2 of Article IV which provided that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Under the authority of this clause, Congress passed the Fugitive Slave Law of 1793. See *The Civil Rights Cases*, 109 U.S. 3, 28 (1883) (Harlan, J. dissenting). The reasons for the provision, as well as Southern expectations regarding it, were elaborated on by James Iredell in the North Carolina Ratifying Convention:

A compromise likewise took place in regard to the importation of slaves. It is probable that all the members reprobated this inhuman traffic; but those of South Carolina and Georgia would not consent to an immediate prohibition of it—one reason of which was, that, during the last war, they lost a vast number of negroes, which loss they wish to supply.

proposals.<sup>52</sup>

Madison's substitute amendment provision was retained in the second major draft of the Constitution reported to the Convention by the Committee of Style and Arrangement on September 12.<sup>53</sup> On September 15, what was now known as Article V read as follows:

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 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 1 & 4 clauses in the 9 section of article I.<sup>54</sup>

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."<sup>55</sup> Accordingly, he moved that "no State should be affected in its internal police, or deprived of its equality in the Senate."<sup>56</sup>

George Mason stated he believed "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."<sup>57</sup> Responding to Mason's concern, Gouverneur Morris and Elbridge Gerry moved to amend the arti-

James Iredell, *Debate in North Carolina Ratifying Convention* (29 July 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 7, at 178. According to George Mason, the slavery clause was the result of a last minute coalition in which the two

Southernmost states . . . struck up a bargain with the 3. N. Engld. states, if they would join to admit slaves for some years, the two Southernmost states would join in changing the clause which required 2/3 of the legislature in any vote. . . [U]nder this coalition the great principles of the Constn were changed in the last days of the Convention.

George Mason, *George Mason's Account of Certain Proceedings in Convention*, reprinted in III FARRAND, *supra* note 9, at 367.

52. II FARRAND, *supra* note 9, at 559.

53. *Id.* at 602.

54. *Id.* at 629.

55. *Id.*

56. *Id.* The State suffrage clause was extremely important to the smaller states. Delegates from Delaware, for example, were prohibited from assenting to any proposal unless equal state suffrage in Congress was preserved. See CAPLAN, *supra* note 2, at 100. See also III FARRAND, *supra* note 9, at 400 (remarks of Jonathan Dayton in the United States Senate, November 24, 1803) ("The States, whatever was their relative magnitude, were equal under the old Confederation, and the small States gave up a part of their rights as a compromise for a better form of government and security; but they cautiously preserved their equal rights in the Senate and in the choice of a Chief Magistrate.").

57. II FARRAND, *supra* note 9, at 629 n. 8. In the margin of his copy of the draft of Sept. 12, Mason had written: "Article 5th — By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a

cle and require a convention upon application of two-thirds of the States.<sup>58</sup> 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.”<sup>59</sup> The motion passed without objection.<sup>60</sup>

Now a series of final attempts to change the text of the Article was started. Sherman moved to strike out the words “of three-fourths” after the words “legislatures” and “Conventions.”<sup>61</sup> This would “leave[] future conventions to act in this matter, like the present Conventions according to circumstances.”<sup>62</sup> The motion fell, 3-7.<sup>63</sup> Gerry made an unsuccessful

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doctrine utterly subversive of the fundamental principles of the rights and liberties of the people.” *Id.* at 629 n. 8. Mason apparently did not believe Congress would be obliged to propose amendments applied for by the states. His concern reflects the struggle over what body would be given the responsibility for proposing amendments. To Mason, a source independent of Congress was necessary for “amendments of the proper kind.” *Id.* Russell Caplan has described the eventual divided proposal power as the “essential compromise of Article V,” for determining who could propose amendments went a long way towards determining what kind of amendments would be adopted. CAPLAN, *supra* note 2, at 29.

58. II FARRAND, *supra* note 9, at 629. The provision for a national convention may have been modeled after article 63 of the Georgia Constitution of 1777 which stated:

No alteration shall be made in this constitution without petitions from a majority of counties, and the petition from each county to be signed by a majority of voters, in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

See CAPLAN, *supra* note 2, at 15.

59. II FARRAND, *supra* note 9, at 629-30.

60. *Id.*

61. *Id.* Thus removing any specified numerical requirement for ratification.

62. *Id.* At first glance, Sherman’s proposal seems strikingly inconsistent with his motion on September 10 that “no amendment will be binding until consented to by the several States,” see *supra* note 48, as well as with his concern expressed earlier in the day that the three-fourths ratification requirement inadequately protected state sovereignty. *Supra* note 55. If future conventions can act “according to circumstances,” then circumstances might call for ratification by two thirds, or a mere majority, of the states-propositions Sherman clearly opposed. Sherman’s proposals can be reconciled if the present motion is seen as a back-door attempt to restore the Articles’ unanimity requirement. Sherman probably believed that, in the absence of any explicit requirement, the Articles would apply by default. State sovereignty would dictate that every state must consent to future amendments—indeed, the idea that fundamental constitutional change could occur without the unanimous consent of the states was seen by the Antifederalists as an assault on an essential principle of the American union: equality of the states. I *The Complete Anti-Federalist* 12-13 (Herbert J. Storing ed., 1981) (hereinafter cited as “STORING”). This interpretation is further supported by the provision Sherman is seeking to remove: On September 10, Sherman moved to add the words “but no amendment will be binding until consented to by the several States.” See *supra* at note 49 and accompanying text. It was this motion that received the immediate, and successful, insertion of “three-fourths of” before “the several States” by Mr. Wilson—the very addition Mr. Sherman is now seeking to delete.

63. II FARRAND, *supra* note 9, at 630.

motion (failing 1-10) to strike out the words “or by Conventions in three-fourths thereof.”<sup>64</sup> Sherman repeated his motion “that no State shall without its consent be affected in its internal police, or deprived of equal suffrage in the Senate.”<sup>65</sup> The motion failed, 3-8.<sup>66</sup> In an apparent act of protest, Sherman then moved to strike out Article V altogether; this motion also failed 2-8, with one abstention.<sup>67</sup> Finally, in deference to the “circulating murmurs of the small States,” Morris moved to pass on the second half of Sherman’s proposal, “that no State, without its consent shall be deprived of its equal suffrage in the Senate.”<sup>68</sup> This motion “was agreed to without debate,”<sup>69</sup> and Article V assumed its final form:

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 one or the other Mode of Ratification may be proposed by 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.<sup>70</sup>

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64. *Id.*

65. *Id.* Prompting Mr. Madison to remark “Begin with these special provisos, and every State will insist on them, for their boundaries, exports, &c.” *Id.*

66. *Id.*

67. *Id.* at 630-31.

68. *Id.* at 631. Recall that, for some states, equal suffrage in the new Congress was a precondition for ratification. See CAPLAN, *supra* note 2, at 100.

69. II FARRAND, *supra* note 9, at 631.

70. *Id.* at 663. Interestingly, where the rest of the Constitution divides power both horizontally (between the three departments of government) and vertically (between the states the federal government), Article V involves only a vertical division: only Congress is explicitly mentioned as playing a role in the amendment process. One explanation lies in the lingering resentment over the role these respective departments played prior to the revolution. According to James Wilson:

[In the recent past, executive and judicial powers] were derived from a different and foreign source: they were regulated by foreign maxims: they were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust? Need we be surprised, that every occasion was seized for lessening their influence, and weakening their energy? On the other hand, our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes. Every power, which could be placed in them, was thought to be safely placed: every extension of power was considered an extension of our own security.

James Wilson, *Lectures on Law, 1790-1791*, in *The Works of James Wilson* 292-93 (Robert Green McClosky ed., Belknap 1967). The Founders anticipated the executive to have a generally limited role in governing the nation. See generally James W. Ceaser, *Presidential Selection: Theory and Development* 52-64 (Princeton, 1979) (discussing Founders’ anxieties about “popular leadership”). See also *Hollingsworth v. Virginia*, U.S. (3 Dall.) 378, 381 n.\* (1798) (Chase, J.) (“[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.”). *But see*, Bruce Ackerman, *Transformative Appointments*, 101 *Harv. L. Rev.* 1164, 1171 (noting that the “assembly-led” classical system has been replaced by the presidentially-led system of the twentieth century) (hereinafter cited as “ACKERMAN”).

### III

## Reaction to Article V: Defense and Invocation

### A. *The Federalists and Article V*

“Look through the Constitution from beginning to end, and you will not find an article which is not founded on the presumption of a clashing of interests.”<sup>71</sup> This is especially true for Article V. The text was a compromise between those who favored Congress as the proposing institution and those who feared that congressional monopoly of the proposing mechanism would prevent (“amendments of the proper kind.”)<sup>72</sup> In their defense of the proposed Constitution, however, the Federalists made a virtue out of this necessary compromise and pointed to Article V as proof of a balanced constitution—one “neither wholly *national* nor wholly *federal*.”<sup>73</sup>

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The decision to exclude the Judiciary was not as much of a foregone conclusion as it was with the Executive. Proposals were advanced at Philadelphia that would have given the Judiciary a role in amending the constitution:

To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers—1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union.

