

ARTICLE V
AMENDING THE CONSTITUTION

ARTICLE V
AMENDING THE CONSTITUTION

TABLE OF CONTENTS

	Page
ArtV.1 Overview of Article V, Amending the Constitution	1247
ArtV.2 Historical Background on Amending the Constitution	1248
ArtV.3 Proposals	1252
ArtV.3.1 Overview of Proposing Amendments	1252
ArtV.3.2 Congressional Proposals of Amendments	1253
ArtV.3.3 Proposals of Amendments by Convention	1254
ArtV.3.4 Role of the President in Proposing an Amendment	1256
ArtV.4 Ratification	1257
ArtV.4.1 Overview of Ratification of a Proposed Amendment	1257
ArtV.4.2 State Legislatures	1258
ArtV.4.2.1 Congressional Deadlines for Ratification of an Amendment	1258
ArtV.4.2.2 Effect of Prior Rejection of an Amendment or Rescission of Ratification	1259
ArtV.4.2.3 Authentication of an Amendment's Ratification	1260
ArtV.4.3 Ratification by Conventions	1261
ArtV.4.4 Choosing a Mode of Ratification	1262
ArtV.5 Unamendable Subjects	1263

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.1 Overview of Article V, Amending the Constitution

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V sets forth procedures for amending the Constitution.¹ Most of the Article’s text addresses the proposal and ratification of amendments.² Two sentences at the end of the Article make certain subjects unamendable.³ Since the Founding, Congress has used Article V’s procedures to propose thirty-three constitutional amendments.⁴ The states have ratified twenty-seven of these proposed amendments, which include the first ten amendments, known as the Bill of Rights,⁵ thereby making them part of the Constitution.

Article V establishes two methods for proposing amendments to the Constitution.⁶ The first method requires both the House and Senate to propose a constitutional amendment by a vote of two-thirds of the Members present.⁷ This is the only method for proposing amendments that has been used thus far. Alternatively, Article V provides that Congress “shall” call a convention for proposing amendments upon the request of two-thirds of the state legislatures.⁸ This method of proposing amendments, which scholars have debated at length, has never been used.⁹

¹ U.S. CONST. art. V. This essay does not examine whether Article V provides the exclusive procedures for amending the Constitution. *See generally, e.g.,* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458–59 (1994) (arguing that the people of the United States may amend the Constitution using methods not specifically outlined in Article V).

² U.S. CONST. art. V.

³ *Id.* (“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.”).

⁴ For a list of the twenty-seven amendments the states ratified, see Intro.3.1 Ratification of Amendments to the Constitution Generally. For a list of the six constitutional amendments that Congress proposed but the states have not ratified, see Intro.3.7 Proposed Amendments Not Ratified by the States.

⁵ The Bill of Rights safeguards certain individual rights from government interference. For a discussion of the proposal and ratification of the Bill of Rights, see Intro.3.2 Bill of Rights (First Through Tenth Amendments).

⁶ U.S. CONST. art. 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. . . .”).

⁷ *Id.*; *Nat’l Prohibition Cases*, 253 U.S. 350, 386 (1920) (“The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.”).

⁸ U.S. CONST. art. V.

⁹ *See* ArtV.3.3 Proposals of Amendments by Convention.

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.1

Overview of Article V, Amending the Constitution

Article V also sets forth two methods for states to ratify amendments to the Constitution.¹⁰ Congress determines which method the states must follow in order for proposed amendments to become effective.¹¹ The first method of ratification requires three-fourths of the state legislatures to ratify an amendment to the Constitution.¹² Alternatively, Congress may require that three-fourths of state ratifying conventions approve a proposed amendment.¹³ Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.¹⁴

The last two sentences of Article V make certain subjects unamendable.¹⁵ The first of these sentences prohibited amendments prior to 1808 that would have affected the Constitution's limitations on Congress's power to (1) restrict the slave trade, or (2) levy certain taxes on land or slaves.¹⁶ This sentence's limitations on amendments have expired. The second sentence of Article V, which remains in effect, prohibits amendments that would deprive states, without their consent, from having equal suffrage in the Senate.¹⁷ Scholars have debated whether the last two sentences of Article V effectively prohibit (or formerly prohibited) amendments on these subjects.¹⁸

This essay examines Article V's procedures for amending the Constitution. It begins with an overview of the historical background of Article V. The Essay then examines relevant Supreme Court decisions, historical practices, and academic debates related to the methods that Article V establishes for proposing and ratifying constitutional amendments.

ArtV.2 Historical Background on Amending the Constitution

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight

¹⁰ U.S. CONST. art. V (stating that amendments to the Constitution may be 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").

¹¹ *United States v. Sprague*, 282 U.S. 716, 730 (1931) ("The choice . . . of the mode of ratification lies in the sole discretion of Congress.").

¹² U.S. CONST. art. V.

¹³ *Id.*

¹⁴ See ArtV.4.3 Ratification by Conventions. The Eighteenth Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. CONST. amend. XVIII, *repealed by id.* amend. XXI.

¹⁵ *Id.* art. V ("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.").

¹⁶ See *id.* See also *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796) (Paterson, J., concurring) (recounting Founding-era debates over these limitations on amendments).

¹⁷ U.S. CONST. art. V.

¹⁸ See generally, e.g., Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 733 (1981). See also ArtV.5 Unamendable Subjects.

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.2
Historical Background on Amending the Constitution

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.

Prior to the Founding, the people of the United States experienced difficulties in attempting to amend the Nation’s first charter, the Articles of Confederation.¹ Under the Articles, Congress and all of the states had to approve amendments before they would become effective.² Perhaps unsurprisingly, attempts to amend the Articles to address perceived shortcomings, such as Congress’s lack of authority to raise revenues by levying import duties, were unsuccessful.³ Nonetheless, several state constitutions in existence at the time of the Founding provided for amendments.⁴ Moreover, at least one state, Vermont, successfully modified its charter by following the specific amendment procedures in its constitution.⁵ These early provisions for amendments in the Articles and state charters informed the Founder’s deliberations at the Convention.

During early debates over the Federal Constitution, the delegates agreed to consider language that would permit the states to amend the Nation’s charter without Congress’s approval.⁶ Proponents of including specific procedures for amending the Constitution maintained that such a mechanism would provide stability to the new government.⁷ For example, George Mason stated it was “better to provide for [amendments] in an easy, regular and Constitutional way than to trust [alterations] to chance and violence.”⁸ He argued that states should have the power to amend the Constitution without Congress’s approval because the national legislature would inevitably abuse its power and ignore states’ calls for necessary changes.⁹ Other delegates viewed the inclusion of a provision for amending the Constitution as unnecessary or improper.¹⁰

¹ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Madison’s notes, Sept. 10, 1787) (statement of Alexander Hamilton).

