CHAPTER I
The Genesis of Article Five

The idea of amending the organic instrument of a state is peculiarly American. Although many of our political and legal institutions take their origin from English and occasionally Continental conceptions, such is not the case in the fundamental matter of altering the constitution. The idea of a written constitution was developed at a late stage of Western civilization, and the United States, not Europe, took the lead. The doctrine of popular sovereignty had an especially strong appeal to the inhabitants of the colonies in the latter half of the eighteenth century. The people were sovereign: it followed that they could make a constitution. Corollary to this, of course, they could revise and amend the document which they had adopted.

The first written charters or constitutions providing for their amendment appear to have been the charters of the Colony of Pennsylvania, which was the only colony to make such provision.1 Eight of the state constitutions during the period between the declaration of independence and the meeting of the Constitutional Convention of 1787 contained amendment clauses.2 Even more important, the Articles of Confederation, defective as they were, made provision for their alteration. It was almost inevitable, therefore, that when the Constitutional Convention assembled some plan of revision would be presented.

The Constitutional Convention assembled on May 14, 1787, and at the meeting of May 29, Randolph presented

2 For detailed consideration of these laws, see Martig, "Amending the Constitution," (1937) 35 Mich. L. Rev. 1253–1255.
the first plan for a new constitution in the form of fifteen resolutions. The thirteenth declared that provision should be made for amendment of the constitution whenever thought necessary and that the assent of the national legislature should not be required. Charles Pinckney presented a proposed draft of a constitution at the same meeting. Article sixteen of his draft set forth that if the legislatures of two-thirds of the states should apply for a convention to amend the constitution, the national legislature should call one; or, in the alternative, Congress by a two-thirds vote of each house might propose, and two-thirds of the legislatures might adopt. Both drafts were referred to the committee of the whole house.

On June 5, the convention discussed Randolph’s resolution. Pinckney expressed doubt as to the propriety or need of an amendment clause. Gerry defended it, however, on the grounds that such a new and difficult experiment required periodical revision, that the opportunity for such revision would stabilize the government, and that “Nothing had yet happened in the states where the provision existed to prove its impropriety.” Randolph’s resolution was again brought up on June 9. Several members thought it not a necessity; they furthermore thought it improper to dispense with the consent of Congress. Mason was of the opinion that the provision was necessary, since the Constitution, like the Articles of Confederation, would prove defective. It would be better to provide for amendments in any easy constitutional way than to rely on chance and violence. He was opposed to having Congress participate in the process since it might abuse its power and refuse to give its assent to changes desired. The resolution

\*\*Elliot, Debates on the Adoption of the Federal Constitution, 2d ed. (1937 facsimile of 1836 ed.) 127-128. Volume 5 is a revised edition of Madison’s diary of the debates.\*

\*Ibid. 129-132.\*

\*Ibid. 157.\*

\*Ibid. 182.\*
was unanimously adopted, but the clause dispensing with the consent of Congress was postponed for further discussion.

A long interval now occurred during which the convention appears to have ignored or overlooked the question of an amending clause. Randolph's original resolution, except as to congressional participation in amending,\(^7\) seems to have been the basis of action until August 6, when Rutledge delivered the report\(^8\) of the committee of detail, to which the resolution had been referred. Article nineteen of the committee's draft provided that Congress should call a convention on the application of the legislatures of two-thirds of the states. There was no discussion of the report until August 30, when Gouverneur Morris suggested that Congress be permitted to call a convention whenever it chose.\(^9\) But the convention unanimously agreed to the article as reported by the committee.