II FARRAND, *supra* note 9, at 342. Even though the proposal was ultimately rejected—thus excluding the Judiciary from any role in generating the text—the Judiciary was not prevented from reviewing whether proper procedures had been followed in the adoption of an amendment. In fact, some members of the Philadelphia Convention expected judicial review. II FARRAND, *supra* note 9, at 92 (remarks of Gouverneur Morris) (“If the Confederation is to be pursued no alteration can be made without the unanimous consent of the Legislatures: Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void.”). See also CAPLAN, *supra* note 2, at 130. Judicial review of the amendment process became a fact within the first decade after ratification. In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Supreme Court held the Eleventh Amendment had been constitutionally adopted and rejected the claim that the Amendment had “not been proposed in the form prescribed by the Constitution.” *Id.* at 381. Although the Court in *Coleman v. Miller*, 307 U.S. 433 (1939), held that issues surrounding the ratification process are generally nonjusticiable, the historical evidence seems to refute that holding. See also CAPLAN, *supra* note 2, at 129; Amar, *supra* note 50, at 1046 n.3.

71. 13 *Annals of Congress* 101 (1803) (remarks of Senator Dayton).

72. See *supra* note 68 and accompanying text.

73. *The Federalist No. 39* (James Madison), *supra* note 8, at 246. See also *The Federalist No. 43* (James Madison), *supra* note 8, at 278-79 (“[Article V] 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 one the other.”). The Antifederalists claimed that the new Constitution violated State Sovereignty and amounted to “consolidation” of the states. In response, the Federalists, pointed out that since two thirds of the states can propose, and three fourths of the states can “accomplish alterations” to the government, “consolidation” was neither intended nor possible under the proposed Constitution. See *A Freeman II*, *Pennsylvania Gazette*, January 30, 1788, reprinted in *XV The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution* 511 (John P. Kaminski & Gaspare J. Saldino eds., 1981) (hereinafter “COMMENTARIES”).

The multi-layered structure of the amendment assailed by the Antifederalists as hopelessly complicated,<sup>74</sup> was portrayed as a structural safeguard “against that extreme facility, which would render the Constitution too mutable;<sup>75</sup> and that extreme difficulty, which might perpetuate its faults.”<sup>76</sup> In response to claims that Article V’s procedures were prohibitively difficult, the Federalist invoked the spirit of the Revolution:

That [the Constitution] may be improved, is not to be doubted, and provision is made for that purpose, in the report itself. A people who could conceive, and can adopt it, we need not fear will be able to amend it, when by experience its inconveniences and imperfections shall be seen and felt. . . . [W]e may safely appeal to the history of this country as proof, in the last twenty years. We have united against the British; we have united in calling the late federal Convention; and we may certainly unite again in such alterations as in reason shall appear to be important for the peace and happiness of America.<sup>77</sup>

Moreover, there was hopeful anticipation that the conventions of the future would be much simpler affairs than the recent one in Philadelphia, as they would have “[n]o experiments to devise; the general and fundamental regulations already laid down.”<sup>78</sup>

Article V was of particular comfort to those who believed the proposed Constitution was flawed, and yet felt amendments should wait until after ratification.<sup>79</sup> The need was to create the best form of national gov-

74. See *infra* note 116 and accompanying text.

75. See *The Federalist No. 49* (James Madison), *supra* note 8, at 313 (discussing the dangers of making the amendment process too frequent an occurrence).

76. *The Federalist No. 43* (James Madison), *supra* note 8 at 278-79. Later commentators would point out the advantage of Article V’s “convoluted” nature. See St. George Tucker, *Blackstone’s Commentaries* 371-72 (1803), reprinted in *4 Founders’ Constitution*, *supra* note 18, at 583 (“[T]he mode both of originating and of ratifying amendments, in either mode which the constitution directs, must necessarily be attended with such obstacles, and delays, as must prove a sufficient bar against light, or frequent innovations.”). Justice Story saw the article’s built-in temporal delays as providing “ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.” Joseph Story, *3 Commentaries on the Constitution* §§ 1821-24 (1833), reprinted in *4 Founders’ Constitution*, *supra* note 18, at 584.

77. 2 ELLIOT’S DEBATES, *supra* note 7, at 117 (remarks of Dr. Charles Jarvis, Massachusetts Ratifying Convention).

78. 3 ELLIOT’S DEBATES, *supra* note 7, at 102 (remarks of Wilson Nicholas, Debates in the Virginia Ratifying Convention, June 16, 1788). Nicholas believed future conventions would “have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations.” *Id.*

79. John Adams, for instance, despite his belief that the Constitution dangerously mixed legislative and executive power in the Senate, still thought “the People had better adopt it as it is—and then appoint a new Convention to make such alterations as may prove necessary.” Abigail Adams Smith to John Quincy Adams (London, February 10, 1788), reprinted in COMMENTARIES (2), *supra* note 82, at 502; John Adams to Cotton Tufts (London, January 23, 1788), reprinted in COMMENTARIES (2), *supra* note 73, at 499. See also Pastor John Craighead to John Nicholson (Rocky Springs, Pa., February 9, 1788), reprinted in COMMENTARIES (4), *supra* note 73, at 95 (“Sincerely des[ire?] to see it amended, if

ernment that could be agreed to at this time—any imperfections could be worked out at some future date.<sup>80</sup> After all, the “seeds of reformation [were] sown within the work itself,”<sup>81</sup> where there was an “easy and constitutional method” of amendment “should it be found faulty in any particular.”<sup>82</sup>

Finally, to the notion that the Constitution could always be easily amended in the future, the Federalists added a sense of emergency. A national government was necessary “to rescue our dear country from that national dishonor, injustice, anarchy, confusion and bloodshed.”<sup>83</sup> Washington believed that “the political concerns of this country are, in a manner, suspended by a thread . . . if nothing had been agreed to by [the Convention], anarchy would soon have ensued—the seeds being richly

adopted. But whether it be safe [to?] attempt it now in our disunited, mouldering state or immediately or as soon as possible after adoption of the general plan, in the mode pointed out by ye convention, I leave to politicians to determine.”); 2 ELLIOT’S DEBATES, *supra* note 7, at 117 (remarks of Dr. Charles Jarvis, Massachusetts Ratifying Convention) (“I shall not sit down, sir, without repeating, that, as 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.”).

80. Typical of this point of view are the remarks of George Washington:

I wish the Constitution which is offered had been made more perfect, but I sincerely believe it is the best that could be obtained at this time—and as a constitutional door is opened for amendment hereafter, the adoption of it under present circumstances of the Union is in my opinion desirable.

George Washington to Former Virginia Governors, Sept. 24, 1787, *reprinted in* COMMENTARIES (1), *supra* note 73, at 224. *See also* *The Federalist No. 38*, *supra* note 8 at 237 “it is a matter both of wonder and regret that those who raise so many objections against the new Constitution should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect: it is sufficient that the latter is more imperfect.”).

81. James Wilson, *Speech at a Public Meeting in Philadelphia*, Oct. 6, 1787, *reprinted in* Commentaries (1), *supra* note 82, at 337.

82. *Federal Constitution*, Pennsylvania Gazette, October 10, 1887, *reprinted in* COMMENTARIES (1), *supra* note 73, at 364. *See also* John Jay to John Adams, October 16, 1787, *reprinted in* Commentaries (1), *supra* note 73 at 385 (“For my part I think [the Constitution] much better than the one we have, and therefore that we shall be the Gainers by the Exchange; especially as there is reason to hope that Experience and the Good sense of the People, will correct what may prove to be inexpedient in it.”). According to Justice Story, Article Five was a “safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.” “A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation . . . [The framers] desired, that [the Constitution] might be open to improvement; and under the guidance of the sober judgment and enlightened skill of the country, to be perpetually approaching nearer and nearer to perfection.” Joseph Story, 3 *Commentaries on the Constitution* §§ 1821-24 (1833), *reprinted in* 4 *Founders’ Constitution*, *supra* note 18, at 584.

83. Meeting of Philadelphia Association of Baptist Churches (New York Packet, October 12, 1787), *reprinted in* COMMENTARIES (1), *supra* note 73, at 375.

sown in every soil.”<sup>84</sup> Federalist writers saw “confusion and distresses” throughout the country and challenged their readers to “[v]iew these things ... and then say that we do not require a new, a protecting, and efficient federal government, if you can.”<sup>85</sup>

### *B. Article V in the State Ratification Conventions*

Article V aroused little controversy in the state ratification conventions. If discussed at all,<sup>86</sup> the Article was most often cited as proof that the people retained the right to amend the proposed Constitution if experience proved it necessary.<sup>87</sup> In Massachusetts, for instance, Federalists claimed Article V provided “the people . . . an opportunity to correct any abuse which might take place in the future administration of the government under it.”<sup>88</sup> Refuting the claim that it would be impossible to get the requisite number of states to agree to amendments after ratification,<sup>89</sup> the Federalists recalled the spirit of unanimity that prevailed during the Revolution and declared “we may certainly unite again in such alterations as in reason shall appear to be important for the peace and happiness of

84. George Washington to Former Virginia Governors, September 24, 1787, reprinted in COMMENTARIES (1), *supra* note 73, at 224.

85. *The Federal Constitution*, Pennsylvania Gazette (October 10, 1787), reprinted in COMMENTARIES (1), *supra* note 73, at 365.