² ARTICLES OF CONFEDERATION AND PERPETUAL UNION of 1781, art. XIII (“And the Articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

³ Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787*, reprinted in 3 FARRAND’S RECORDS, *supra* note 1, at 120–21 (“[I]t is to this unanimous consent, the depressed situation of the Union is undoubtedly owing. Had the measures recommended by Congress and assented to, some of them by eleven and others by twelve of the States, been carried into execution, how different would have been the complexion of Public Affairs? To this weak, this absurd part of the Government, may all our distresses be fairly attributed.”). See also 1 CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776–1787, at 140–41 (Merrill Jensen ed., 1976) (discussing a proposal to grant Congress the power to collect import duties).

⁴ See, e.g., MASS CONST. OF 1780, pt. 2, ch. 6, art. X (setting forth procedures for amending the Massachusetts Constitution that included two-thirds of eligible voters calling a convention for that purpose); MD. CONST. OF 1776, THE CONSTITUTION, OR FORM OF GOVERNMENT, cl. LIX (authorizing the state legislature to amend the Constitution by an affirmative vote before and after a new election, but requiring a higher vote threshold for approval of amendments affecting the government of the eastern shore); VT. CONST. OF 1777, ch. 2, § XLIV (establishing a council empowered to call a convention for amending the Constitution).

⁵ Vt. Sec. of State, *The Amendment Process*, <https://sos.vermont.gov/vsara/learn/constitution/amending-the-constitution/process/>.

⁶ 1 FARRAND’S RECORDS, *supra* note 1, at 22 (Madison’s notes, May 29, 1787) (“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.”).

⁷ 1 FARRAND’S RECORDS, *supra* note 1, at 121–22, 202–03 (Madison’s notes, June 5, 11, 1787).

⁸ 1 FARRAND’S RECORDS, *supra* note 1, at 121–22, 202–03 (Madison’s notes, June 5, 11, 1787).

⁹ 1 FARRAND’S RECORDS, *supra* note 1, at 121–22, 202–03 (Madison’s notes, June 5, 11, 1787).

¹⁰ 1 FARRAND’S RECORDS, *supra* note 1, at 121–22, 202–03 (Madison’s notes, June 5, 11, 1787).

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.2

Historical Background on Amending the Constitution

The delegates did not consider the draft Article V language until a month before the end of the Federal Convention.¹¹ At that time, the draft text required Congress to call a convention for proposing amendments to the Constitution upon the request of two-thirds of the states.¹² Some delegates believed that this text made amendments too difficult and advocated for Congress to play a greater role in proposing amendments. For instance, Alexander Hamilton, who noted the difficulties in amending the Articles of Confederation,¹³ suggested that Congress, acting on its own initiative, should have the power to call a convention to propose amendments.¹⁴ In his view, Congress would perceive the need for amendments before the states.¹⁵ Roger Sherman took Hamilton's proposal a step further, moving that Congress itself be authorized to propose amendments that would become part of the Constitution upon ratification by all of the states.¹⁶ James Wilson moved to modify Sherman's proposal to require three-fourths of the states for ratification of an amendment.¹⁷ James Madison offered substitute language that permitted two-thirds of both houses of Congress to propose amendments, and required Congress to propose an amendment after two-thirds of the states had applied for one.¹⁸ This language passed unanimously.¹⁹

The delegates also debated whether Article V should prohibit amendments on certain subjects. Some delegates from the southern states, including John Rutledge of South Carolina, opposed allowing amendments to existing provisions of the draft Constitution that already limited Congress's power to (1) restrict the importation of slaves, or (2) levy taxes on land or slaves.²⁰ Fervent disagreement between northern and southern states over slavery prompted inclusion of these provisions.²¹ To preserve the compromise on the issue of slavery, the delegates added a sentence to the draft of Article V prohibiting amendments on these subjects before 1808.²² At a later meeting of the convention, Roger Sherman and Gouverneur Morris proposed that no state should, without its consent, be deprived of equal suffrage in the Senate.²³ This proposal, which sought to safeguard state sovereignty and the delegates'

¹¹ 2 FARRAND'S RECORDS, *supra* note 1, at 461 (Journal, Aug. 30, 1787).

¹² 2 FARRAND'S RECORDS, *supra* note 1, at 557 (Madison's notes, Sept. 10, 1787).

¹³ 2 FARRAND'S RECORDS, *supra* note 1, at 558. As noted, the Articles of Confederation required Congress and all of the states to approve an amendment before it would become effective. ARTICLES OF CONFEDERATION AND PERPETUAL UNION of 1781, art. XIII ("And the Articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

¹⁴ 2 FARRAND'S RECORDS, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787). In contrast to Hamilton's views, some delegates expressed concerns that the draft Article V language made the amendment process too easy. For instance, Elbridge Gerry raised concerns that a majority of states at a convention could ratify amendments that would subvert state constitutions. 2 FARRAND'S RECORDS, *supra* note 1, at 557–58. *See also* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 720 (1981).

¹⁵ 2 FARRAND'S RECORDS, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787).

¹⁶ 2 FARRAND'S RECORDS, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787).

¹⁷ 2 FARRAND'S RECORDS, *supra* note 1, at 559.

¹⁸ 2 FARRAND'S RECORDS, *supra* note 1, at 559.

¹⁹ 2 FARRAND'S RECORDS, *supra* note 1, at 559.

²⁰ 2 FARRAND'S RECORDS, *supra* note 1, at 559.

²¹ Linder, *supra* note 14, at 721. Some of the delegates were apparently concerned that amendments removing the limitation on Congress's power to levy direct taxes without apportionment could result in federal taxes on slaves, who were considered property at the time. THE FEDERALIST No. 43 (James Madison) (stating that both exceptions in the first sentence on unamendable subjects "must have been admitted on the same considerations which produced the privilege defended by it").

²² 2 FARRAND'S RECORDS, *supra* note 1, at 559 (Madison's notes, Sept. 10, 1787).

²³ 2 FARRAND'S RECORDS, *supra* note 1, at 630–31 (Madison's notes, Sept. 15, 1787).

