



Scholar Exchange: Article V — The Amendment Process

Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

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INTRODUCTION

Pre-Class Question: If you were to introduce a new Amendment, the 28th Amendment, what would you propose?

Big Questions

- Why did the Founding generation include a formal process for amending the Constitution?
- How does the Constitution’s amendment process work, and why did the Founders make it so hard to amend the Constitution?
- What’s the relationship between the Constitution’s Article V amendment process and key foundational principles like popular sovereignty and the rule of law?
- What key changes have the American people made to the Constitution over time and what does that tell us about the key constitutional issues in American history?

ARTICLE V: HOW DOES IT WORK?

Let’s begin—as we always do when interpreting the Constitution—with the Constitution’s text. Article V sets out the process for amending the Constitution.

The Founding generation didn’t believe that they had a monopoly on constitutional wisdom. Therefore, the Founders set out a formal amendment process that allowed later generations to revise our nation’s charter without the need to resort to violence or revolution. But the Founders limited new amendments to those that could actually secure broad support from the American people—support that transcended factional (and, later, party) interests.

It’s a really hard process. Reformers need to secure a really big, strong consensus in order to change the Constitution. So, if you want to write a new amendment into the Constitution—whether it’s an Equal Rights Amendment, a term limits amendment, a Balanced Budget Amendment, or an amendment allowing 16-year-olds to vote—you have to go through a really tough process.

But throughout American history, reformers *have* succeeded. “We the People” *have* amended our Constitution—transforming it in important ways. And often making it a “**more perfect**” document. But before we get to those inspiring stories, let’s begin with the amendment process itself.

So, how *do* we amend the Constitution?

The Article V amendment process has two steps: (1) proposal and (2) ratification. Let’s walk through both of them!

Let’s begin with Article V’s *proposal* phase.

Article V includes *two* methods for proposing new amendments.

First, Congress can propose an amendment if reformers secure $2/3$ votes in *both* Houses of Congress. But even then, Congress doesn’t get a final say. Congress must still send the proposed amendment to the states for ratification. This has been the pathway for every amendment to the Constitution—so far.

Second, Article V also gives the states a way to work around Congress. If Congress refuses to act on proposals for constitutional reform, state legislatures have the power under Article V to force Congress to “**call a Convention for proposing Amendments**” whenever “**the Legislatures of two thirds of the Several States**” apply for one.

Again, this is only the beginning of the process. The Convention must still agree on a proposed amendment (or amendments) and then it (or they) is/are sent to the states for ratification.

So far, no amendment has triggered this process.

But reformers *have* leveraged this power of the states to spur *Congress* to propose constitutional amendments. (For instance, that’s a key part of the 17th Amendment story—leading to the direct election of Senators.)

So, that’s the proposal phase. What about the *ratification* phase?

Article V sets out two pathways for ratifying a new amendment—with Congress having the power to choose which pathway to use. So, once a proposed amendment survives the proposal stage, Congress then chooses the “**Mode of Ratification.**”

Congress’s choices?: ratification “**by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof.**”

Congress chose state legislatures for the ratification stage for all but one of our nation’s constitutional amendments. (We used state conventions for the 21st Amendment, repealing Prohibition Amendment.)

But Congress disappears from the process after choosing the mode of ratification.

The ultimate ratification decision falls to the states—whether through the state legislatures or state conventions. Ratification requires approval by three-fourths of the states.

More broadly, the Article V amendment process is rooted in the Founding generation’s commitment to popular sovereignty. This is that idea that the Constitution establishes a government that’s driven by *us*—as the Preamble says, **“We the People.”** Not a monarch, not the elites, not the aristocracy, but by us, the American people.

As with most things, Abraham Lincoln may have said it best: popular sovereignty means **“government of the people, by the people, for the people.”**

On this view, the Amendment process was designed to ensure that the Constitution’s text maintained a connection to the considered judgments of the American people—giving them a way to write those views into the Constitution.