86. There is no record of discussions regarding Article V in the state ratification conventions of Delaware, New Jersey, Georgia, Maryland, or New Hampshire. See generally *The Bill of Rights: A Documentary History* (Bernard Schwartz ed., 1971) (hereinafter “SCHWARTZ”).

87. In Pennsylvania, Thomas M’Kean agreed with his colleague, James Wilson, that the people had the right at any time to “alter and abolish their government,” and he was “happy to observe, that the Constitution . . . provides a regular mode for that event.” 2 SCHWARTZ, *supra* note 86, at 643-44. Speaking before the North Carolina assembly, James Iredell declared his belief that Article V allowed the Constitution to 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.” 4 ELLIOT’S DEBATES, *supra* note 7, at 177. Rejecting the contention that amendments “depended altogether on Congress,” *Id.* at 178, Iredell pointed out 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 convention, so that they have no option.” *Id.* at 178 (emphasis in original). In the Connecticut convention, Richard Law remarked that “[t]here is one clause in [the Constitution] which provides a remedy for whatever defects it may have . . . [The Article provides] an easy and peaceable way of amending any parts of the Constitution which may be found inconvenient in practice.” 2 ELLIOT’S DEBATES, *supra* note 7 at 200.

88. 2 ELLIOT’S DEBATES, *supra* note 7, at 116 (remarks of Rufus King).

89. For example, Samuel Adams had his doubts about waiting until after ratification to propose amendments. “Suppose, sir, nine states accept the Constitution *without* any conditions at all, and the four states should wish to have amendments, —where will you find nine states to propose, and the legislatures of nine states to agree to, the introduction of amendments?” *Id.* at 124. Adams believed amendments would have a better chance if ratification was made conditional on their acceptance. *Id.* at 124-25.



America.”<sup>90</sup> In fact, even those states which believed the proposed Constitution was flawed, nevertheless, invoked Article V as the proper vehicle for obtaining amendments.<sup>91</sup>

The Virginia convention provides the sole recorded instance of sustained discussion regarding Article V. Speaking in support of the proposed Constitution, Edmund Pendleton described the Article as providing “an easy and quiet method of reforming what may be amiss.”<sup>92</sup> Pendleton dismissed the possibility that a future recalcitrant Congress would refuse to allow needed amendments, for if Congress refused to act “[w]ho shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.”<sup>93</sup>

The Antifederalists were not convinced. Patrick Henry declared the way to amendment was “shut.”<sup>94</sup> Because “[t]wo-thirds of the Congress, or of the state legislatures, are necessary even to propose amendments, [I]f one-third of these be unworthy men, they may prevent the application for amendments.”<sup>95</sup> Moreover, requiring three-fourths of the states to concur for ratification “is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.”<sup>96</sup> Since a bare majority in four of the smallest states could hinder the adoption of amendments, “we may fairly and justly conclude that one twentieth part of the American people may prevent the removal of the most grievous inconveniences and oppression.”<sup>97</sup> Lee also rejected Pendleton’s argument that, should the government become oppressive, a convention could easily be

90. *Id.* at 147 (remarks of Dr. Charles Jarvis).

91. After voting to ratify the Constitution, Massachusetts proposed amendments which were to be obtained “agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.” 2 ELLIOT’S DEBATES, *supra* note 7, at 178. New Hampshire also proposed amendments to be “Considered agreeably to the fifth Article of the said Constitution” and requested their representatives “to exert their Influence & use all reasonable & Legal methods to obtain a ratification of the said alterations and Provisions, in such a manner as provided in the said article.” 2 SCHWARTZ, *supra* note 86, at 761. New York also directed their Representatives to “use all reasonable means to Obtain a Ratification of the following Amendments to the Constitution in the manner prescribed therein.” *Id.* at 915.

92. 3 ELLIOT’S DEBATES, *supra* note 7, at 37.

93. *Id.*

94. *Id.* at 49.

95. *Id.*

96. *Id.*

97. *Id.* at 50. Henry noted that the Virginia bill of rights guaranteed to “the majority of the community . . . an indubitable, unalienable, and indefeasible right to reform, alter, or abolish [the government], in such manner as shall be judged most conducive to the public weal,” and declared Article V violated “the language of democracy.” *Id.* See also *id.* at 55 (Henry pointing out that, even were Virginia to be unanimous in its desire to amend the Constitution, “yet they may be prevented therefrom by a despicable minority at the extremity of the United States”).

called and delegated powers revoked. "Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all? You read of a riot act in a country which is called one of the freest in the world, where a few neighbors cannot assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America."<sup>98</sup>

Madison defended Article V's numerical requirements by pointing out that, under the Articles of Confederation, the decision to amend must be unanimous.<sup>99</sup> Repeating the argument he made in Philadelphia, Madison reminded the convention of the numerous times proposed amendments to the Articles were defeated by "the smallest state in the Union" and asked "[w]ould 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?"<sup>100</sup> In response to Lee's prediction of a recalcitrant Congress, George Nicholas conceded that, had Article V granted Congress a monopoly over proposing amendments, "there might have been danger." However, in this case, "[t]he committee will see that there is another mode provided, besides that which originates with Congress."<sup>101</sup> Moreover, one could expect future conventions to be rather limited affairs.

"[They] will have their deliberations confined to a few points; no local interest to divert their attention; nothing but the necessary alterations. . . . No experiments to devise; the general and fundamental regulations being already laid down."<sup>102</sup> Virginia ultimately ratified the Constitution and along with its notice of ratification sent to Congress a list of amendments to be passed "in the manner provided by the 5th article of the said Constitution."<sup>103</sup>

Considering the state convention commentary on Article V as a whole, it is revealing that Article V was both attacked and defended on the grounds of popular sovereignty. The Antifederalists attacked the Article as an affront to the "language of democracy" which recognizes the people's right to "alter or abolish" their system of government.<sup>104</sup> The Federalists responded by pointing out that the Article explicitly guaran-

98. *Id.* at 51.

99. *Id.* at 88.

100. *Id.* at 89.

101. *Id.* at 101.

102. *Id.* at 102. It is not clear whether Nicholas was expressing his *hope*, or whether he believed conventions under Article V could be limited. Although raising an important issue, the question of whether a national convention can be limited in its deliberations is beyond the limited scope of this Article.

103. *Id.* at 661. The proposed additions included "[t]hat the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances." 2 SCHWARTZ, *supra* note 86, at 842. Madison used Virginia's proposed amendments as a model for the Bill of Rights he presented to the first Congress. *See id.* at 765.

104. 3 ELLIOT'S DEBATES, *supra* note 7, at 50 (remarks of Mr. Henry).

teed the right of the people to “assemble in convention.”<sup>105</sup> A number of states were apparently unconvinced and called for more explicit amendments protecting principles of popular sovereignty.<sup>106</sup> Madison himself proposed amendments to the Constitution which would protect the People’s right to “alter or abolish” their Constitution,<sup>107</sup> and the right to “peaceably assemble.”<sup>108</sup> However, even if these proposals suggest that many believed the Constitution should explicitly recognize and protect the sovereignty of the people, Article V itself was remarkably uncontroversial. Of the many proposed amendments to the new Constitution, none sought to change the proposed “constitutional road to the decision of the people.” In fact, to the dismay of the Federalists, the Antifederalists engaged in a campaign to convince the people to walk this road as soon as possible.

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105. See *supra* note 93 and accompanying text (remarks of Mr. Pendleton).

106. Among the amendments considered by the Maryland convention was one asserting that “whenever the ends of government are perverted, and the public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to, reform the old, or establish a new government.” 2 SCHWARTZ, *supra* note 86, at 735. Although not officially adopted, the amendments proposed in the Maryland convention were circulated by the minority in pamphlet form and may have influenced the amendments later recommended by Virginia, upon which Madison drew in writing his draft of the Bill of Rights. *Id.* at 729. Virginia’s recommendations included a declaration that “all power is naturally invested in, and consequently derived from, the people,” and that “the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.” *Id.* at 840-842. New York also proposed a declaration explicitly recognizing that “all power is originally invested in, and consequently derived from, the people,” and the people’s “right peaceably to assemble together to consult for their common good.” *Id.* at 911, 913. North Carolina followed suit and sought a declaration that “all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them,” *Id.* at 966, and that “the people have a right peaceably to assemble together, to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.” *Id.* at 968. See also 2 ELLIOT’S DEBATES, *supra* note 7, at 434-35 (James Wilson’s remarks at the opening of the Pennsylvania ratification convention) (“We, the *people of the United States*, in order to form a more perfect union, establish justice, &c., do ordain and establish this Constitution for the United States of America.” It is announced in *their name*—it receives its political existence from *their authority*: they ordain and establish. What is the necessary consequence? Those who ordain and establish have the power, if they think proper, to repeal and annul.”) (emphasis in original).

107. Madison’s proposed Preamble read: “That the people have an indubitable, unalienable, and indefensible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.” 2 SCHWARTZ, *supra* note 86, at 1026. The proposal was opposed on the grounds that the words in the current preamble “speak as much as it is possible to speak; it is a practical recognition of the tight of the people to ordain and establish Governments, and is more expressive than any other mere paper declaration.” *Id.* at 1072 (remarks of Rep. Jackson of Georgia). See Amar, *supra* note 50, at 1057 (citing Madison’s proposals as evidence for the non-exclusivity of Article V). But see John Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V’s Mechanisms*, 21 *Cumb. L. Rev.* 271 (1990-1991).