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.2
Historical Background on Amending the Constitution

delicate compromise on the structure of the national legislature,²⁴ was agreed to without debate and appended to the end of the draft text.²⁵

Finally, as the Convention drew to a close, the delegates agreed to include a means for the states to propose constitutional amendments. George Mason expressed concerns that, as drafted, Article V would permit Congress to block constitutional amendments favored by the states.²⁶ Gouverneur Morris and Elbridge Gerry proposed to remedy this perceived problem by requiring Congress to call a convention of the states for proposing amendments upon the application of two-thirds of the states.²⁷ James Madison did not see the need for this convention mechanism.²⁸ He argued that Congress would be bound to propose amendments legislatively upon the request of two-thirds of the states.²⁹ Nevertheless, Madison did not oppose including a provision allowing for a constitutional convention.³⁰ The motion passed unanimously.³¹

Following the Convention, the debates over ratifying the Constitution briefly touched upon Article V's procedures for amending the Nation's charter. Federalists, who generally supported a strong central government, argued that Article V's high vote thresholds for proposing and ratifying amendments would protect the Constitution from destructive changes, while permitting amendments to address significant shortcomings in the document.³² Anti-Federalists, on the other hand, expressed concerns that Article V would make amending the Constitution too difficult once it was ratified.³³ Consequently, they advocated for "amendments" to certain subjects prior to submitting the Constitution to the states.³⁴ Federalists opposed such amendments as premature.³⁵

After the states ratified the Constitution, debates continued over amendments, including the adoption of a Bill of Rights.³⁶ In his 1789 Inaugural Address, President George Washington

²⁴ Linder, *supra* note 14, at 722.

²⁵ 2 FARRAND'S RECORDS, *supra* note 1, at 630–31 (Madison's notes, Sept. 15, 1787).

²⁶ 2 FARRAND'S RECORDS, *supra* note 1, at 629.

²⁷ 2 FARRAND'S RECORDS, *supra* note 1, at 629.

²⁸ 2 FARRAND'S RECORDS, *supra* note 1, at 629–30.

²⁹ 2 FARRAND'S RECORDS, *supra* note 1, at 629–30.

³⁰ 2 FARRAND'S RECORDS, *supra* note 1, at 629–30. In remarks that presaged later scholarly debates over the proposal of amendments by a convention of the states, Madison questioned how such a Convention would be formed and conduct itself. 2 FARRAND'S RECORDS, *supra* note 1, at 630. After the Convention, James Madison wrote in the *Federalist Papers* that Article V with the state convention mechanism "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." THE FEDERALIST NO. 43 (James Madison).

³¹ 2 FARRAND'S RECORDS, *supra* note 1, at 630 (Madison's notes, Sept. 15, 1787).

³² THE FEDERALIST NO. 43 (James Madison) ("The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."). See also THE FEDERALIST NO. 22 (Alexander Hamilton) ("When the concurrence of a large number is required by the constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.").

³³ For insight into the Anti-Federalist position on this issue, see *Centinel II*, FREEMAN'S J. (Phila.), Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST (Herbert L. Storing ed., 1981).

³⁴ See *id.*

³⁵ See generally THE FEDERALIST NO. 85 (Alexander Hamilton) (providing a broad overview of the debate).

³⁶ See President George Washington, First Inaugural Address (Apr. 30, 1789).

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.2

Historical Background on Amending the Constitution

alluded to these ongoing debates, stating that the people of the United States would ultimately judge when it was appropriate to exercise “the occasional power delegated by the fifth article of the Constitution.”³⁷

ArtV.3 Proposals

ArtV.3.1 Overview of Proposing Amendments

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V establishes two methods for proposing amendments to the Constitution.¹ The first method requires both the House and Senate to propose a constitutional amendment by a vote of two-thirds of the Members present.² Since the Founding, Congress has followed this procedure to propose thirty-three constitutional amendments, which were sent to the states for potential ratification.³ The states ratified twenty-seven of these amendments.⁴

Alternatively, Article V provides that Congress “shall” call a convention for proposing amendments upon the request of two-thirds of the states.⁵ This method of proposing amendments has never been used.⁶ Scholars continue to debate issues surrounding these Article V conventions, including: (1) whether Congress must call a convention upon receiving the requisite number of state applications; (2) whether the convention can be limited in any way (the “runaway convention” debate); and (3) Congress’s control over other aspects of a convention (e.g., rules of procedure).⁷

³⁷ See *id.*

¹ U.S. CONST. art. 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. . . .”).

² *Id.*; Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920) (“The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.”).

³ For a list of constitutional amendments that Congress proposed but the states did not ratify, see Intro.3.7 Proposed Amendments Not Ratified by the States. At least 11,000 proposals to amend the Constitution have been introduced in Congress, but were not approved by the two-thirds majority in each house required for submission to the states for ratification. *U.S. Senate: Measures Proposed to Amend the Constitution*, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>.

⁴ See Intro.3.1 Ratification of Amendments to the Constitution Generally.

⁵ U.S. CONST. art. V.

⁶ See ArtV.3.3 Proposals of Amendments by Convention.

⁷ See ArtV.3.3 Proposals of Amendments by Convention.

ARTICLE V—AMENDING THE CONSTITUTION
Proposals

ArtV.3.2
Congressional Proposals of Amendments

ArtV.3.2 Congressional Proposals of Amendments

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The first method for proposing amendments permits two-thirds of the Members of the House and Senate to propose a constitutional amendment when they “shall deem it necessary.”¹ This is the only method that has thus far been used to propose amendments to the Constitution.

The Supreme Court addressed Article V’s procedures for congressionally proposed constitutional amendments in the *National Prohibition Cases*, which challenged the validity of the Eighteenth Amendment.² In these cases, the Supreme Court held that both the House and Senate must propose a constitutional amendment by a vote of two-thirds of the Members present (rather than two-thirds of the entire membership present and absent), assuming the presence of a quorum.³ The Court also held that Congress’s successful proposal of an amendment indicates that Congress considers the amendment “necessary.”⁴ Thus, it appears that the Court will not require Congress to state that an amendment is necessary specifically or second-guess Congress’s judgment on the issue of necessity.⁵

Although Members of Congress have introduced more than 11,000 proposed amendments to the Constitution since the Founding,⁶ Congress has approved only thirty-three proposed amendments by the requisite two-thirds vote.⁷ Congress has historically proposed constitutional amendments by enacting a joint resolution.⁸ Following historical practice involving proposing amendments, which included the Bill of Rights, Members of Congress have

¹ U.S. CONST. art. V.

² 253 U.S. 350 (1920).

³ *Id.* at 386 (“The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum and not a vote of two-thirds of the entire membership, present and absent.”).

⁴ *Id.*

⁵ *See id.*

⁶ *U.S. Senate: Measures Proposed to Amend the Constitution*, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>.

⁷ For a list of constitutional amendments that Congress proposed but the states did not ratify, see Intro.3.7 Proposed Amendments Not Ratified by the States.

⁸ 1 ANNALS OF CONG. 735 (1789).

ARTICLE V—AMENDING THE CONSTITUTION

Proposals

ArtV.3.2 Congressional Proposals of Amendments

proposed amendments as codicils (i.e., supplementary articles), rather than line-by-line revisions to the Constitution’s text.⁹ After congressional approval, proposed amendments are sent to the states for potential ratification.¹⁰

ArtV.3.3 Proposals of Amendments by Convention

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V establishes an alternative method for amending the Constitution by a convention of the states.¹ It provides that Congress “shall call a Convention for proposing Amendments” upon the request of two-thirds of the state legislatures.² This method of proposing amendments, which scholars have debated at length, has never been used.³ This essay surveys a few of the most prominent debates surrounding an Article V convention of the states.

