ARTICLE V

The fifth Article of the Constitution defines the process by which the Constitution may be amended. In this class we will launch our study into the principles and application of Article V of the U.S. Constitution. This course will look at the debates and discuss the manner in which the amendment process is intended to occur.

Article V of the US Constitution:

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.

1. The Purpose for the Text:

The fifth Article of the Constitution broadly outlines the requirements for amending the Constitution. Upon realizing the need for political alterations, it was historically upheaval and violence that birthed the Liberty charters and remonstrances that gave rise to our Constitution. These lessons in history, including our own revolution, revealed a need for peaceful means of reform through an amendment process.. Early on eight state constitutions and two charters granted by William Penn in 1682 and 1683 provided means for amendment. Three state constitutions provided for amendment through the legislature, and the other five gave the power to specially elected conventions, therefore we find each of these elements in the Constitution.
The amendment process in the Articles of Confederation required proposal by Congress and ratification by the unanimous vote of ALL thirteen state legislatures. The amendment process in the Constitution includes a threshold of three fourths, as James Madison explained in Federalist 43, to establish a balance between the instability of constant change and inability to make reforms:
"It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults." – James Madison

From the beginning the drafters of the Constitution knew there would be both a need and danger to opening the Constitution for Amendment. James Madison remarked in his notes of the ratification debates that he:

"…saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."

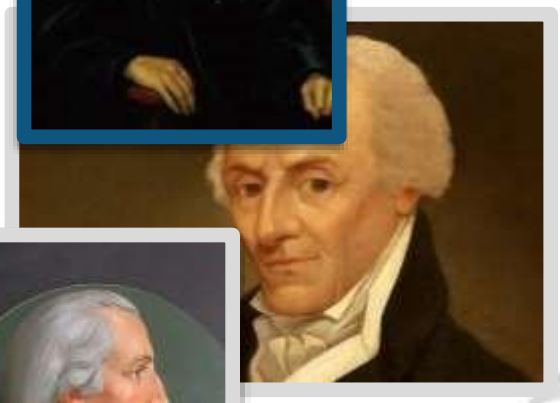
Why do we would we ever need to amend our Constitution once adopted? Our founders will teach us why they believed it would be necessary and their reasons ought to be what we use as a template when considering this process in our current day:

Thomas Jefferson remarked:

"I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." Thomas Jefferson (July 12, 1816) a personal letter to Samuel Kercheval

Jefferson did not believe that amending the Constitution is something that should be undertaken for small or transient reasons; amending the Constitution is not for correcting matters of inconvenience. Jefferson is teaching that we need to have a means to amend the Constitution for when Americans become more mature and enlightened in their quest for Liberty. As we know from our history of the Constitution classes we know that progressing in Liberty demands broader Liberty protections for the people and less power for government. Through his analogy of the man outgrowing the coat of his youth, Jefferson shows us that as our society matures,

we should outgrow our need for government at which point we will need to amend the Constitution to provide greater limits of federal power to ensure greater liberty for the people. I am sure that both Madison and Jefferson would agree that we should never consider amending the Constitution to increase federal control and diminish the Liberty of the people. That would be an aberration to Jefferson's analogy, a man who shrinks to child size is an abnormality in nature.



The drafters of the Constitution were also very clear that the reason the Constitution needed a written process for amendment was to prevent the tumult and violence experienced in their history every time they wanted to limit power and expand Liberty. Elbridge Gerry, in Madison's records of the federal debates, remarks that because this Constitutional Republic was something that had never been experienced before, there must be "periodical revision" that will give "intermediate stability" to the government; no need for bloody revolution since the people had full power and control through the Constitution.

This idea that the Constitution needed a standard mechanism for amendment to avoid violence and war was likely the most repeated justification for Article V. Both James Iredell and St. George Tucker, participants in the drafting of this article, made the following observations:

"The Constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war." James Iredell

"…without hazarding a dissolution of the confederacy, or suspending the operations of the existing government… Nor can we too much applaud a constitution, which thus provides a safe, and peaceable remedy for its own defects, as they may from time to time be discovered. A change of government in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable." St. George Tucker

It was not only the history of the British Charters that proved to our drafters that we needed a standard mechanism within the Constitution for amendments, the difficulties they experienced with the Articles of Confederation also proved this need. George Mason, in Madison's record of the federal debates, teaches us that this particular history was an important guide to drafting Article V:

"The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be.
Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."