108. See 5 *The Founders’ Constitution*, *supra* note 18, at 25 (“The people shall not be restrained from peaceably assembling and consulting for their common good.”).

### C. *The Antifederalists and the Second Convention Movement*

Ye patriots! ye lovers of peace, of liberty, and of your fellow men! ye are called upon at this solemn juncture, to stand forth and save your country; before the breach is too wide, and while the parties may still be reconciled to each other; before anarchy stalks through the land; and before the sword of civil discord is unsheathed. For the sake of every thing that is great and good, and as you shall answer for it at the great tribunal, use your influence to procure another general convention with all possible speed, as the only way left to preserve the union of America, and to save your fellow citizens from misery and destruction.<sup>109</sup>

The call for a second convention came even before the assembly in Philadelphia adjourned. On August 31, 1787, George Mason declared that “he would sooner chop off his right hand than put it to the Constitution as it now stands.”<sup>110</sup> If certain changes were not made, “his wish would then be to bring the whole subject before another general Convention.”<sup>111</sup> Gouverneur Morris and Edmund Randolph echoed Mason’s concerns, with Randolph proposing that the State ratifying conventions “be at liberty to propose amendments to be submitted to another General Convention which may reject or incorporate them, as shall be judged proper.”<sup>112</sup>

On September 10, Randolph again stated his objections to the Constitution as it now stood and proposed “that the State Conventions shd. be at liberty to offer amendments to the plan — and that these should

109. *Philadelphiensis (IX)*, Philadelphia Freeman’s Journal (February 6, 1788), reprinted in COMMENTARIES (4), *supra* note 73, at 60. Calls for a second convention are ubiquitous in Antifederalist writings. See Richard Henry Lee to Governor Edmund Randolph (December 22, 1787), Virginia Gazette reprinted in 5 STORING, *supra* note 63, at 116 (“[U]pon the whole, sir, my opinion is, that as this constitution abounds with useful regulations, at the same time that it is liable to strong and fundamental objections, the plan for us to pursue, will be to propose the necessary amendment, and express our willingness to adopt it with the amendments, and to suggest the calling of a new convention for the purpose of considering them. To this I see no well founded objection, but great safety and much good to be the probable result.”). See also *Letters of Centinel VII*, (Philadelphia) Independent Gazetteer (December 27, 1787) reprinted in 2 STORING, *supra* note 63, at 175; *Reply to Medium by a Citizen*, New York Journal (November 24, 1787), reprinted in 6 STORING, *supra* note 63, at 47; *Essay by a Farmer*, (New Hampshire) Freeman’s Oracle and New Hampshire Advertiser (January 11, 1788), reprinted in 4 STORING, *supra* note 63, at 209; *Essays of Philadelphiensis (IX, X)*, (Philadelphia) Independent Gazetteer (November 1787 - April 1788), reprinted in 3 STORING, *supra* note 63, at 129, 133; *A Federal Republican, A Review of the Constitution* (November 28, 1787), reprinted in COMMENTARIES (2), *supra* note 82, at 276; *The Letters of Agrippa (III)*, Massachusetts Gazette (November 30, 1787), reprinted in, 4 STORING, *supra* note 63, at 75.

Interestingly, a controversy mirroring the calls for a second national convention had played out earlier at the state level when Pennsylvania adopted its constitution in 1776. WOOD, *supra* note 3, at 438. Pressuring the legislature to call a new convention, the Republicans derided the reluctance of the Constitutionalists: . . . [Y]ou are afraid to trust the people with their own power . . . The people (you seem to say by your conduct) are such a set of stupid creatures, that they will chuse improper men to make a constitution for them.” Pennsylvania Journal (Philadelphia, June 23, 1784), cited in WOOD, *supra* note 3, at 445.

110. II FARRAND, *supra* note 9, at 479.

111. *Id.*

112. *Id.*

be submitted to a second General Convention, with full power to settle the Constitution finally.”<sup>113</sup> The motion was seconded by Benjamin Franklin.<sup>114</sup> On September 15, Randolph renewed his motion, this time stating that should the motion not pass, he would be unable to sign the proposed Constitution.<sup>115</sup> Mason agreed: “This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it.”<sup>116</sup> He too could not sign without an agreement to hold a second convention.<sup>117</sup> Charles Pinckney, however, saw “[n]othing but confusion & contrariety” coming from a second convention. “The States will never agree in their plans—And the Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not to be repeated.”<sup>118</sup> Mr. Randolph’s motion was unanimously defeated.<sup>119</sup> On September 28, 1787, Congress transmitted the proposed Constitution to the states for ratification.

### 1. The Public Debate

Antifederalists rejected Federalist claims that the union was “suspended by a thread;” instead, they portrayed the country as experiencing neither “external war, or internal discord” that would “prevent the most cool, collected, full, and fair discussion of this all-important subject.”<sup>120</sup> Moreover, there was “remarkable uniformity in the objections made to the constitution, on the most important points.”<sup>121</sup>

113. *Id.* at 560-61, 564. Note that Randolph apparently assumed the second convention would have the power to make amendments part of the constitution *without* subsequent state ratification.

114. II FARRAND, *supra* note 9, at 564.

115. *Id.* at 631. See also *A Letter His Excellency Edmund Randolph, Esquire, on the Federal Constitution* (Richmond, October 10, 1787), reprinted in 2 STORING, *supra* note 63.

116. II FARRAND, *supra* note 9 at 632.

117. *Id.* See also *id.* at 633 (remarks of Elbridge Gerry) (“[T]he best that could be done he conceived was to provide for a second general Convention.”).

118. *Id.* at 632.

119. *Id.* at 633.

120. *Richard Henry Lee to Governor Edmund Randolph*, Petersburg Virginia Gazette (December 6, 1787), reprinted in COMMENTARIES (2), *supra* note 73, at 367. See also Luther Martin, *Genuine Information III*, Baltimore Maryland Gazette (January 4, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 252.

121. *Address by a Plebeian* (New York, 1788), reprinted in 6 STORING, *supra* note 63, at 136. See also *Centinel IV*, Philadelphia Independent Gazetteer (November 30, 1787), reprinted in COMMENTARIES (2), *supra* note 73, at 323 (“[T]here never was such a coincidence on any occasion as on the present, the opponents of the proposed plan, at the same time in every part of the continent, harmonised in the same objections; such a uniformity of opposition is without example and affords the strongest demonstration of its solidity.”); *The Pennsylvania Herald* (December 26, 1787), reprinted in COMMENTARIES (3), *supra* note 73, at 110 (noting the “unanimous opinion of the states, respecting the alterations that ought to be made”). Plebeian emphasized the interstate nature of the objections to the proposed constitution and

Antifederalist publications exhorted the people to take advantage of the relative ease with which a new convention could be called. After all, the same power that called the last convention could call another.<sup>122</sup> “Only a few months will be necessary for this purpose; if we consider the magnitude of the object, we shall deem it well worth a little time and attention . . . .”<sup>123</sup> In his letter to wavering Virginia Governor Edmund Randolph, Richard Henry Lee noted “[e]xperience and the actual state of things, show there is no difficulty in procuring a general convention; the late one being collected without any obstruction . . . . If with infinite ease, a convention was obtained to prepare a system, why may not another with equal ease be procured to make proper and necessary amendments? Good government is not the work of a short time, or of sudden thought.”<sup>124</sup>

Not only would a new convention be just as easily obtained as the last, the next would have an advantage: delegates informed by the considered judgment of the people. The debates of the last convention “were kept an impenetrable secret, and no opportunity was given for well informed men to offer their sentiments upon the subject.”<sup>125</sup> Since that [time], however,” [the Constitution] has been the object of universal attention—it has been thought of by every reflecting man—been discussed in a public and private manner, in conversation and in print; its defects have been pointed out, and every objection to it stated.”<sup>126</sup>

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downplayed the existence of more parochial concerns. See *Address by a Plebeian* (New York, 1788), reprinted in 6 *STORING*, *supra* note 63, at 136 (“It is also worthy of notice, that very few of the matters found fault within it, are of a local nature, or such as affect any particular state; on the contrary, they are such as concern the principles of general liberty, in which the people of New Hampshire, New York, and Georgia are equally interested.”).

122. See *Essays of An Old Whig (IV)*, (Philadelphia) *Independent Gazetteer* (October 1787 February 1788), reprinted in 3 *STORING*, *supra* note 63, at 31. Thomas Jefferson shared the Antifederalists’ faith in the relative ease with which a convention could be convened and accomplish its task. See *infra* note 207.

123. *Id.*

124. *Richard Henry Lee to Governor Edmund Randolph*, Petersburg Virginia Gazette (December 6, 1787), reprinted in *COMMENTARIES* (2), *supra* note 73, at 367. See also Luther Martin, *Genuine Information III*, Baltimore Maryland Gazette (January 4, 1788), reprinted in *Commentaries* (3), *supra* note 73, at 251-52.