One ongoing debate concerns whether Congress *must* call a convention upon the request of two-thirds of the states. Article V states that Congress “shall call a Convention” when enough states have applied for one. Some of the Constitution’s Framers, concerned that Congress would block amendments favorable to the states,⁴ argued that this language would obligate Congress to call for a convention after receiving the requisite number of state requests.⁵ Furthermore, some of the earliest Members of Congress argued that Congress had no power to deliberate on whether to call an Article V convention once it received the requisite number of applications.⁶

However, more recently, some modern scholars have theorized that Congress may be able to block a convention by exercising its apparent role in reviewing state applications and

⁹ *Id.* at 733–44 (1789).

¹⁰ Under current federal law, the Archivist of the United States is responsible for certifying a state’s ratification of a constitutional amendment. See National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

¹ U.S. CONST. art. V.

² *Id.*

³ Although the convention method for proposing amendments has never been used, some scholars have speculated that the states may “prod” Congress into proposing an amendment on a particular matter by applying for an Article V convention on that issue. See, e.g., Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 ARIZ. L. REV. 1011, 1015, 1016 n.49 (1980).

⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629–31 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Madison’s notes, Sept. 15, 1787).

⁵ For example, writing in the *Federalist Papers*, Alexander Hamilton stated that Congress would be “obliged” to call a convention “on the application of the legislatures of two thirds of the States.” THE FEDERALIST No. 85 (Alexander Hamilton).

⁶ 1 ANNALS OF CONG. 260–61 (1789).

ARTICLE V—AMENDING THE CONSTITUTION
Proposals

ArtV.3.3
Proposals of Amendments by Convention

deciding whether the requisite number of states has applied for a convention.⁷ In addition, Congress might refuse to submit amendments that result from an Article V convention to the states for ratification.⁸ Because it seems unlikely that the Supreme Court would order Congress to call a convention or submit a proposed amendment to the states,⁹ such arguments raise questions about whether Article V effectively *obligates* Congress to call for a convention.

Another ongoing debate revolves around whether a state convention, once called, may be limited to addressing certain topics. Concerns with a so-called “runaway convention” that proposes amendments on subjects beyond the scope of the initial call have prompted many of these debates. Some commentators have argued that states may (or must) determine the scope of an Article V convention by applying for a convention on a specific subject or group of subjects.¹⁰ Congress would then be obliged to call a convention only on the issues in the state applications.¹¹ Other scholars have argued that the text of the Constitution provides only for a general convention, one not limited in scope to considering amendments on a particular matter.¹²

A third prominent debate concerns Congress’s control over other aspects of a convention. During debates over the Constitution, James Madison questioned how an Article V convention would be formed and conduct its proceedings.¹³ In the modern era, scholars have debated various issues, including: (1) how delegates to the convention should be chosen; (2) whether Congress, state legislatures, or the delegates should set rules of procedure for the convention; (3) the vote threshold would be required to propose an amendment in convention; and (4) how voting rights on a proposed amendment should be apportioned among the states.¹⁴ Beginning at least as early as the 1960s, Members of Congress have introduced various pieces of legislation that would seek to establish some procedures for an Article V convention.¹⁵

⁷ See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1527 (2010) (“If different states apply for limited conventions covering marginally different subjects, then it is quite possible that Congress will use its discretion to determine that the requisite number of states have not agreed on a single subject to apply for a convention. Similarly, even if two-thirds of the states applied for the same limited convention, Congress might use its discretion to determine that limited conventions are not allowed.”). *But see* Morris D. Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1079 (1967) (“Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the [state convention method] of its independence.”).

⁸ See Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765, 777–78 (2011). *But see* Gerland Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 23 (1979) (acknowledging that Congress may review applications for a convention for conformity with Article V, but adopting the view that Congress cannot refuse to submit a proposed amendment to the states).

⁹ One scholar has suggested that, even if the Supreme Court exercised jurisdiction over the case, it appears unlikely the Court would “issue an order compelling Congress to carry out a duty which can hardly be called a simple ministerial duty or would, in the alternative, take it upon itself to prescribe the procedures for a convention.” See Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 905–06 (1968) (“Whether any legal procedure would be available to compel [Congress] to perform its duty is another question.”).

¹⁰ Rappaport, *supra* note 7, at 1518 (surveying scholarly debates on the issue). Some scholars have argued that Article V permits states to apply for a convention on particular amendment text. *E.g.*, Rappaport, *supra* note 7, at 1518.

¹¹ Limited convention proposals could call for an Article V convention to consider an amendment establishing congressional term limits or requiring a balanced federal budget, for example. Rappaport, *supra* note 7, at 1513.

¹² See Rappaport, *supra* note 7, at 1518.

¹³ 2 FARRAND’S RECORDS, *supra* note 4, at 630 (Madison’s notes, Sept. 15, 1787).

¹⁴ See, e.g., Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 892–94 (1968) (discussing federal legislation seeking to address these questions).

¹⁵ See, e.g., *id.*

ARTICLE V—AMENDING THE CONSTITUTION

Proposals

ArtV.3.3 Proposals of Amendments by Convention

Since 1960, the states have submitted more than 180 applications for Article V conventions on various subjects.¹⁶ However, Congress has never deemed Article V's threshold for calling a convention to be met. Many unresolved questions surround the state application process, including how to determine whether state applications address the same subject matter and whether the applications expire after a certain amount of time.¹⁷ In the past several decades, the states have come closest to satisfying the threshold for calling a convention of the states on the issues of apportionment in state legislatures¹⁸ and requiring a balanced federal budget.¹⁹

ArtV.3.4 Role of the President in Proposing an Amendment

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The Constitution does not specifically establish a role for the President in amending the Constitution.¹ Nonetheless, some Presidents have played a ministerial role in transmitting Congress's proposed amendments to the states for potential ratification. For example, President George Washington sent the first twelve proposed amendments, including the ten proposals that later became the Bill of Rights, to the states for ratification after Congress approved them.² In addition, President Abraham Lincoln signed the joint resolution proposing the Thirteenth Amendment abolishing slavery even though his signature was not necessary for proposal or ratification of the amendment.³

Despite these examples of Presidents playing an informal, ministerial role in the amendment process, the Supreme Court has articulated the Judicial Branch's understanding

¹⁶ Clerk of the United States House of Representatives, *Selected Memorials*, <https://clerk.house.gov/SelectedMemorial>.

¹⁷ *Is There a Constitutional Convention in America's Future?: Hearing Before the H. Comm. on the Judiciary*, 103d Cong. 6–10 (1993).