In response to:

- Historical events—like the Civil War. (The Reconstruction Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments.)
- Social movements—like women’s suffrage. (The Nineteenth Amendment.) And the Civil Rights movement. (The Twenty-Fourth Amendment, ending the poll tax.)
- Critics of the Constitution—like the Anti-Federalists. (The Bill of Rights.)
- Controversial Supreme Court decisions—like *Dred Scott*. (The Thirteenth and Fourteenth Amendments.) Also the Eleventh Amendment and the Sixteenth Amendment.
- Lessons learned over time—like the need for presidential term limits after FDR’s unprecedented *four* terms in office. (The Twenty-Second Amendment.) Or revisions to the Electoral College after the Election of 1800. (The Twelfth Amendment.) Or the need for an amendment to deal with presidential incapacity after the assassination of JFK. (The Twenty-Fifth Amendment.)

Throughout American history, we have used Article V to amend the Constitution 27 times.

The first ten amendments were proposed by the First Congress and ratified shortly thereafter. Of course, this is our Bill of Rights.

These amendments protect some of our most cherished liberties, including free speech, a free press, religious freedom, and the right to a jury trial—among many others. They responded, in part, to the concerns of the Anti-Federalists—the group of Americans who opposed the Constitution.

These amendments originally applied to the national government only—*not* the states. (The Fourteenth Amendment would later extend many of these rights to protect us against state abuses. Scholars call this process “incorporation.”)

After the Civil War, we ratified a series of three amendments—the Thirteenth, Fourteenth, and Fifteenth—that transformed the Constitution forever.

- The Thirteenth Amendment abolished slavery.
- The Fourteenth Amendment wrote the Declaration of Independence’s promise of freedom and equality into the Constitution.
- And the Fifteenth Amendment promised to end racial discrimination in voting.

Many scholars refer to these transformational amendments as our nation’s **“Second Founding.”**

Of course, the remaining amendments altered the Constitution in ways both big and small.

They protected women against discrimination at the ballot box (19A). (And we celebrate that glorious amendment in a new exhibit at the National Constitution Center—*How Women Won the Vote!*)

They banned the sale, manufacture, and transportation of alcohol throughout the nation (18A)—and then repealed that failed experiment in Prohibition (21A).

They altered the Electoral College (12A), gave the national government the power to collect an income tax (16A), gave the American people the power to vote directly for their Senators (17A), limited the President to two terms (22A), gave D.C. voters the power to vote for President (23A), abolished poll taxes in national elections (24A), and protected the voting rights of those 18 and older from age discrimination (26A).

Big Idea: The Founding generation didn’t believe that it had a monopoly on constitutional wisdom. Therefore, the Founders set out a formal amendment process that allowed later generations to revise our nation’s charter and **“form a more perfect Union.”** They wrote this process into Article V of the Constitution.

THE FOUNDING STORY OF ARTICLE V: THE CONSTITUTIONAL CONVENTION

At the Constitutional Convention, the delegates worked to ensure that the Constitution included a workable amendment process. They looked to strike a balance between a Constitution that was too easy to amend and one that was impossible to amend.

The delegates already had the experience of living under a national charter—the Articles of Confederation—that, many concluded, was *far* too difficult to amend.

Under the Articles, any amendment required the unanimous vote of *all thirteen states*. Practically speaking, this made the Articles impossible to amend—even as the Founding generation became more and more convinced that the Articles were deeply flawed. No amendment was approved under this procedure. Following this experience, the Founding generation concluded that the American people needed a national charter that was easier to amend.

At the same time, history (and their own Enlightenment worldview) convinced them that they should approach constitution-making with humility. They believed that the American people would learn from experience.

They looked at their own earlier experience at Constitution-making—*both* the state constitutions written after the Declaration of Independence *and* the Articles of Confederation—and saw deeply flawed documents.

And they concluded that while the new Constitution should provide a stable framework of government, future generations should have the power (and, indeed, that they had the duty) to improve on the Founding generation’s work.

At the Convention, the delegates looked to write into the new Constitution an amendment process that was still demanding—but also much easier to meet than the unanimity requirement of the Articles of Confederation.