We also see that Mason knew a standard mechanism was necessary to prevent the wars required in their history to effectuate these changes.
A second security in creating a mechanism to amend the Constitution would be to ensure that the Constitution could not become a "living breathing document" subject to changes by whim, fleeting societal notions, or the will of those in power. The amendment process would ensure that the only legal way to change the responsibilities and power was to follow this strict and confined procedure. All other changes to the Constitution could be rejected as unlawful and void of power and application. Once again, Madison in his notes on the federal debates makes this point clear:

"It guards equally against that extreme facility which would render the Constitution too mutable;"

2. The Procedure of the Text

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;

Remember, one of the primary purposes to ratifying the Article V procedure was to ensure that the Constitution could not be changed on a whim. Our founders believed in the security of having the requirements in writing, ratified by the representatives of the people as a power reminder and motivator of the people to keep governments within the confines of this procedure. The procedure we are to study is one James Iredell speaks of during the federal debates:

"Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shallthink proper, and, upon the ratification of three fourths of the states, will become a part of the Constitution."

The exact procedure of amending the Constitution was one of great debate. Just like every other aspect of the Constitution, the concern was the same: How do we create a federal government, delegate to it very limited and defined powers, and keep it that way? George Mason, who would eventually refuse to sign on to the ratification of the Constitution, was very articulate in his concerns about involving the Congress in a process that would amend the Constitution, possibly giving them the ability to increase their own power beyond the will of the people.

"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 opportunity for such an abuse, may be the fault of the Constitution calling for amendmt." Madison's records on the federal debate

Madison records in the federal debates that Alexander Hamilton offers an alternative to Mason's concern:

"The State Legislatures will not apply for alterations but with a view to increase their own powers—
The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention—
There could be no danger in giving this power, as the people would finally decide in the case."

Hamilton asks, how do we keep the States from using the amendment process to simply increase their own power to the detriment of the other States? He asserts that the federal legislature will have an advantage to seeing the problems through direct experience and will have a duty to essential guard against the increase power of some States over less powerful States. Hamilton seemed to have little worry of Congressional abuse since, in his opinion, the Constitution would be well protected as no amendment could ever be adopted without the approval of the people through their State legislatures.

To combat the possibility of the larger States consuming the authority of the smaller states via an Amendment by convention, Roger Sherman suggested that Article V require that the adoption of any Amendment require unanimous consent of all the States and not simply a ¾ vote.

"Mr. Sherman moved to strike out of art. V. after "legislatures" the words "of three fourths" and so after the word "Conventions" leaving future Conventions to act in this matter, like the present Conventions according to circumstances.

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."

Elbridge Gerry shared Sherman's concerns regarding the lesser States being over-powered by the larger States via amendments to the Constitution.

"This Constitution…is to be paramount to the State Constitutions. It follows, hence, from this article that two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether.".

Sherman and Gerry may not have seen their suggestion for unanimous consent of the States make it into the Constitution, but we can likely attribute the final clause of Article V, "**and that no state, without its consent, shall be deprived of its equal suffrage in the Senate,**" as a solution to their concern.

James Madison also gives insight on the incorporation of this particular clause in the Constitution during the ratification debates:

"The exception in favour 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."

Once it was decided that both the Congress and the States could propose Amendments, the question became who will call the convention.

Gouverneur Morris, a delegate from Pennsylvania, suggested that Congress should be free to call the convention whenever they felt the need. After all, no amendment could ever become part of the Constitution without ratification by approval of ¾ of the State legislators. James Madison documents Morris' remarks in his debate notes:

"Mr. Govr. Morris suggested that the Legislature should be left at liberty to call a Convention, whenever they please."

If Congress can call a convention whenever they want, can they likewise refuse to call a convention if they don't want one? James Iredell explains that the States hold equal power to Congress to call a convention and the Constitution does not authorize Congress to refuse once the requisite States have made their request.

"…it did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress shall call such convention, so that they will have no option."

James Madison confirms Mr. Iredell's assertions;

"Mr Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a call a Convention on the like application."