¹⁸ Some states sought an Article V convention to consider a constitutional amendment that would overturn the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). In that case, the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause requires that state legislative houses be apportioned "substantially" on the basis of population. *Id.* at 568–76.

¹⁹ See Clerk of the United States House of Representatives, *Selected Memorials*, <https://clerk.house.gov/SelectedMemorial>; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764–89 (1993) (cataloguing state applications for conventions on different subjects). This essay not examine whether a state may amend, rescind, or place conditions on an application for a convention.

¹ See U.S. CONST. art. V. This essay does not examine whether the President has any role in an Article V convention of the states.

² Letter from President George Washington to Governor Charles Pinckney (Oct. 2, 1789), <https://digital.scetv.org/teachingAmerhistory/lessons/GWashingtonLetter.htm>. Under modern federal law, the Archivist of the United States is responsible for certifying a state's ratification of a constitutional amendment. See National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

³ The House Joint Resolution Proposing the Thirteenth Amendment to the Constitution, 38th Cong. (1865), https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

ARTICLE V—AMENDING THE CONSTITUTION
Ratification

ArtV.4.1

Overview of Ratification of a Proposed Amendment

that the President has no formal constitutional role in that process. In a brief opinion in the 1798 case *Hollingsworth v. Virginia*, the Court held that the Eleventh Amendment had been “constitutionally adopted.”⁴ The Supreme Court reporter recorded Justice Samuel Chase’s statement during oral argument that the President “has nothing to do with the proposition, or adoption, of amendments to the Constitution.”⁵

Later, in the 1920 case *Hawke v. Smith*, the Supreme Court characterized the Court’s decision in *Hollingsworth* as having “settled” that “submission of a constitutional amendment did not require the action of the President.”⁶ Therefore, the Court appears to have adopted the view that the President cannot veto a proposed amendment.

ArtV.4 Ratification

ArtV.4.1 Overview of Ratification of a Proposed Amendment

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V sets forth two methods by which states may ratify amendments to the Constitution.¹ Congress determines which of the two methods the states must use in order to ratify a particular proposed amendment.² The first method of ratification requires three-fourths of the state legislatures to ratify an amendment to the Constitution.³ Alternatively, Congress may require that three-fourths of state ratifying conventions approve a proposed amendment.⁴ Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.⁵

⁴ 3 U.S. (3 Dall.) 378, 382 (1798).

⁵ *Id.* at 381 n.2. See also Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1275 (2005) (recounting how the Supreme Court reporter recorded Justice Chase’s statement during oral argument).

⁶ *Hawke v. Smith*, 253 U.S. 221, 229 (1920). President Jimmy Carter signed a joint resolution purporting to extend the deadline for ratification of the Equal Rights Amendment despite being advised that his signature was unnecessary. Ratification of the Equal Rts. Amend., 44 Op. O.L.C. 1, 8–9 (2020).

¹ U.S. CONST. art. V (stating that amendments to the Constitution may be 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”).

² *United States v. Sprague*, 282 U.S. 716, 730 (1931) (“The choice . . . of the mode of ratification. . . lies in the sole discretion of Congress.”).

³ U.S. CONST. art. V.

⁴ *Id.*

⁵ See Intro.3.1 Ratification of Amendments to the Constitution Generally. The Eighteenth Amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.” U.S. CONST. amend. XVIII, repealed by *id.* amend. XXI.

ARTICLE V—AMENDING THE CONSTITUTION
Ratification, State Legislatures

ArtV.4.2.1
Congressional Deadlines for Ratification of an Amendment

ArtV.4.2 State Legislatures

ArtV.4.2.1 Congressional Deadlines for Ratification of an Amendment

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The first method of ratification requires three-fourths of the state legislatures to ratify a proposed amendment to the Constitution.¹ Although this method has been used to ratify twenty-six of the Constitution’s twenty-seven successful amendments,² many questions concerning this mode of ratification remain unresolved.

One prominent question is whether Congress may place a deadline on the states’ ratification of a proposed amendment, either in the text of the proposed amendment or the accompanying joint resolution. The text of Article V does not specifically address the issue. In *Dillon v. Gloss*, the Supreme Court held that the Constitution implicitly authorizes Congress to “fix a definite period” for ratification of an amendment.³ In that case, the Court upheld Congress’s specification of a seven-year time limit on the ratification of the Eighteenth Amendment establishing Prohibition.⁴

The *Dillon* Court determined that Congress’s specific power to determine the mode of ratification (i.e., by state legislatures or state ratifying conventions) implied an incidental authority to specify a deadline for ratification.⁵ Furthermore, as a practical matter, a definite period for ratification would ensure that states understood how much time they had to ratify the amendment.⁶ Although the Court also opined that, regardless of whether Congress specifies a deadline, the time period for ratification must be “reasonable,” it appears this language was subsequently regarded as nonbinding dicta in *Coleman v. Miller*.⁷ Beginning with its 1917 proposal of what would become the Eighteenth Amendment, Congress has specified a deadline of seven years for the ratification of every proposed amendment except for the proposal that became the Nineteenth Amendment recognizing women’s suffrage.⁸

¹ U.S. CONST. art. V.

² Intro.3.1 Ratification of Amendments to the Constitution Generally.

³ 256 U.S. 368, 375–76 (1921).

⁴ *Id.*

⁵ *Id.* at 376.

⁶ *Id.*

⁷ 307 U.S. 433, 453 (1939) (discussing *Dillon*, 256 U.S. at 375–76). In *Coleman*, Chief Justice Charles Evans Hughes suggested, in an opinion titled “Opinion of the Court,” that Congress is responsible for “promulgating” the “adoption” of a constitutional amendment and, consequently, Congress had the power to determine whether ratification of a proposed amendment occurred within a “reasonable time.” *Coleman*, 307 U.S. at 453–56. However, subsequent commentators have argued that this dicta in *Coleman* is incorrect because the Constitution gives Congress no such role. See, e.g., Ratification of the Equal Rts. Amend., 44 Op. O.L.C. 1, 30–31 (2020).

⁸ See Ratification of the Equal Rts. Amend., 44 Op. O.L.C. at 15.