As George Mason explained at the Convention, the delegates wrote Article V to ensure **“an easy, regular[,] and Constitutional way”** of amending the Constitution. He hoped that the Constitution might be **“altered with as much regularity, and as little confusion, as any act of Assembly.”**

This may have been overstating it! But it should give you a sense of the Framers’ instinct: Make sure that the new Constitution wasn’t as impossible to amend as the Articles of Confederation!

This process was designed to allow the American people to amend the Constitution for reasons *both big and small*.

Perhaps the Constitution might prove to be deeply flawed and require an amendment (or amendments) to place it on a stronger foundation. (The Reconstruction Amendments come to mind.)

Or perhaps experience might teach us that a smaller change may improve the Constitution. (For instance, think of something like the Twenty-Second Amendment limiting the President to two terms.)

The key point is that the Framers didn’t want to require the American people to start a revolution every time that they wanted to change their government.

As James Iredell described it, Article V should allow the American people to ratify any amendment that was **“conducive to their welfare”**—whether to check governmental abuses, tweak the Structural Constitution, or add new rights protections.

Or, as Alexander Hamilton described it in *Federalist #78*: The Article V amendment process advanced a **“fundamental principle of republican government” — “the right of the people to alter . . . the established constitution whenever they find it inconsistent with their happiness.”**

Of course, this is one of the most fundamental *natural rights* of all!

To fulfill this goal, the Framers wrote a few different ways of amending the Constitution into our nation’s charter.

- They abandoned the Articles of Confederation’s unanimity requirement. But they *did* require constitutional reformers to secure more than majority support.
- They also wanted reformers in the states to have a way of getting around Congress. They feared that Congress may seize too much power and block efforts to check it when Members of Congress overreached.
- They wanted to keep the pathways of reform open—but also demanding. They wanted reformers to *earn* the right to speak for “We the People.”

So, at the Convention, the delegates rejected a proposal to give Congress a veto over any proposed amendment.

For instance, here’s George Mason (again): **“It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.”**

The delegates wanted to be sure that Congress didn’t have the final say when it came to constitutional reform.

They feared that Congress might block amendments checking its power and push for amendments that would increase it.

We’ve already discussed the mechanics of Article V. But let’s return to the amendment process itself to understand how that process responded to the Founding generation’s concerns about Congress.

Let’s begin with Article V’s proposal phase.

Again, the delegates created *two* methods for proposing new amendments—through Congress and through a call by the state legislatures.

So, the delegates *did* give Congress control over one of the pathways to reform. Congress *can* propose an amendment if reformers secure 2/3 votes in *both* Houses of Congress. But even then, Congress doesn’t get a final say. Congress must still send the proposed amendment to the states for ratification.

Second, the delegates also gave the *states* a way to work around Congress—with Article V giving the state legislatures the power to force Congress to “**call a Convention for proposing Amendments**” whenever “**the Legislatures of two thirds of the Several States**” apply for one.

So, that’s the proposal phase.

James Madison explained the reason for these two alternatives pathways for proposing new amendments in *Federalist #43*:

Article V “**equally enables the general and state governments, to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other.**”

This allowed the American people to draw on the best ideas in Congress and in the states.

What about the ratification phase?

The delegates also set out two pathways for ratifying a new amendment—with Congress having the power to choose which pathway to use. Congress’s choices?: ratification “**by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof.**”

So, either by the state legislatures or by specially elected state ratifying conventions.

But Congress disappears from the process after choosing the mode of ratification. The ultimate ratification decision falls to the states—whether through the state legislatures or state conventions.

In the end, with Article V, the delegates checked Congress in *two* ways.

They gave the reformers in the states a way to *propose* amendments without congressional action.

And they wrote Congress out of the final ratification decision altogether—giving the *states* the power to ratify (or reject) new amendments.