3. The Caveat in the Text

If you remember from our LFU course "Slavery and the American Founders" that the majority of our founders had a strong aversion to the institution of slavery. One of the attempts to end the slave trade in America is found her in Article V. It may seem counter-intuitive to think that this language:

"…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…"

is actually a mechanism to end slavery. But when we review the facts, the purpose becomes clear. Madison records that during the debates that John Rutledge, a delegate from South Carolina, explains why the Constitution must include a caveat to the prohibition upon the slave trade:

"Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it. In order to obviate this objection, these words were added to the proposition: "provided that no amendments which may be made prior to the year 1808. shall in any manner affect the 4 & 5 sections of the VII article"

One might ask the question, why wouldn't the delegates simply just say no and move on with the union without South Carolina and the States that agreed with her? James Iredell explains why the delegates believed that it was absolutely necessary to adopt this language to keep these States in the Union.

"…"It was the wish of a great majority of the Convention to put an end [to slavery] immediately; but the states of South Carolina and Georgia would not agree to it. …
If we do not agree to it, do we remedy the evil? No, sir, we do not. For if the Constitution be not adopted, it will be in the power of every state to continue it forever. They may or may not abolish it, at their discretion.
But if we adopt the Constitution, the trade must cease after twenty years, if Congress declare so, whether particular states please so or not; surely, then, we can gain by it. This was the utmost that could be obtained. I heartily wish more could have been done."

For a more comprehensive understanding of this dilemma please study with the LFU course "Slavery and the American Founders."

4. Summary:

Therefore, following the intent of the founders and the text of Article V, what is the power of Congress in this amendment process?

- The Power to propose amendments directly;
- The Responsibility to "call" conventions; and
- The Responsibility to submit proposed amendments and their mode of ratification to the States.

James Iredell confirms this delegation of power during the federal debates:

"The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a general convention for the purpose, in which case Congress are under the necessity of convening one."

Finally, following the intent of the founders and the text of Article V, what is the power of the States in the amendment process?

- The Power petition for a convention with concurrence of 2/3 of the States;
- The Power to propose amendments
- The Power to ratify amendments with concurrence of 3/4 of the States

All amendments properly ratified are to be considered as a valid part of the Constitution.

Some of The Drafters' Concerns
About the Amendment Process Through Convention

1. WHO are the delegates and what is their motivation?

According to James Madison in Federalist 49, one significant problem with conventions is – WHO will be the delegates? Madison discusses two options for choosing delegates: either through the Legislators or through popular vote of the people. In each case he believed there was cause for concern.
In modern terms, when delegates are chosen by the legislators, what we could see are appointments based upon party loyalty, power or popularity rather than upon Constitutional expertise and dedication to Liberty principles. When the delegates are chosen by popular vote, typical election dynamics could determine the outcome. Voters would vote based upon party popularity and perhaps even a "lesser of two evils" and the same corrupt politicians would now be "fixing" the very problems they created. Madison framed the outcome this way, "The same influence which had gained them an election into the legislature, would gain them a seat in the convention… They would consequently be parties to the very question to be decided by them."

According to Madison, the real difficulty with delegates boils down to "motivation". What will be the motivating force behind the delegates and their amendments? Madison recognized that the only reason we have our current Constitution is that the framers had just come from a bloody revolution that kept the delegates focused upon LIBERTY and that forced them to set aside their party politics and personal motivations and it was still no easy path:

"We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government;" ~ James Madison Federalist 49

Madison seems to be telling us that without some overriding and unifying motivation, the convention would likely degrade into another Republican vs. Democrat drama. If we cannot get delegates that are properly constitutionally minded rather than driven by political gain and greed, this will never benefit us.

2. WHEN will it be done?

One practical difference between nullification and convention is the time each takes to implement. Any advocate of Article V must admit that this is a LONG TERM goal and not a quick fix. To call convention, choose delegates, agree on amendments, an Article V convention could take several years, possibly 5 to 10 years. Adding to the time frame is the Article V requirement of 3/4 ratification by the States. That means EVERY AMENDMENT must be agreed upon (debated), individually, by 3/4 of the States to ratify. During such a time frame, it would be prudent to use nullification to puts the brakes on at the state level until corrections (if truly needed) can be made at the federal level.