ARTICLE V—AMENDING THE CONSTITUTION
Ratification, State Legislatures

ArtV.4.2.2

Effect of Prior Rejection of an Amendment or Rescission of Ratification

Limited historical practice suggests that if Congress does not specify a deadline for ratification, the amendment remains pending before the states until the requisite number of states have ratified it. In 1992, the Twenty-Seventh Amendment, which addressed the effective date of congressional pay raises, became part of the Constitution more than 202 years after it was proposed.⁹ At the time, the Department of Justice’s Office of Legal Counsel (OLC) advised that the amendment became part of the Constitution once the Archivist of the United States certified that the requisite number of states had ratified the amendment.¹⁰ Rejecting dicta to the contrary in *Dillon*, the OLC stated that, in the absence of a congressionally proposed deadline, an amendment remains pending before the states.¹¹

ArtV.4.2.2 Effect of Prior Rejection of an Amendment or Rescission of Ratification

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Additional unresolved questions are whether a state may (1) ratify an amendment after rejecting it, or (2) rescind its ratification of a constitutional amendment before that amendment becomes part of the Constitution. The Supreme Court addressed these issues in *Coleman v. Miller*.¹ In *Coleman*, twenty-four members of the Kansas state legislature sought a writ of mandamus compelling state officials to recognize that Kansas had not ratified an amendment to the Federal Constitution, the Child Labor Amendment,² challenging the way the vote was taken.³ One of the plaintiffs’ arguments was that the ratification was invalid because the Kansas state legislature previously rejected the amendment.⁴

The Supreme Court indicated that whether a state could ratify an amendment after rejecting it—or rescind an amendment already ratified—were political questions for Congress

⁹ For more on the Twenty-Seventh Amendment’s ratification and authentication, see Intro.3.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments) and Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation.

¹⁰ Cong. Pay Amend., 16 Op. O.L.C. 85, 87 (1992).

¹¹ *Id.* at 90, 97. Otherwise, in the OLC’s view, the Article V process would become unworkable because states would not know whether they could still ratify an amendment. *Id.* at 97 (“The implicit time limit thesis is thus deeply implausible, because it introduces hopeless uncertainty into that part of the Constitution that must function with a maximum of formal clarity if it is to function.”). In 2020, the OLC advised that Congress lacks the authority to: (1) extend the ratification deadline for an amendment pending before the states; or (2) revive an amendment after the initial deadline has expired, without restarting the Article V process. Ratification of the Equal Rts. Amend., 44 Op. O.L.C. at 3.

¹ 307 U.S. 433 (1939).

² The proposed Amendment provided in part that “Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.” *Id.* at 435 n.1 (internal quotation marks omitted).

³ *Id.* at 436–37.

⁴ *Id.* at 447.

ARTICLE V—AMENDING THE CONSTITUTION

Ratification, State Legislatures

ArtV.4.2.2

Effect of Prior Rejection of an Amendment or Rescission of Ratification

to resolve.⁵ As support for this theory, the Court cited Congress's 1868 adoption of a concurrent resolution declaring that the Fourteenth Amendment had been ratified.⁶ Congress adopted this resolution despite the fact that three states had previously rejected the amendment before later ratifying it, and two states attempted to rescind their prior ratifications.⁷

However, it is unclear whether this historical practice remains relevant. The adoption of the Fourteenth Amendment presented special circumstances. The three southern states that previously rejected the Amendment had constituted new governments at Congress's direction as a result of Reconstruction by the time they ratified it.⁸ Thus, the Court's ruling would not appear to have definitively resolved questions about the effect of a prior ratification or rejection.⁹ Furthermore, since *Coleman*, some commentators have expressed doubts that Congress has any constitutional role in determining whether a state has properly ratified a proposed constitutional amendment.¹⁰

ArtV.4.2.3 Authentication of an Amendment's Ratification

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Another prominent debate surrounds the method by which the states' ratification of an amendment is authenticated. Article V provides that an amendment becomes part of the Constitution "when ratified" by three-fourths of state legislatures or state ratifying conventions.¹ In *Dillon v. Gloss*, the Supreme Court held that an amendment becomes part of the Constitution on the day that the number of state ratifications meets the three-fourths

⁵ *Id.* at 449–50.

⁶ *Id.* at 448–50.

⁷ *Id.* (“[T]he political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.”). The three states that rejected the Amendment before later ratifying it were Georgia, North Carolina, and South Carolina. The two states that ratified the Amendment and later sought to rescind their ratifications were New Jersey and Ohio. *Id.*

⁸ *Id.*

⁹ See, e.g., *Idaho v. Freeman*, 529 F. Supp. 1107, 1150 (D. Idaho 1981) (“Until the technical three-fourths has been reached, a rescission of a prior ratification is clearly a proper exercise of a state’s power granted by the article V phrase ‘when ratified’ especially when that act would give a truer picture of local sentiment regarding the proposed amendment.”), *vacated as moot*, *NOW, Inc. v. Idaho*, 459 U.S. 809 (1982).

¹⁰ See *Ratification of the Equal Rts. Amend.*, 44 Op. O.L.C. 1, 30 (2020) (expressing the view that a congressional role in “promulgating” a constitutional amendment ratified by three-fourths of the states lacks a basis in the Constitution’s text); *Cong. Pay Amend.*, 16 Op. O.L.C. 85, 98–99 (1992) (“[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice.”).

¹ U.S. CONST. art. V. The Supreme Court has held that state legislatures perform a federal constitutional function when ratifying proposed constitutional amendments. Consequently, the people of a state cannot limit the legislature’s performance of this function through a popular referendum, the enactment of state constitutional provisions, or other means. See *Leser v. Garnett*, 258 U.S. 130, 136–37 (1922) (rejecting the argument that the people of a state could deprive the state legislature of the power to ratify the Nineteenth Amendment establishing women’s suffrage by

ARTICLE V—AMENDING THE CONSTITUTION
Ratification

ArtV.4.3
Ratification by Conventions

threshold.² Consequently, the date on which an Executive Branch official proclaims the amendment has been ratified is not controlling.³

Under current federal law, the Archivist of the United States is responsible for certifying that a proposed constitutional amendment has been ratified after receiving “official notice” from three-fourths of the states that they have adopted the amendment in accordance with the Constitution.⁴ The Archivist publishes the amendment’s text along with a certificate listing the states that have adopted the amendment.⁵ The Department of Justice’s Office of Legal Counsel has adopted the view that, in order to perform this duty, the Archivist must determine whether “he has received official notice that an amendment has been adopted according to the provisions of the Constitution.”⁶ The Archivist may consult the Attorney General on this legal question, as he did with respect to the states’ ratification of the Twenty-Seventh Amendment.⁷

ArtV.4.3 Ratification by Conventions

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Alternatively, Congress may require that state ratifying conventions approve a proposed amendment.¹ Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.² In the joint resolution proposing the Twenty-First Amendment, Congress specified that “conventions in three-fourths of the several States” must ratify the Amendment for it to become operative.³

At the time Congress proposed the Twenty-First Amendment in 1933, many politicians believed that only state ratifying conventions should ratify constitutional amendments that

enacting state constitutional provisions); *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that a state lacked the power to require submission of the state’s ratification of the Eighteenth Amendment to a popular referendum).

² 256 U.S. 368, 376 (1921).