Here’s how Alexander Hamilton described it in *Federalist #85*: The “**national authority**” would have “**no option**” but to go along with the states whenever they used their powers under the proposal or ratification stages of the Article V process. So, the states were given the power to propose constitutional amendments—no matter Congress’s wishes.

And even if Members of Congress secured 2/3 support in *both* Houses of Congress, their proposal remained just that—a *proposal*. It would only become part of the Constitution with the support of 3/4 of the states.

The Founding generation’s ultimate goal?: To be sure that there was a formal process for ratifying new amendments (as James Iredell explained it) “**generally wished for by the people.**”

This is how Article V reflects the principle of popular sovereignty, structurally. By appealing to the Article V amendment process, the people themselves still ruled and held ultimate power—a final say over their own Constitution.

Even so, the Framers limited the Article V amendment process in *two* ways—*both* written into Article V itself. First, Article V protects a state’s equal representation in the Senate. Here’s the text: **“no State, without its consent, shall be deprived of its equal Suffrage in the Senate.”** So, no matter how many Members of Congress or states want to reduce a state’s representation in the Senate, that can only happen if that state agrees. Not very likely! Because of this, every state will continue to have two Senators—no matter its size.

Second, Article V wrote protections in for slavery.

As a reminder, the Framers wrote protections for the slave trade into the Constitution. Here’s the language in Article I, Section 9: **“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”** This language took away Congress’s power to ban the slave trade before 1808.

Of course, the Slave Trade Clause drew some of the most heated debates at the Convention.

By the Founding, even many slaveholders opposed the inhumane Atlantic slave trade. Only delegates from South Carolina and Georgia were determined to continue this brutal trade.

George Mason, John Dickinson, and Rufus King proposed an outright ban on the Atlantic slave trade, but the delegates rejected it.

Instead, the Convention reached a compromise over the slave trade. Congress could ban the slave trade, but only twenty years after the ratification of the Constitution—January 1, 1808. In other words, this Clause protected the brutal slave trade until 1808.

And between 1788 and 1808, the number of African slaves imported into the United States exceeded 200,000—only roughly 50,000 fewer than the total number of slaves imported to American in the previous 170 years. At that point, Congress had the power to abolish it. (And so it did.)

Article V reinforced the Slave Trade Clause. It made the limits on congressional power unamendable.

Here’s the language from Article V: **“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.”**

CONSTITUTIONAL AMENDMENTS OVER TIME

We’ve covered the Constitutional Convention and the Founding generation’s vision for Article V. What happens next? How have the American people used the Article V amendment process over time?

Throughout American history, the American people have ratified 27 amendments. To give a flavor to the range of stories behind these amendments, let's take a look at a few examples.

Let's begin with a weird one—written by James Madison and taken to the finish line over two hundred years later by a passionate student angry about a bad grade on his homework! This is the story of the Twenty-Seventh Amendment.

Here's the language of the Twenty-Seventh Amendment: **"No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened."**

This amendment prevents Members of Congress from raising their own salaries until there has been a new election. So, a pay increase wouldn't take effect until the beginning of the new Congress.

Basically, it limits Congress's power to give itself a raise.

At the Constitutional Convention, the delegates spent several days discussing congressional pay.

For instance, Benjamin Franklin's first speech at the Convention was on this topic.

He opposed pay for Members of Congress. He feared that congressional pay would lead to the election of representatives with **"bold and violent" personalities, interested in "selfish pursuits."** However, other delegates countered that congressional pay was necessary to ensure that those without great wealth could serve in Congress.

Franklin lost this debate, and Members of Congress would receive a salary. Even so, Franklin framed the larger issue well.

Many delegates were concerned with the problem of corruption—in this case, the threat of Members of Congress running for office in order to make money (and a lot of it).

They saw this problem in England—with many people (known as "placemen") holding office in Parliament but also being paid by the King to hold various (easy, but high-paying) executive branch jobs at the same time. In other words, the King was buying their loyalty in Parliament.

The delegates dealt with this problem with Article I, Section 6's Incompatibility Clause, which prevented someone from holding a seat in Congress and another job in the executive branch.