125. *Address by a Plebeian* (New York, 1788), reprinted in 6 *STORING*, *supra* note 63, at 136. See also II *FARRAND*, *supra* note 9, at 632 (remarks of George Mason) (“This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it.”).

126. *Address by a Plebeian* (New York, 1788), reprinted in 6 *STORING*, *supra* note 63, at 136. See also *Centinel (IV)*, Philadelphia *Independent Gazetteer* (November 30, 1787), reprinted in *Commentaries* (2), *supra* note 73, at 323 (“[The Convention was] wholly uninformed of the sentiments of their constituents in respect to this form of government, as it was not in their contemplation when the convention was appointed to erect a new government, but strengthen the old one. . . .”); *Essays by Candidus (I)*, (Boston) *Independent Chronicle* (December 6, 1787), reprinted in 4 *STORING*, *supra* note 63 at 127 (Should a new convention be called “[t]he objections (if any) of the several States would then be fully known, and after examining the sentiments of the whole, some plan it is probable would be devised, that would meet the approbation of the confederacy.”); *Speeches of Rawlins Lowndes in the*

Those who proposed a second convention rejected the idea that amendments could be secured after the Constitution was formally adopted; the new (and distant) national government could not be trusted to propose—or accept—any amendment that would limit its own power:

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 artful and ever active aristocracy, will prevent all peaceable measures for changes, unless when they shall discover some favorable 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 the idea that amendments of it, may be obtained when necessary. This is a pernicious idea . . . .<sup>127</sup>

Little solace was taken in Article V's requirement that Congress call a convention upon the application of two-thirds of the states. With issues of national concern delegated to assemblies in Washington, the states themselves would be too preoccupied with local matters "to turn their thoughts to such high subjects."<sup>128</sup>

Even absent self-dealing by the national government, the amendment procedure itself was portrayed as hopelessly convoluted. It was "a labyrinth," and by the time its intricacies were traced, "ages will revolve, and perhaps the great principles upon which our late glorious revolution was founded, will be totally forgotten."<sup>129</sup> In the words of one

*South Carolina Legislature* (January 17, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 7, at 290. ("He [Lowndes] recommended that another convention should be called, and as the general sense of America appeared now to be known, every objection could be met on fair grounds, and adequate remedies applied where necessary. This mode of proceeding would conciliate all parties, because it was candid, and had a more obvious tendency to do away with all inconveniences than the adoption of a government which perhaps might require the bayonet to enforce it. . . .").

In the shadows of this argument lurks the claim that the Philadelphia Convention exceeded its mandate. *See, e.g.,* Luther Martin, *Genuine Information* (III), *Baltimore Maryland Gazette* (January 4, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 252 (stating his belief that the only reason a new convention might not be obtained was because "when [the States] discovered the part *this* convention had acted, and how much its members were *abusing the trust* reposed in them, the States would never trust *another* convention.") (emphasis in original). No less a figure than George Washington doubted the legality of the Convention, but nonetheless felt the circumstances warranted going beyond the letter of the Articles, "otherwise, like a house on fire, whilst the most regular mode of extinguishing it is contended for, the building is reduced to ashes." George Washington to Henry Knox (February 3, 1787), cited in CAPLAN, *supra* note 1, at 26.

127. *Federal Farmer* (IV) (October 12, 1787), reprinted in 4 *The Founders' Constitution*, *supra* note 18, at 579. *See also* *Letters From the Federal Farmer* (IV) (October 12, 1787), reprinted in 2 STORING, *supra* note 63, at 250-51 ("[W]hen power is once transferred from the many to the few, all changes become extremely difficult. . . ."); Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, (April 1788), reprinted in 5 STORING, *supra* note 63, at 88; *Essays of an Old Whig* (I), (Philadelphia) Independent Gazetteer (October 1787 - February 1788), reprinted in 3 STORING, *supra* note 63, at 20; *Letters of a Republican Federalist* (IV), *Massachusetts Centinel* (January 12, 1788), reprinted in 4 STORING, *supra* note 63, at 177.

128. *Essays of an old Whig* (I), (Philadelphia) Independent Gazetteer (October 1787 February 1788), reprinted in 3 STORING, *supra* note 63, at 20.

129. *An Old Whig* (I), Philadelphia Independent Gazetteer (October 12, 1787), reprinted in COMMENTARIES (1), *supra* note 73, at 377.

Antifederalist, Article V required a confluence of circumstances so unlikely, he “would full as soon sit down and take my chance of winning an important privilege to the people, by the casting of the dice ’till I could throw sixes a hundred times in succession.”<sup>130</sup>

In sum, Antifederalists believed Article V provided no more guarantee of the peoples’ right to alter or abolish their constitution than the “parchment barriers” so derided by the Federalists.<sup>131</sup> Neither Congress nor the States would have an incentive to propose amendments of the proper kind and, in the unlikely event such proposals were made, the intricacies of the Article would cause such delay that the people themselves would grow accustomed to the constitutional imperfection. The Antifederalists argued that if the Constitution required alteration, then the time to amend was not later, but *now*.<sup>132</sup>

## 2. The Second Convention Movement in the State Assemblies

As the debate raged outside in pamphlets and newspaper editorials, state ratifying conventions met to consider whether to adopt the Constitution as written or to seek pre-ratification amendments by way of a second convention. Following Randolph’s report to the Virginia House of Delegates,<sup>133</sup> George Mason and Patrick Henry introduced resolutions in the Virginia legislature defraying the expenses of “the deputies to a Federal Convention in case such a Convention should be judged necessary.”<sup>134</sup> On December 12, 1787, the Virginia legislature passed an act which reserved funds for the state’s ratification convention to hold “communications with any of the sister states” and for “collecting the sentiments of the union respecting the proposed federal constitution.”<sup>135</sup>

Randolph, whose enthusiasm for a second convention had apparently cooled, did not forward the Act to other state governors until December 27;<sup>136</sup> Governor George Clinton of New York did not receive his copy

130. *An Old Whig (VIII)*, Philadelphia Independent Gazetteer (February 6, 1788), reprinted in COMMENTARIES (4), *supra* note 73, at 56.

131. See *The Federalist No. 48* (James Madison), *supra* note 8, at 308. See also *Centinel II*, Philadelphia Freeman’s Journal (October 24, 1787), reprinted in COMMENTARIES (1), *supra* note 73, at 467 (Article is “mere sound”).

132. See *An Old Whig (VIII)*, Philadelphia Independent Gazetteer (February 6, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 56 (“Inveterate power is at all times very hard to be controuled. Habits, connexions, dependence, and a thousand circumstances in course of time, rivet the chains of slavery ’till we grow either callous to their galling, or too feeble to shake them off, or too listless to resist . . . . It will be extremely difficult to change it for the better even in the beginning; but in a little time it will become utterly impossible.”); Edmund Randolph to Speaker of Virginia House of Delegates (October 10, 1787), reprinted in *4 Founders’ Constitution*, *supra* note 18, at 659 (“[I]t may be questionable, whether, after the particular advantages of its operation shall be discerned, three fourths of the States can be induced to amend.”).

133. III FARRAND, *supra* note 9, at 123.

134. CAPLAN, *supra* note 2, at 34-35.

135. *Id.* at 35.

136. Robert Allen Rutland, *The Ordeal of the Constitution* 188 (Oklahoma Press, 1966) (hereinafter cited as “RUTLAND”).



until March 7, 1788.<sup>137</sup> The delay<sup>138</sup> prevented New York's legislature from acting in concert with Virginia.<sup>139</sup> Clinton's response of promising his cooperation "with any sister State" was received by Randolph but not delivered to the Virginia legislature until, two days before the state convention's vote on ratification.<sup>140</sup> The Virginia delegates first learned of Clinton's letter the day after they had voted to ratify when it was read to the legislature.<sup>141</sup> Virginia eventually sent its reply to Clinton and sought to coordinate a call for a second federal convention, but this message too was somehow delayed; months after the resolution had been posted in Richmond it was still undelivered in New York.<sup>142</sup> Given their size and political importance, the new Constitution could not have been successful without the support of New York and Virginia and had it not been for these crucial delays, a second convention would have been inevitable.<sup>143</sup>

Even after the Constitution went into effect,<sup>144</sup> there were continued calls for a second convention. On October 30, 1788, the Virginia House of Delegates approved Patrick Henry's measure calling for a second convention.<sup>145</sup> In tandem with its ratification notice, New York circulated a letter to the governors of each state, requesting that Congress call a second convention.<sup>146</sup> The New York legislature passed its resolution for a second convention on February 7, 1789.<sup>147</sup> On November 21, in the second of two conventions, North Carolina voted to ratify the Constitution and recommended amendments to be obtained through a second federal convention.<sup>148</sup>

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137. *Id.*

138. Given the rapidity at which the contemporary events were unfolding, the numerous delays in the transmission of the letters are somewhat suspicious, to say the least. See RUTLAND, *supra* note 136, at 188; CAPLAN, *supra* note 2, at 35.