³ *Id.*

⁴ See National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

⁵ *Id.* Since the early days of the United States, various Executive Branch officials have performed the ministerial duty of certifying the ratification of a constitutional amendment. In 1818, Congress enacted a law providing that the Secretary of State would perform this role. Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439. Congress later transferred this role to the Administrator of General Services and then to the Archivist of the United States. See Cong. Pay Amend., 16 Op. O.L.C. 85, 98 (1992) (discussing the history of the Executive Branch’s ministerial duty).

⁶ Cong. Pay Amend., 16 Op. O.L.C. at 99.

⁷ *Id.*

¹ U.S. CONST. art. V.

² See Intro.3.1 Ratification of Amendments to the Constitution Generally.

³ *The House Joint Resolution Proposing the Twenty-First Amendment to the Constitution*, 72nd Cong. (1933), <https://www.docsteach.org/documents/document/21st-amendment>.

ARTICLE V—AMENDING THE CONSTITUTION

Ratification

ArtV.4.3 Ratification by Conventions

implicated individual rights and morals.⁴ In addition to seeking a ratification method deemed to better reflect the popular will, Congress may have also wished to bypass the Temperance lobby, which remained powerful in state legislatures.⁵ According to this view, by specifying that specially elected state delegates would ratify the Amendment, rather than state legislators, Congress increased the Amendment's chances of successful ratification.⁶

Neither the Constitution nor Supreme Court precedent specifically provides guidance as to how the states should convene ratifying conventions, select delegates, or conduct the proceedings. The thirty-eight state conventions that considered the ratification of the Twenty-First Amendment in 1933 followed a variety of procedures.⁷ In general, the delegates at the state conventions, most of whom were pledged to vote for the repeal of the Eighteenth Amendment, did not engage in significant deliberation on an issue that already received strong popular support at the polls.⁸

ArtV.4.4 Choosing a Mode of Ratification

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The Supreme Court has held that Congress determines whether state legislatures or state ratifying conventions should consider the ratification of a proposed constitutional amendment.¹ In *United States v. Sprague*, the federal government indicted defendants under the National Prohibition Act (NPA) for unlawfully transporting and possessing intoxicating liquors.² The lower courts quashed the indictment, determining that Congress lacked the authority to enact the NPA.³ These courts held that the Eighteenth Amendment, which granted Congress the authority to enact laws like the NPA, was invalid because state legislatures had ratified it rather than state ratifying conventions.⁴

⁴ EVERETT S. BROWN, RATIFICATION OF THE TWENTY FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 3 (2003).

⁵ Robert P. George & David A. J. Richards, *The Twenty-First Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151> (“[P]olitical prudence pointed in the direction of ratifying conventions as a way of leaving gun-shy legislators with their eyes on re-election out of the process and ‘off the hook.’”).

⁶ *See id.*

⁷ BROWN, *supra* note 4, at 8–9.

⁸ BROWN, *supra* note 4, at 5–7.

¹ *United States v. Sprague*, 282 U.S. 716, 730 (1931) (“The choice . . . of the mode of ratification lies in the sole discretion of Congress.”). Presumably, Congress could also choose the mode of ratification for amendments proposed by an Article V convention of the states. *See* U.S. CONST. art. V.

² *Sprague*, 282 U.S. at 729.

³ *Id.*

⁴ *See id.* at 729–30.

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.5
Unamendable Subjects

On appeal, the Supreme Court considered whether state conventions should have ratified the Eighteenth Amendment because it conferred new powers on Congress to abridge individual rights by enacting laws to enforce Prohibition.⁵ The Court rejected this argument, determining that “the choice . . . of the mode of ratification lies in the sole discretion of Congress.”⁶

State legislatures have ratified twenty-six of the twenty-seven amendments that have become part of the Constitution.⁷ As noted, Congress has chosen the convention method of ratification only once.⁸ In the joint resolution proposing the Twenty-First Amendment repealing Prohibition, Congress specified that “conventions in three-fourths of the several States” must ratify the Amendment for it to become operative.⁹

ArtV.5 Unamendable Subjects

Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The last two sentences of Article V made certain subjects unamendable.¹ The first of these sentences prohibited amendments prior to 1808 that would have affected either of two subjects addressed in Article I, Section 9 of the Constitution: (1) limitations on Congress’s power to prohibit or restrict the importation of slaves before 1808; and (2) limitations on Congress’s power to enact an unapportioned direct tax.² As noted, during the convention in Philadelphia, some delegates from the southern states opposed allowing amendments to provisions of the Constitution that limited Congress’s power to restrict or tax the slave trade.³ To mitigate these

⁵ *Id.*

⁶ *Id.* at 730.

⁷ For information about the ratification of amendments to the Constitution and the text of the amendments, see Intro.3.1 Ratification of Amendments to the Constitution Generally.

⁸ See Intro.3.1 Ratification of Amendments to the Constitution Generally.

⁹ *The House Joint Resolution Proposing the Twenty-First Amendment to the Constitution*, 72nd Cong. (1933), https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

¹ U.S. CONST. art. V (“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.”).

² *Id.*

³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Madison’s notes, Sept. 10, 1787). The latter provision was apparently motivated in part by concerns over federal taxes on slaves, who were considered property at the time. THE FEDERALIST NO. 43 (James Madison) (stating that both exceptions in the first sentence on unamendable subjects “must have been admitted on the same considerations which produced the privilege defended by it”). See also *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796) (Paterson, J., concurring) (recounting debates over these limitations on amendments).

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.5

Unamendable Subjects

concerns, the delegates added a sentence prohibiting amendments on these subjects before 1808.⁴ This sentence’s restrictions on amendments have expired.

The second sentence of Article V, which remains in effect, provides “that no State, without its Consent, shall be deprived of its equal suffrage in the Senate.”⁵ This provision was introduced by Roger Sherman, one of the architects of the Connecticut Compromise, out of concern that three-quarters of the States might use Article V to abolish or deprive smaller states of their representation in the Senate.⁶ Writing in the *Federalist Papers* after the Federal Convention, James Madison suggested that this exception would assuage concerns that large states would use the amendment process to infringe upon the sovereignty of the smaller states by reducing their voting power in the Senate.⁷ He wrote, “The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality.”⁸

By expressly prohibiting amendments that would deprive a state of equal suffrage in the Senate without its consent, Article V enshrines the “partly federal, and partly national” structure of the bicameral Congress, which was at the heart of the Connecticut Compromise.⁹ In vesting the legislative power in a bicameral Congress, the Framers of the Constitution purposefully divided and dispersed legislative power between two Chambers—the House of Representatives with representation based on a state’s population and the Senate with equal state representation.¹⁰ The Framers recognized that the division of legislative power between two distinct Chambers of elected members was needed “to protect liberty” and address the states’ fear of an imbalance of power in Congress.¹¹ As later explained by Chief Justice Warren

⁴ 2 FARRAND’S RECORDS, *supra* note 3, at 559 (Madison’s notes, Sept. 10, 1787).