But the delegates decided to leave congressional salaries to ordinary laws passed by Congress. So, Members of Congress would decide how much to pay themselves. And the voters were free to check them at the ballot box if they thought that Members were paying themselves too much.

This feature of the Constitution came under fire during the ratification debates. And James Madison himself became concerned, as well. The critics feared that Members of Congress would choose to pay themselves too much.

Enter (what would eventually become) the Twenty-Seventh Amendment. The Twenty-Seventh Amendment was first written in 1789 and proposed as part of the original Bill of Rights.

James Madison and the First Congress wrote it and approved it with a 2/3 vote in both Houses of Congress. Madison and his colleagues wanted to set some sort of limit on Congress's power to raise congressional salaries.

But they also didn't want to turn that power over to the President. They wanted to maintain that separation of powers—and congressional independence.

So, Madison proposed the (eventual) Twenty-Seventh Amendment—requiring a new election to take place before a congressional pay increase would take effect.

They sent it along to the states for ratification. Within a few years, six states voted to ratify it—short of the 3/4 of the states necessary to ratify a new amendment. While the American people went on to ratify our current Amendments 1-10—what we know today as the Bill of Rights—this other proposal did *not* become part of the Constitution. The states then ignored it for decades.

At the same time, Article V doesn't set any formal limits on the amount of time the states have to ratify a proposal sent to the states by Congress. And the First Congress had not set a deadline for ratifying the proposed amendment.

Every now and again, another state would vote to ratify the (eventual) Twenty-Seventh Amendment. For instance, one state joined the other six in the 1800s. And some others in the 1900s. But no one thought that the amendment would ever be ratified (or even thought about the proposal at all).

But let's fast forward to 1982.

The proposed amendment looked dead. Very few states had ratified it. Then, Gregory Watson—a sophomore at the University of Texas—was given a homework assignment. He had to write a paper on some sort of government process.

While doing his research, he found a chapter in a book that listed amendments that had *not* been ratified. And he chose to write his paper about the (eventual) Twenty-Seventh Amendment.

His central argument?: The proposal had no time limit on it. Article V didn't set any deadline either. So, the amendment could *still* be ratified—nearly 200 years later!

How did Gregory Watson do on the paper? He got a “C!” Watson was angry. He thought that it was a good paper! So, he appealed his grade. First, he went to his TA. And then, he went to his professor. They didn’t change it!

But then, Watson decided to appeal to his fellow citizens!

Here’s how Watson described his thinking (as part of a May 2017 NPR interview), **“I thought right then and there, ‘I’m going to get that thing ratified.’**” (And the professor later admitted that he should have given the paper an “A!”)

Watson wrote letters to legislators across the country. Most of them ignored him! But one powerful Senator loved the idea—Senator William Cohen of Maine. Cohen pushed for its ratification in Maine. He succeeded in 1983! And this inspired Watson to keep pushing! From there, his amendment push gained momentum.

Watson’s push went hand in hand with broader public dissatisfaction with Congress in the 1980s.

Voters thought that Congress wasn’t doing enough to help the American people. They thought that Members of Congress were paid too much and enjoyed too many perks while in office. In 1985, five more states ratified the amendment. Finally, in 1992, over two centuries after the First Congress proposed the Amendment to the states, 3/4 of the states (38 of 50) ratified it.

And the Twenty-Seventh Amendment became part of the Constitution. It only took a little over 202 years to get it done!

In more recent years, Congress has actually set a deadline for ratification of a proposed amendment in the text of the amendment itself—for instance, saying that the proposal must be ratified within seven years or it would die. But as for the Twenty-Seventh Amendment, we have James Madison *and* (especially) Gregory Watson to thank for that one!

Finally, consider the only example of “We the People” repealing a previous amendment in its entirety. Let’s rewind to Prohibition.

Our nation’s experience with Prohibition reminds us that even constitutional reformers sometimes make mistakes—or at least that’s what the American people themselves concluded just over a decade after writing Prohibition into the Constitution.