139. Caplan *supra* note 2, at 35; RUTLAND, *supra* note 123, at 188.

140. Ironically, so intense was the interest in the state convention's proceedings, the Virginia legislature was unable to obtain a quorum—and thus consider the letter—until after the convention rejected Patrick Henry's passionate arguments and voted to unconditionally ratify the Constitution. Edward P. Smith, *The Movement Towards a Second Constitutional Convention in 1788*, reprinted in *Essays in the Constitutional History of the United States in the Formative Period, 1775-1789* 88-89 (John F. Jameson, ed. 1889).

141. CAPLAN, *supra* note 2, at 35; RUTLAND, *supra* note 123, at 252.

142. RUTLAND, *supra* note 123, at 252.

143. CAPLAN, *supra* note 2, at 35.

144. Occurring on June 21, 1788, when New Hampshire became the ninth state to ratify the Constitution.

145. CAPLAN, *supra* note 2, at 36; Smith, *supra* note 140, at 104. Francis Corbin twice moved to amend the measure and allow Congress to propose its own amendments as an alternative to calling a convention; his proposal was voted down both times. CAPLAN, *supra* note 2, at 36-37.

146. *Id.* at 37. Upon hearing of the circular letter, Washington commented the circular was designed to "set every thing afloat again." George Washington to Benjamin Lincoln (August 28, 1788), cited in CAPLAN, *supra* note 2, at 37.

147. *Id.* at 38.

148. *Id.*

Madison, aware that delay could cause the Antifederalists to “blow the trumpet for a second Convention,”<sup>149</sup> urged the First Congress to propose amendments to the new Constitution.<sup>150</sup> Representative Gerry believed the proposed amendments would “prevent the necessity which the States may think themselves under of calling a new convention.”<sup>151</sup> Ironically, the Federalists cited Article V’s cumbersome convention mechanisms as a reason for allowing the Congress to propose amendments rather than taking the time-consuming route of a national convention.<sup>152</sup> By the time Congress submitted to the states for ratification the amendments now known as the Bill of Rights, calls for a second convention had ceased.<sup>153</sup>

#### IV

#### The Federalist Critique of National Conventions

Although he did not believe it was necessary to make constitutional provision for future conventions, Madison, nevertheless, embraced the principle of popular sovereignty. After having the people meet in convention to ratify the Constitution would not only erase whatever concerns remained about the legality of the Philadelphia Convention,<sup>154</sup> it would also trump the amendment procedures in state constitutions.<sup>155</sup> In fact, it

149. James Madison to Richard Peters (August 19, 1789), *cited in* CAPLAN, *supra* note 2, at 39. In a letter to George Eve, Madison wrote that he preferred congressional proposal of amendments to a second convention because of the time required for the convention process and the fact that some states would oppose the convention mode. Moreover, congressional proposal was “the safest mode. The Congress, who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it.” Letter to George Eve (Jan. 2, 1789), *reprinted in*, Paul J. Weber & Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention* 53 n.51 (1989) (hereinafter cited as “WEBER” & PERRY”).

150. 2 SCHWARTZ, *supra* note 86, at 983. Others have noted how concerns about a second convention played a role in Madison’s willingness to propose the amendments that became the Bill of Rights. See WEBER & PERRY, *supra* note 149, at 48; Sanford Levinson, “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 Tex. Tech. L. Rev. 2443, 2454 (1990).

151. 2 SCHWARTZ, *supra* note 86, at 1037.

152. According to Madison, congressional proposal of amendments was “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.” Letter to George Eve (Jan. 2, 1789), *reprinted in* WEBER & PERRY, *supra* note 149, at 53 n.51.

153. CAPLAN, *supra* note 2, at 40.

154. *The Federalist No. 40* (James Madison), *supra* note 8, at 253.

155. Responding in Philadelphia to a delegate’s complaint that Article V violated his state’s procedures for constitutional amendment, Madison replied, “[t]he difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution, and all officers were under oath to support it. The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bill of rights, that first principles might be resorted to.” II FARRAND, *supra* note 9, at 476.

is at least plausible the Preamble and Assembly Clause presented by Madison to the First Congress were intended to explicitly recognize the people's right to assemble in convention and alter or abolish their Constitution.

But not right now. First principles notwithstanding, there was too much at stake to chance another convention before the results of the first had been tested by time. Moreover, the very concept of convention raised Madisonian concerns regarding faction and demagoguery. Not only was a convention at the moment imprudent, the arguments deployed by the Federalists called into question whether a convention *at any time* could be trusted to produce the considered judgment of the people.

### A. Concerns of the Moment

The Federalists opposed a second convention for a variety of reasons—some having nothing to do with conventions *per se*. For example, many believed a second convention was unlikely to bring together a group of men better qualified to create a new system of government than those who met in Philadelphia. The original convention was made up of “first characters,”<sup>156</sup> who constituted “the wisdom of America.”<sup>157</sup> Accordingly, “another convention in all respects equal to the present cannot be found;”<sup>158</sup> “[a] second group would “*inevitably* be inferior to the first.”<sup>159</sup> Indeed, the people’s “enthusiastic confidence” in these “patriotic leaders, . . . stifled the ordinary diversity of opinions on great national questions.”<sup>160</sup> Given the superior quality of the men at Philadelphia, a second convention could not hope to have the same “spirit of amity” or the same “mutual deference and concession” that accompanied the first.<sup>161</sup>

On the other hand, a second convention right now would include “insidious characters from different parts of America, would at least spread a general alarm, and be but too likely to turn everything into confusion and uncertainty.”<sup>162</sup> The opposition was made up of “Nabobs” who “appear[] to proceed in the present instance from no good motive.”<sup>163</sup> A

156. *Astrides, Remarks on the Proposed Plan of a Federal Government* (January 31 - March 27, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 540.

157. *Id.* at 541.

158. *Observer V*, *New Haven Gazette* (September 20, 27, 1787), reprinted in III *Documentary History of the Ratification of the Constitution*, *supra* note 73, at 350.

159. *Astrides*, *supra* note 195, at 540.

160. THE FEDERALIST NO. 49, *supra* note 8, at 315.

161. *George Washington, Letter to Congress* (September 17, 1787), reprinted in II FARRAND, *supra* note 9, at 667). See also, *Astrides*, *supra* note 195, at 541. See also THE FEDERALIST NO. 85, *supra* note 8 at 524 (noting the “improbability of assembling a new convention under circumstances in any degree so favorable to a happy issue as those in which the late convention met, deliberated, and concluded”).

162. 5 *The Writings of James Madison* 321 (G. Hunt ed., 1904), cited in Walter Dellinger, *The Recurring Question of the “Limited” Constitution Convention*, 88 *Yale L. J.* 1623, 1634 n.47 (1979).

163. Rufus King to Jeremiah Wadsworth (December 23, 1787), reprinted in COMMENTARIES (3), *supra* note 73, at 70-71.

second convention would “give opportunities to designing men”<sup>164</sup> who would use their influence to “cause instructions to be given which would effectually prevent an ageament [sic].”<sup>165</sup> According to Madison, “[i]f an early convention cannot be parried, it is seriously to be feared that the system which has resisted so many direct attacks may at last be undermined by its enemies.”<sup>166</sup>

Moreover, regardless of one’s belief that the Constitution could use amending, the timing was wrong. The Constitution was too young to face the fundamental challenge the Antifederalists would mount in a second convention. Madison believed that, “as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>167</sup> To even attempt a second convention “strikes at the confidence in the first; and the existence of a second by opposing influence to influence, would in a manner destroy an effectual confidence in either.”<sup>168</sup> Calling a convention at this point would lead to “anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue.”<sup>169</sup>

The fact that the Constitution remained untested also meant that a second convention would necessarily be more a debate over political theory than an attempt to remedy a concrete problem. Unfortunately, “[h]uman opinions” were “as various and irreconcilable concerning theories of Government, as doctrines in Religion.”<sup>170</sup> “[D]issensions on the Subject will beget heats and animosities, that would in case of another convention prevent a general acquiescence [sic] in any plan.”<sup>171</sup> The fact

164. James Madison to Edmund Randolph (New York, January 10, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 327.

165. From Henry Knox (New York, September 1787), reprinted in Commentaries (1), *supra* note 73, at 280.

166. 2 *Rives’s Madison* 629, reprinted in Edward P. Smith, *The Movement Towards a Second Constitutional Convention in 1788*, in *Essays in the Constitutional History of the United States in the Formative Period, 1775-1789* 95 (John F. Jameson ed., 1889). See also *The Federalist No. 85*, *supra* note 8 at 527 (“I know that POWERFUL INDIVIDUALS, in this and other States, are enemies to a general national government in every possible shape.”) (capitalization in original).

167. *The Federalist No. 49*, *supra* note 8 at 314. See also, Levinson, *supra* note 150 at 2459 (arguing that Madisonian concerns about “veneration” of the document have contributed to “a process of surreptitious and unacknowledged amendment”).

168. James Madison to Edmund Randolph (New York, January 10, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 327. Madison also argued there was danger in calling a convention to amend so young a constitution.

169. *The Federalist No. 85* (Hamilton), *supra* note 8 at 527.

170. James Madison to Edmund Randolph (New York, January 10, 1788), reprinted in COMMENTARIES (3), *supra* note 73, at 327.