The most serious and detailed discussion did not occur until the last week of the convention.\(^10\) On September 10, Gerry moved to reconsider article nineteen. The Constitution, he asserted, would be paramount to the state constitutions. Under the article, two-thirds of the states could obtain a convention, "a majority of which can bind the Union to innovations that may subvert the state constitutions altogether." He asked whether such a state of affairs should be brought about. Hamilton seconded Gerry's motion, but with a different motive than the latter. He did not object to the result described by Gerry and contended that it was no worse to subject the people of the United States to "the major voice" than to so subject the people of a particular state. He desired an easier mode of amendment than that provided in the Articles of Confederation, and regarded article nineteen as

\(^7\) Ibid. 190, 351, 376.
\(^8\) Ibid. 376-381.
\(^9\) Ibid. 498.
\(^10\) Ibid. 530-532.
inadequate in accomplishing this. Like Gouverneur Morris, he proposed that Congress be given a free hand in calling a convention.

"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."

James Madison also supported the motion for reconsideration. The language concerning the calling of a convention was too vague. It was not clear how the convention would be formed, nor by what rules it would transact business, nor what force its acts would have. The motion to reconsider was thereupon passed, nine states favoring and one opposing. Sherman moved that Congress be permitted to propose amendments to the states, but that "no amendments shall be binding until consented to by the several states." Wilson moved to insert "two thirds of" before the words "several states" in Sherman's proposal. This failed by a five to six vote, but a later motion by Wilson to insert instead "three fourths of" was adopted.

Madison then moved to postpone the amended proposition in order to consider a proposal of his own, worded much like the present Article Five providing for proposal of amendments by Congress either on a two-thirds vote of each house or on application of the legislatures of two-thirds of the states, and ratification by the legislatures or conventions of three-fourths of the states. Hamilton seconded the motion. This proposal meant a significant change in the entire scheme. Instead of permitting amendment by a single convention, the plan made necessary the participation of the legislatures or conventions of the states. At this point Rutledge stated that he would

11 Ibid. 531.
never agree to an amending power "by which the articles relating to slaves might be altered by the states not interested in that property, and prejudiced against it." A proviso was then added to Madison’s plan to meet this objection, and his amended proposition was adopted by a vote of nine to one.

Five days later, as the convention was about to conclude its labors, the amendment clause was reported as Article Five by the committee of style and arrangement. Sherman feared that “three fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate.” He therefore thought it reasonable that the limitations on the amending power should be enlarged so as to provide “that no state should be affected in its internal police, or deprived of their equality in the Senate.”

Mason believed that the proposed method of amending the constitution was “exceptionable and dangerous.” Both modes required action by Congress immediately or ultimately; hence no amendment of the proper kind could be obtained by the people if the government became oppressive, as he believed would be the case. Gouverneur Morris and Gerry then moved to amend the article so as to require a convention on the application of two-thirds of the states, in order to obviate this objection. Madison pointed out in response that he did not see why Congress would not be as much obligated to propose amendments applied for by two-thirds of the states, as to call a convention on a similar application. He was not unalterably opposed to providing for a convention, but thought that difficulties might arise as to the form and quorum, matters which should be avoided in constitutional regulations. The motion for a convention was, however, unanimously adopted. Sherman moved to amend

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12 Ibid. 532.
13 Ibid. 551–552.
Article Five so as to require ratification of amendments by all state legislatures or conventions instead of three-fourths of them, but his motion failed, seven to three. Gerry moved to amend so as to allow ratification only by the state legislatures and not by state conventions as an alternative method, but this failed, ten to one.

One last attempt was made to limit the amending body. Sherman, in accordance with his previously expressed idea, moved to annex at the end of the article a clause that "no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the senate." Madison objected that if such special provisos were added every state would insist on them, for their boundaries, exports, and other matters. Sherman's motion then failed, eight to three, the small states, Connecticut, New Jersey, and Delaware voting for it. He then moved to strike out Article Five altogether, and this motion also failed, by an eight to two vote. Gouverneur Morris moved to annex the simple proviso, as it now appears in Article Five, "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." And as Madison concisely reports it, this motion, "being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or on the question, saying no." At this same meeting the entire Constitution as amended was accepted by the convention, and ordered to be engrossed. Two days later on Monday, September 17, the engrossed Constitution was read and signed, and the convention adjourned.

14 Ibid. 552.
15 Ibid. 553.