⁵ 2 FARRAND’S RECORDS, *supra* note 3, at 559. The Supreme Court has indicated that the equal suffrage provision does not prohibit Congress from refusing to seat a Senator while it investigates his election or qualifications. *Barry v. United States*, 279 U.S. 597, 615–16 (1929).

⁶ 2 FARRAND’S RECORDS, *supra* note 3, at 629 (Madison’s notes, Sept. 15, 1787) (“Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.”). Sherman’s proposal also would have prohibited amendments that affected a state “in its internal police.” 2 FARRAND’S RECORDS, *supra* note 3, at 629. After Sherman’s amendment to the draft Article V was voted down, he moved to strike Article V altogether. 2 FARRAND’S RECORDS, *supra* note 3, at 630. Gouverneur Morris proposed the final provision, which lacked the language that Madison had opposed limiting amendments that would affect a state in its “internal police.” 2 FARRAND’S RECORDS, *supra* note 3, at 631. The motion “being dictated by the circulating murmurs of the small States was agreed to without debate.” 2 FARRAND’S RECORDS, *supra* note 3, at 630–31.

⁷ THE FEDERALIST NO. 43 (James Madison).

⁸ *Id.* During the Federal Convention, Madison had argued against equality of suffrage for the states in the Senate—an unpopular notion in the larger states. *See, e.g.*, 1 FARRAND’S RECORDS, *supra* note 3, at 551 (Madison’s notes, July 7, 1787) (statement of James Madison).

⁹ *See INS v. Chadha*, 462 U.S. 919, 950 (1983). Roger Sherman and other delegates from Connecticut repeatedly advanced a legislative structure early in the Convention debates that eventually was proposed as the Great Compromise. *See* 1 FARRAND’S RECORDS, *supra* note 3, at 196. Historians often credit Sherman and the Connecticut delegates as the architects of the Great Compromise. MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 96–98 (2013) (discussing Sherman’s proposal during the Convention debates that led to the “Connecticut Compromise”); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 106 (1913). *See also* *Wesberry v. Sanders*, 376 U.S. 1, 12–13 (1964) (discussing Sherman’s role in the Connecticut Compromise).

¹⁰ U.S. CONST. art. I, § 7. cl. 2. *See* THE FEDERALIST NO. 39 (James Madison) (“The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is national not federal. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.”).

¹¹ *See INS v. Chadha*, 462 U.S. 919, 950 (1983) (“[T]he Framers were. . . concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.5
Unamendable Subjects

Burger, “the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.”¹² By diffusing legislative power between two Chambers of Congress, including a Senate in which the states had equal suffrage, the Framers of the Constitution also sought to promote the separation of powers, federalism, and individual rights.¹³ They designed the bicameral Congress so that “legislative power would be exercised only after opportunity for full study and debate in separate settings.”¹⁴

Controversial since its inception because it protects small state interests against those of larger states, Article V’s prohibition on amending the Constitution so as to deprive states of equal suffrage has been a subject of scholarly interest. In discussions on whether the Article V prohibition should be given full legal force,¹⁵ some commentators have noted that the Constitution’s text and the Framers’ intent require the provision to have legal effect.¹⁶ Commentators have also argued that the people of the United States have accepted other limitations on the amending power (e.g., the high vote threshold for proposal and ratification of amendments).¹⁷ Thus, in their view, it is unclear why the limitation on depriving states of equal suffrage in the Senate should not also have legal effect.¹⁸

Academic debates over the legal force of Article V’s clause on unamendable subjects echo broader discussions of other possible external, textual, or implicit limitations on the amendment of the Constitution.¹⁹ For example, scholars have debated whether it is possible to

could pass laws favoring a minority of the people.” See also THE FEDERALIST NO. 51 (James Madison) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”); FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, *supra* note 9, at 99–112 (describing the debate among the states regarding the structure of Congress).

¹² *Chadha*, 462 U.S. at 950 (1983). See also FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, *supra* note 9, at 105–06 (explaining the structure of Congress as achieved under the “Great Compromise”).

¹³ See THE FEDERALIST NO. 62 (James Madison) (“[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.”). See also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUMBIA L. REV. 673, 708–09 (1997) (describing how the legislative procedures “promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation”).

¹⁴ *Chadha*, 462 U.S. at 951.

¹⁵ See generally, e.g., Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 717 (1981).

¹⁶ *Id.* at 733.

¹⁷ John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373, 379 (1985).

¹⁸ *Id.* (“It is unclear why the United States should be bound by one such restraint, the super-majorities required for most amendments, and not another, the unanimous state consent required for altering a state’s equal suffrage in the Senate.”). Commentators who oppose the disproportionate influence of less populated states in the Senate and electoral college have argued that the Article V prohibition should not have full legal force. These arguments, however, are not reconcilable with Article V’s express language or the intent of the Framers in adopting it. For instance, some scholars have argued that the provision is “merely declaratory” by reasoning that sovereignty resides in the people of the United States, and past actors cannot bind “the will of the people” in the future. See Linder, *supra* note 15, at 722–23. Article V, however, provides that a state’s body politic may consent to no longer having equal suffrage, but the “will of the people” as expressed by the political entities whose agreement is necessary to amend the Constitution cannot deprive an unconsenting state of equal suffrage. Scholars have also debated whether the equal suffrage requirement could be removed in two steps by: (1) amending the Constitution to repeal the limitation; and (2) amending the document to alter equal suffrage. See generally George Mader, *Binding Authority: Unamendability in the United States Constitution—A Textual and Historical Analysis*, 99 MARQ. L. REV. 841, 852–53 (2016); Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT’L J. CONST. L. 655, 663 (2015). A two-step process to such an end, however, would still violate Article V’s plain language providing that a state cannot be deprived of equal suffrage without its consent.

¹⁹ Mader, *supra* note 18, at 845–46 (surveying relevant scholarship).

ARTICLE V—AMENDING THE CONSTITUTION

ArtV.5 Unamendable Subjects

amend those provisions of the Nation's charter that embody fundamental norms or characteristics of the U.S. Government (e.g., provisions that establish a republican form of government).²⁰ Other debates have focused on whether Article V's procedures for amendment can themselves be amended.²¹ Such debates, many of which have been part of the national conversation since the Founding,²² raise critical questions about how the Nation may alter its fundamental law.

²⁰ See Mader, *supra* note 18, at 845–46.

²¹ Mader, *supra* note 18, at 848 (“It is generally accepted that constitutional amending provisions can be used to amend themselves.”). *But see* Linder, *supra* note 15, at 733 (“Article five itself cannot be amended so as to create any new limitations on the amending power.”).

²² President George Washington, First Inaugural Address (Apr. 30, 1789).