171. From Henry Knox (New York, September 1787), reprinted in COMMENTARIES (1), *supra* note 73, at 280.

that the previous convention had escaped such discord was attributed both to the men who attended it<sup>172</sup> and the fact that positions had since become polarized.<sup>173</sup> Given the “difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance,” Madison “tremble[d] for the result of a Second, meeting in present temper of America.”<sup>174</sup>

## B. Theoretical Concerns

### I. Liberalism and the Assumption of Faction

Originally, the convention’s glory was its status as an extra-institutional, therefore super-legitimate expression of the will of the people themselves.<sup>175</sup> Implicit in this idea is the faith that one group *can* represent the will of the people—it assumes a certain degree of commonality. In fact, the Antifederalist call for a second convention explicitly adopted the Republican ideal that citizens are able to put aside parochial concerns and seek the common good.<sup>176</sup> Madison himself recognized that, under “certain great and extraordinary occasions,” the people could assemble in convention and “repress[] the passions most unfriendly to order and concord.”<sup>177</sup> However, this was the exception. To Madison, “[t]he danger of

172. See *supra* note 156 and accompanying text.

173. James Madison to G. L. Turberville (New York, November 2, 1788), *reprinted in* WEBER & PERRY, *supra* note 149, at 31-32 (election to a second convention “would be courted by the most violent partizans on both sides; it would probably consist of the most heterogeneous characters; [and] would be the very focus of that flame which had already too much heated men of all parties.”).

174. *Id.*

175. According to Charles Jarvis in the Massachusetts Ratifying Convention:

Let us inquire, then, sir, under what authority we are acting, and to what tribunal we are amenable. Is it, then, sir, from the late federal Convention that we derive that authority? Is it from Congress, or is it even from the legislature itself? It is from neither, sir. We are convened in right of the people, as their immediate representatives, to execute the most important trust which it is possible to receive; we are accountable, in its execution, to God only, and our own consciences.”

2 ELLIOT’S DEBATES, *supra* note 7, at 151. Madison also equated conventions with “the people.” See II FARRAND, *supra* note 9, at 476 (“Mr. Madison considered it best to require Conventions [for ratifying the Constitution]. . . . The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.”); *The Federalist No. 40*, *supra* note 8, at 251 (“In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation of *all the States*, they have reported a plan which is to be confirmed and may be carried into effect by *nine States only*.”). See also Bruce A. Ackerman, *We the People: Foundations* 178 (1991) (discussing how Publius equated “convention” with “the people.”).

176. See *supra* note 121 and accompanying text.

177. *The Federalist No. 49*, *supra* note 8 at 314, 315. This “repression of factionalism” occurs only in times of crisis when there is “a universal alarm for the public safety.” *The Federalist No. 50*, *supra* note 8 at 320. In these extraordinary times, “an enthusiastic confidence of the people in their patriotic leaders” could “stifle[] ordinary diversity of opinions on great national questions.” *The Federalist No. 49*, *supra* note 8 at 315.

disturbing the public tranquility by interesting too strongly the public passions” was a “serious objection against a frequent reference of constitutional questions to the decisions of the whole society.”<sup>178</sup> Accordingly, such “experiments [were] of too ticklish a nature to be unnecessarily multiplied.”<sup>179</sup>

Madison spoke from contemporary experience. In the decade following the Revolution, the track record of the state legislatures provided less reason to see society in terms of majorities acting for the common good and more reason to see competing factional interests that had to be controlled through institutional safeguards.<sup>180</sup> “Wherever the real power in a Government lies,” Madison wrote to Thomas Jefferson, “there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from the acts in which the Government is the mere instrument of the major number of the constituents.”<sup>181</sup>

A liberal gloss was thus added to the Republican assumptions which had informed the Revolution.<sup>182</sup> Republicanism, at the time of Founding, trusted in an organic state where the goal of society was the pursuit of the common good and promotion of public virtue;<sup>183</sup> this assumes a commonality of interest among the people which could be determined by majority vote.<sup>184</sup> Under this view, there is no reason to question the decisions of the people meeting in convention—indeed, there was more reason to trust them, given the reduced “agency costs” inherent in normal representative government.<sup>185</sup> However, the idea of a homogeneous society was explicit-

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178. *The Federalist No. 49*, *supra* note 8 at 315.

179. *Id.* Indeed, *Federalist No. 51* presents a system of government where separation of powers prevents the necessity of having to resort to such “ticklish experiments.”

180. For a general discussion of legislative excesses in the 1780s, see WOOD, *supra* note 3, at 411.

181. James Madison to Thomas Jefferson (October 17, 1788), *cited in* WOOD, *supra* note 3, at 410.

182. This does *not* mean that Liberalism *replaced* Republicanism, or that there exists a sharp dichotomy between the two. See Ackerman, *supra* note 175 at 31 (rejecting dichotomy and interpreting Madison and the Founder as embracing a form of “liberal republicanism”); Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988) (same). It does mean, however, that Madisonian notions of politics-as-faction played a far greater role in the 1780s than in 1776. See WOOD, *supra* note 3, at 606-15 (discussing the shift from classical Republicanism to emerging Liberalism). See also Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 704 (1985) (same).

183. WOOD, *supra* note 2, at 68.

184. *Id.*

185. See Amar, *supra* note 50, at 1094. An example of republicanism’s sanguine view of conventions are the remarks of Thomas Jefferson after the deadlocked election of 1800. Facing the possibility that the present administration might expire without a new president, Jefferson believed a constitutional convention was a real possibility. See CAPLAN, *supra*, note 2, at 43. According to Jefferson, this possibility gave the Federatists “the horrors, as in

ly rejected by Founders such as John Adams and James Madison who believed society was composed of groups whose interests normally diverged.<sup>186</sup> This rejection had tremendous implications for Madison's faith in conventions as a tool for producing the considered judgment of the people.

## 2. Madisonian Factionalism and the Theory of Convention

At Philadelphia, Madison expressed his concerns about conventions in relatively benign terms. He was troubled by "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?"<sup>187</sup> Although not opposed to conventions as such, Madison was concerned that "difficulties might arise as to the form, the quorum, &c. which in Constitutional regulations ought to be as much as possible avoided."<sup>188</sup>

These criticisms are deceptively innocuous. Only later, in his contributions to the *Federalist Papers*, did Madison have a chance to elaborate on his concerns regarding the "formation and force" of conventions. In *Papers* 49 and 50, Madison critiques the utility of appealing to the people in convention as a means of preventing the departments of government from overreaching their authority.<sup>189</sup> Although Madison agreed that "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions,"<sup>190</sup> he considered this road too dangerous for "frequent reference of constitutional questions to the decision of the whole society." For one thing, frequent appeals to the people would "deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest

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the present democratical spirit of America, they fear they should lose some of the favorite morsels of the Constitution." *Id.* Jefferson, on the other hand, believed a convention "would have been on the ground in 8 weeks, would have repaired the Constitution where it was defective, & wound it up again." *Id.*

186. See WOOD, *supra* note 3, at 502.

187. II FARRAND, *supra* note 9, at 558. At the time Madison made this comment, the proposed Article read: "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." *Id.* at 468. Note that the final form of Article V appears to address only the last of Madison's concerns, "what force of its acts?" by requiring state ratification.

188. II FARRAND *supra* note 9, at 630.

189. In *The Federalist* 49, Madison discusses Jefferson's proposition "that whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the Constitution, or correcting breaches of it, a convention shall be called for the purpose." *The Federalist* No. 49, *supra* note 8, at 313 (emphasis in original). In Paper No. 50, Madison discusses Pennsylvania's method of periodic resort to convention. *Id.* at 318.

190. *The Federalist* No. 49, *supra* note 8, at 314.

and freest governments would not possess the requisite stability.”<sup>191</sup>

Madison’s biggest concerns, however, were with the *formation* of conventions. Future conventions would have to contend with the people’s ordinary diversity of opinion which “could mingle its leaven in the operation.” Madison reminded the readers of the *Federalist Papers* that although “all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord,” “future situations in which we must expect to be usually placed do not present any equivalent security.”<sup>192</sup> There were institutional concerns as well. Despite the fact that calls to convention would most likely be provoked by the actions of a self-aggrandizing legislature, the legislature, nevertheless, would have the greatest influence over that convention. In fact, the same influence which had gained them an election into the legislature would gain them a seat in the convention.”<sup>193</sup>

Even in those situations where the legislature had less influence, conventions “could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties or of parties springing out of the question itself,” and would be “connected with persons of distinguished character and extensive influence in the community.”<sup>194</sup> In short, “[t]he *passion*, therefore, and not the reason, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government.”<sup>195</sup>

Madison’s point is to show that a convention is an inadequate, “exterior provisions” for keeping the departments of government responsive to the people. He solves this problem in *Paper No. 51* “by so contriving the *interior* structure of government as that its several constitutional parts

191. *Id.* See also James Madison to Thomas Jefferson (June 27, 1823), reprinted in 9 Writings of Madison at 140-141 (G. Hunt ed.), cited in CAPLAN, *supra* note 2, at 49 (“To refer every point of disagreement to the people in Conventions would be a process too tardy, too troublesome, & too expensive; besides its tendency to lessen a salutary veneration for an instrument so often calling for such explanatory interpositions.”).

192. *The Federalist No. 49*, *supra* note 8, at 315.

193. *Id.* at 315-16.