The 18th Amendment—the Prohibition Amendment—banned **“the manufacture, sale, or transportation of intoxicating liquors.”** The American people ratified it in 1919.

While it’s easy to criticize Prohibition in retrospect, it grew out of decades of social movement activism and what many identified as a genuine problem.

The problem?: Americans drank a lot of alcohol. And this could give rise to all sorts of social problems—wages spent at the saloon, abuse at home, difficulty holding down a job, etc.

And the social movement?: a combination of five (sometimes overlapping) groups—progressives, suffragists, populists, nativists, and white Southerners.

Some of it was driven by a public-minded concern for the societal problems brought about by excessive drinking. Violence. Accidental deaths (and injuries). Unemployment. Poverty. Parenting issues. Abandoning your family. Personal illness. Etc.

Some of it was driven by bigotry against certain groups—whether white Southerners against African Americans, nativist Americans against immigrants (like Irish Catholics), or World War I-Era Americans against beer-producing (and-drinking) German-Americans.

Some of it was driven by long standing political alliances between Prohibitionists and Suffragists—part principle, part political expediency.

This movement worked for decades to push for Prohibition—culminating in the ratification of the 18th Amendment.

The Prohibition Amendments was also part of one of the most active eras of constitutional reform in American history—the Progressive Era.

Between 1870 (and the ratification of the 15th Amendment, banning racial discrimination in voting) and 1913, the American people didn't amend the Constitution a single time.

But between 1913 and 1920—so, a 7-year span—the American people amended the Constitution *four* times.

- The Sixteenth Amendment—ratified in 1913—gave Congress the power to pass an income tax.
- The Seventeenth Amendment—*also ratified in 1913*—provided for the direct election of U.S. Senators.
- And the Nineteenth Amendment—ratified in 1920—protected the right to vote free of gender discrimination. (Again, the amendment itself followed decades of advocacy by the suffragists and widespread experimentation in the states—with many states extending the vote to women before the ratification of the Nineteenth Amendment.)
- The Prohibition Amendment—ratified in 1919—fit right in with this period of constitutional reform.

In the end, the 18th Amendment remained a live part of the Constitution for 13 years. But problems soon arose—and many Americans had second thoughts.

The Twenty-First Amendment is the only example in American history of a constitutional amendment repealing another one in its entirety. Here's the key language from Section One of the Amendment: **"The**

eighteenth article of amendment to the Constitution of the United States is hereby repealed.” The amendment was ratified in 1933.

Why did public opinion turn against Prohibition so quickly?

The simplest answer is that the American people wanted easy access to beer, wine, liquor, etc. Full stop. And they were willing to pay the potential societal costs associated with it. But as our *Interactive Constitution* scholars—Robert George and David Richards—explained it, many American concluded that **“Prohibition had been a failed, if noble, experiment.”** And despite its flaws, Prohibition *did* succeed in lower alcohol consumption in the United States—and with it, some of the societal ills linked to drunkenness and alcohol abuse.

However, Prohibition also had many failures. It was easy to defy and difficult to enforce. There was a massive black market for alcohol. This spurred the rise of organized crime. And law enforcement did little to stop it. So, there was still plenty of illegal alcohol produced and sold. Think of the famous speakeasy. But it was also linked with crime and violence. Think Al Capone. And the rampant illegality—with many Americans consuming illegally produced and sold alcohol—making a mockery of the Constitution and the rule of law.

This mix of organized crime, police corruption, and consumption of illegally produced and sold alcohol outraged many Americans.

Interestingly, the Twenty-First Amendment is also the only amendment ratified by state ratifying conventions—*not* state legislatures. Why did the repeal movement pursue this path?

Public opinion seems to have turned against Prohibition. But those pushing for repeal still feared the continued lobbying power of the temperance movement inside the legislatures of many states. And many legislators may have feared the attacks of that passionate minority more than any other electoral threat.

So, the repeal movement looked for a process that was a more direct expression of public opinion—or, at least, potentially so—state ratifying conventions.