Heritage Online Guide to the Constitution on Article V

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

ARTICLE V

The process of amendment developed with the emergence of written constitutions that established popular government. The charters granted by William Penn in 1682 and 1683 provided for amending, as did eight of the state constitutions in effect in 1787. Three state constitutions provided for amendment through the legislature, and the other five gave the power to specially elected conventions.

The Articles of Confederation provided for amendments to be proposed by Congress and ratified by the unanimous vote of all thirteen state legislatures. This proved to be a major flaw in the Articles, as it created an insuperable obstacle to constitutional reform. The amendment process in the Constitution, as James Madison explained in *The Federalist* No. 43, was meant to establish a balance between the excesses of constant change and inflexibility: "It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."
In his *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote that a government that 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; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution....The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

The Virginia Plan at the start of the Constitutional Convention called for amendment "whensoever it shall seem necessary." The Committee of Detail proposed a process whereby Congress would call for a constitutional convention on the request of two-thirds of the state legislatures. After further debate, the delegates passed language proposed by Madison (and seconded by Alexander Hamilton) that the national legislature shall propose amendments when two-thirds of each House deems it necessary, or on the application of two-thirds of the state legislatures, to be ratified by three-fourths of the states in their legislatures or by state convention.

The Convention made two specific exceptions to the Amendments Clause, concerning the slave trade (Article V, Clause 2) and equal state suffrage in the Senate (Article V, Clause 2), but defeated

a motion to prevent amendments that affected internal police powers in the states. Just before the end of the Convention, George Mason objected that the amendment plan gave too much power to Congress, and thus the provision was added requiring Congress to call a convention on the application of two-thirds of the states. The careful consideration of the amending power demonstrates that the Framers would have been astonished by more recent theories claiming the right of the Supreme Court to superintend a "living" or "evolving" Constitution outside of the amendment process. More significantly, the double supermajority requirements—two-thirds of both Houses of Congress and three-quarters of the states—create extensive deliberation and stability in the amendment process and restrain factions and special interests. It helps keep the Constitution as a "constitution," and not an assemblage of legislative enactments.

The advantage of the Amendments Clause was immediately apparent. The lack of a bill of rights—the Convention had considered and rejected this option—became a rallying cry during the ratification debate. Partly to head off an attempt to call for another general convention, but mostly to legitimize the Constitution among patriots who were Anti-Federalists, the advocates of the Constitution (led by Madison) agreed to add amendments in the first session of Congress. North Carolina and Rhode Island acceded to the Constitution, and further disagreements were cabined within the constitutional structure.

Madison had wanted the amendments that became the Bill of Rights to be interwoven into the relevant sections of the Constitution. More for stylistic rather than substantive reasons, though, Congress proposed (and set the precedent for) amendments appended separately at the end of the document. Some have argued that this method makes amendments more susceptible to an activist interpretation than they would be otherwise.

Since 1789, over 5,000 bills proposing to amend the Constitution have been introduced in Congress; thirty-three amendments have been sent to the states for ratification. No attempt by the states to call a convention has ever succeeded, though some have come within one or two states of the requisite two-thirds. The movement favoring direct election of Senators was just one state away from an amending convention when Congress proposed the Seventeenth Amendment.

Because no amending convention has ever occurred, an important question is whether a convention can be limited in scope, either to a particular proposal or within a particular subject. While most calls for amending conventions in the nineteenth century were general, the modern trend is to call for limited conventions. Some scholars maintain that such attempts violate Article V and are therefore void. Other questions include the practical aspects of how an amending convention would operate and whether any aspects of such a convention would be subject to judicial review.

Much greater certainty exists as to the power of Congress to propose amendments. In a challenge to the Eleventh Amendment, the Supreme Court waved aside the suggestion that amendments proposed by Congress must be submitted to the President according to the Presentment Clause (Article I, Section 7, Clause 2). *Hollingsworth v. Virginia* (1798). In the *National Prohibition Cases*(1920), the Court held that the "two-thirds of both Houses" requirement applies to a present quorum, not the total membership of each body. One year later, in*Dillon v. Gloss* (1921), the Court allowed Congress, when proposing an amendment, to set a reasonable time limit for ratification by the states.
Since 1924, no amendment has been proposed without a ratification time limit, although the Twenty-seventh Amendment, proposed by Madison in the First Congress more than two hundred years ago, was finally ratified in 1992. Regardless of how an amendment is proposed, Article V gives Congress authority to direct the mode of ratification. *United States v. Sprague* (1931). Of the ratified amendments, all but the Twenty-first Amendment, which was ratified by state conventions, have been ratified by state legislatures. In *Hawke v. Smith* (1920), the Court struck down an attempt by Ohio to make that

state's ratification of constitutional amendments subject to a vote of the people, holding that where Article V gives authority to state legislatures, these bodies are exercising a federal function. Although some scholars have asserted that certain kinds of constitutional amendments might be "unconstitutional," actual substantive challenges to amendments have been unsuccessful. *National Prohibition Cases* (1920); *Leser v. Garnett* (1922). The Supreme Court's consideration of procedural challenges thus far does not extend beyond the 1939 decision of *Coleman v. Miller*, dealing with Kansas's ratification of a child labor amendment. The Court split on whether state ratification disputes are nonjusticiable political questions, but then held that Congress, "in controlling the promulgation of the adoption of constitutional amendment[s]," should have final authority over ratification controversies.

In the end, the Framers believed that the amendment process would protect the Constitution from undue change at the same time that it would strengthen the authority of the Constitution with the people. "The basis of our political systems is the right of the people to make and to alter their Constitutions of Government," George Washington wrote in his Farewell Address of 1796. "But the Constitution which at any time exists, ‘till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all."

Case Law

- Coleman v. Miller, 307 U.S. 433 (1939)
- Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)
- Hawke v. Smith, 253 U.S. 221 (1920)
- National Prohibition Cases, 253 U.S. 350 (1920)
- Dillon v. Gloss, 256 U.S. 368 (1921)
- Leser v. Garnett, 258 U.S. 130 (1922)
- United States v. Sprague, 282 U.S. 716 (1931)