194. *Id.* at 317. In a letter to George Turberville, Madison wrote:

If a general Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; and election into it would be courted by the most violent partizans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of that flame which had already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in others parts of the union might have a dangerous opportunity of sapping the very foundation of the fabric.

Letter to George Lee Turberville (Nov. 2, 1788), reprinted in WEBER & PERRY, *supra* note 149 at 31-32. See also Edward Carrington to Thomas Jefferson (New York, October 23, 1787), reprinted in COMMENTARIES (1), *supra* note 73, at 440 (future conventions could expect to be “clogged with instructions and biased by the presentiments of their constituents”).

195. *The Federalist No. 49*, *supra* note 8, at 317.



may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>196</sup> By structuring the processes of government so that “ambition is made to counteract ambition,” Madison minimizes the need for “frequent reference of constitutional questions to the decision of the whole society.” The danger of conventions, however, is left unsolved. Although one might hope future conventions will be formed under circumstances that “repress the passions most unfriendly to order and concord,” there is no guarantee that this will be the case.<sup>197</sup> Madison himself believed the extinction of “party spirit” required “either a universal alarm for the public safety, or an absolute extinction of liberty.”<sup>198</sup> Nor are there structural safeguards within the convention itself that ensure—or even make likely—an outcome that will reflect more “reason” than “passion.”

Suddenly, Madison’s concerns about how conventions are formed, by what rule decided, and what force of its acts, appear quite serious indeed. It is no wonder that Madison’s proposed version of Article V avoided conventions altogether and left the matter of constitutional amendment to the Congress “who will be appointed to execute as well as to amend the Government [and] will probably be careful not to destroy or endanger it.”<sup>199</sup>

### C. Beyond the Founding

The dangers associated with “passionate,” popular assemblies were more than theoretical. In the period between the Revolution and the adoption of the Constitution, there had been increasing concern regarding extra-institutional assemblies.<sup>200</sup> By the turn of the century, the great upheaval in France highlighted the American advantage of having a “regular and legal mode” for altering fundamental law.<sup>201</sup> It also gave a subtle

196. *The Federalist No. 51*, *supra* note 8, at 320 (emphasis added).

197. Some scholars have characterized Madison’s concerns about conventions as being limited to technical problems and the disadvantages to calling a second convention before the new Constitution had been properly tested. See WEBER & PERRY, *supra* note 149, at 48. This does not explain Madison’s continued suspicion of national conventions—a suspicion that lasted well into the Nineteenth Century and long after the Constitution had survived multiple amendments. See Letter to Thomas Jefferson (June 27, 1823) (conventions are “a process too tardy, too troublesome, and too expensive,” and have a “tendency to lessen a salutary veneration for an Instrument so often calling for explanatory interpositions”), reprinted in Levinson, *supra* note 150, at 2452 n.20. Nor does it address the theoretical problems with conventions described by Madison in *The Federalist Papers*.

198. *The Federalist No. 50*, *supra* note 149, at 320.

199. 5 *The Writings of James Madison* 321 (G. Hunt ed. 1904).

200. See Letter of James Madison to Thomas Jefferson (Aug. 12, 1786), reprinted in WOOD, *supra* note 3, at 327 [Unauthorized assemblies] were “continually starting up here or there, and carried on merely as the gnawing worm of malice or resentment may bite individuals.”).

201. See St. George Tucker, 1 *Blackstone’s Commentaries* 371-72 (1803), reprinted in 4 *Founders’ Constitution*, *supra* note 18, at 583 (“A change in governments in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable.”).

impetus towards using the congressional mode of amendment and away from utilizing conventions. In his widely-used edition of Blackstone's Commentaries, St. George Tucker noted that a national convention "will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy."<sup>202</sup>

By the mid-nineteenth century, legal treatises described national conventions as "without limit and without landmark" and "not likely to be resorted to for any other purpose than to destroy the government."<sup>203</sup> Writing soon after the Civil War and the Southern secession conventions, John A. Jameson commented that the convention was "an institution that, however hedged about by legal restraints, obviously exhibits more features that are menacing to republican liberty than any other in our whole political structure."<sup>204</sup>

It would appear these warnings have been heeded. In the two hundred years since the ratification of Article V, state applications for a national convention have never reached the two-thirds majority required to force Congress to call a national convention.<sup>205</sup> It would seem Charles Pinckney's words were prophetic: "Conventions are serious things, and ought not to be repeated."<sup>206</sup>

202. *Id.*

203. Timothy Faffar, *Manual of the Constitution of the United States of America* 392 (Boston, 1867), cited in CAPLAN *supra* note 2, at 158. Timothy Faffar was Daniel Webster's law partner and is described by Russell Caplan as "an ardent Unionist." *Id.* John C. Calhoun apparently shared Farrar's conception of the authority of national conventions, but without the pejorative. See *The Works of John C. Calhoun*, reprinted in VILE, *supra* note 6 at 87 (arguing that a national convention "represent[ed] the united sovereignty of the confederated States" and had "power and authority to correct every error").

204. John A. Jameson, *A Treatise On Constitutional Conventions* 2 (4th ed. 1887). Jameson believed there were four types of conventions: the "spontaneous convention" or public meeting (protected by the First Amendment Assembly Clause); the ordinary legislative convention or "General Assembly"; the revolutionary convention or "provisional government"; and the constitutional convention (as described in Article V). *Id.* at 3-4. Jameson believed it was a mistake to equate constitutional conventions with the people acting in the sovereign capacity. This was a "heresy" that could "pull down the edifice of our liberties" and, in fact, described the actions of the southern states during the Civil War. *Id.* at 3.

205. The method has come close to being invoked on several occasions. Only one state was needed to trigger a national convention when Congress permitted passage of an amendment providing for the direct elections of Senators. See *The Constitution of the United States of America: Analysis and Interpretation* 902 (Johnny H. Killian & Leland E. Beck eds., 1987). The movement for a constitutional limitation on income tax rates lacked only two states to force a convention. *Id.* Only one state was needed to force a convention to consider limiting the Supreme Court's legislative apportionment decisions. *Id.* In our own time, only two states are needed to for a convention to propose a balanced budget amendment. *Id.*

206. II FARRAND, *supra* note 9, at 632. But see ACKERMAN, *supra* note 70 (arguing that certain political movements have acted analogously to the convention procedure set out in Article V).

### Conclusion: Retaining Conventional Wisdom

The essence of federalist ambivalence regarding conventions is this: Although the people are capable of repressing the passions most unfriendly to “order and concord” in times of constitutional crisis, there is no guarantee, they will do so. Therefore, better to trust future constitutional innovation to the existing institutions of government. The federalists, however, did not have the last word. A more Republican view of the people—a view less trusting of existing institutions—refused to grant Congress a monopoly on proposals for constitutional reform. If the view of society-as-faction was integrated into the Constitution in its structured separation of powers, so too was the Republican ideal of a people capable of acting in the interest of all on certain great and extraordinary occasions.

“Great and extraordinary occasions,” however, are not a prerequisite to a national convention.<sup>207</sup> The two modes of amendment presented in Article V are *always* available. One mode allows the people to channel their desires to amend the Constitution through normal political institutions; the other mode assumes the people are just as capable as their institutions in wielding this extraordinary power in the name of the common good. There is no preference in the Article itself—no exhaustion requirement that the people must *first* try Congress, then, if unavailing, they may resort to convention. Article V simply presents both modes, both ideals, and leaves the choice to the exigencies of the time.

In fact, the choices of Article V create a peculiar constitutional dynamic. Madison may have hoped that by granting Congress the power to propose amendments, the country could avoid the trauma of another convention. In fact, it is the convention clause itself that makes conventions unlikely. The option of a convention serves as a reminder to Congress that it cannot ignore widespread and sustained calls for constitutional reform.<sup>208</sup> In this way, the Convention Clause guarantees that the

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207. Interestingly enough, the occasions generating the most calls for constitutional conventions could well be characterized as “great and extraordinary.” The first call to a convention after the Founding period came in the winter of 1832-33 during the nullification crisis when the national tariff enacted by Congress prompted some states to question whether the states had the authority to nullify congressional acts they considered unconstitutional. WEBER & PERRY, *supra* note 149, at 59. The next wave of petitions occurred on the eve of the Civil War when several states sought a convention to avert the impending rebellion over slavery. *Id.* Other events generating a significant number of petitions include the Progressive Movement (calling for direct election of Senators), World War I & II (seeking to outlaw war), and Desegregation (following the Supreme Court’s decision in *Brown v. Board of Education*). *Id.* at 61-64.

208. Consider, for example, the Seventeenth Amendment. In the late nineteenth and early twentieth century, Congress received numerous petitions calling for a convention to consider amending the Constitution to allow the direct election of Senators. Initially blocking attempts at such an amendment, the Senate eventually acquiesced and adopted a joint resolution with the House proposing the Seventeenth Amendment. According to some scholars, this “handwriting on the wall syndrome,” in which state applications occasionally influenced Congress to take action on an issue, is “a familiar tendency in twentieth century constitutional revision.” WEBER & PERRY, *supra* note 149, at 61.

Constitution remains in the hands of the people, not their institutions, and that the people retain the right to alter or abolish that Constitution as they see fit.