3. What will be the scope and impact?

Probably the most debated aspect is the notion of a “runaway convention.” Some say the ¾ ratification is a check on a runaway convention, that ¾ of the states would never go along with a total rewrite of the Constitution or the addition of harmful amendments. Of course, ¾ of the states DID ratify the very harmful 16th and 17th amendments. Tinkering with the foundation is always risky business. SO at the end of the day it may well come back to the main issue of the motivation, focus and education of the people and their delegates. What about the opposite of a runaway convention? What about a do-nothing convention? What if we do open-heart surgery on the Constitution for something as cosmetic as a balanced budget amendment?!

Additional Discussion:

Article V Conventions and Nullification are NOT mutually exclusive, nor is one the magic pill for all of our federal problems. Each is has legitimate Constitutional role, but each has a different aim and application.

IMPORTANE NOTE: When you find yourself debating the convention issue, I like to use the phrase "**the fifth Article of the Constitution**" rather than say "Article five." The phrase "Article five" has practically been transformed into a label that is now associated with a camp or position, so that productive discussion is hindered. It is important that we try not to have the narrative dictated FOR us. So say, "the fifth Article of the Constitution" so that we are tethered to the standard and it is clear we are not referring to someone's camp, opinion or philosophy.

Conventions and nullification each have legitimate concerns that should be considered and dangers to be guarded against. They can be used together in the defense of Liberty **as long as we understand each in its own context and consider the pitfalls involved**. It must be noted that we are having this discussion because of the very fact that we have stepped so far out of the Constitutional boundaries given to this government that we are operating practically in a post-Constitutional America. At this point, it is unlikely that any solution will be perfect or without peril. The use of the Convention process defined in the Fifth Article of the Constitution is a long-term fix aimed at making fundamental adjustments to the framework of our Republic and its federal government. Nullification is an immediate defense of that framework at the state, local and individual level. An alteration using the Fifth Article of the Constitution aims to make structural changes or further clarifications to the operations of the federal government and its relation to the states by amending the Constitution. Nullification aims to make no changes to the current Constitution but is simply an assertion by the individual sovereign states and communities of the authority they already possess and a declaration of the limitations to federal power already defined by the Constitution. An alteration by convention/amendment in the current context seeks to fix what is assumed to be broken or lacking in the federal system and is to be used in the rarest of circumstances. Nullification, as intended by the framers, was to be a part of "republican maintenance," whereby the central government was to be continually kept in check by its masters - the people through their states.

(We must note that **Nullification is NOT an amendment process.** It is a sovereign state carrying out what is ALREADY IN the Constitution and resisting that which is not. Therefore, a state **DOES NOT NEED TO WAIT for three-fourths of the states**, in order to do what the Constitution says or to refrain from submitting to what the Constitution does not authorize.)

Nullification

First, Nullification is a constitutional solution not because it is enumerated per se, but because the Constitution is a contract (technically a compact) among the States that created the federal government. The States are the parties to the Constitutional Contract and the federal government is the PRODUCT of that contract. Inherent in EVERY contract is the right of the parties to that contract to control the product of the contract. The States are the representatives of the people in this contract

and have a DUTY to keep the federal government within its constitutional boundaries and thus protect the rights of the people. Nullification is inherent in the very nature of the Constitution. Nullification is that act of the PEOPLE through their States to keep the federal government within in its “limited and defined” boundaries and should be as regularly carried out as an oil change in your car.

Madison states this principle again in Federalist 49:

“As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.”

Some Challenges in Nullification:

Fear of Nullification

The first problem with nullification is fear and lack of education. For some, nullification’s association (rightly or wrongly) with the Civil War and slavery (despite the fact that it was used to resist slavery) throws a veil of fear over the entire issue. So care must be taken not to add fuel to the fire of racial division because those who capitalize on such things will use it for their own design. Many mistruths and misconceptions regarding this Liberty solution must be overcome in order to even utilize this option. Retorts such as “the South lost the war,” “SCOTUS says no,” or “it’s the law of the land” are common among those ignorant of the concepts of State and local autonomy and nullification.

Even as nullification happens all around us today with, States legalizing marijuana and same sex marriage; states denying the federal government power to enforce the indefinite detention provisions of NDAA 2012 and Obamacare; local and state governments refusing to enforce federal gun restrictions, some will still say that nullification is an obscure and outdated concept. With more than 100 years of distorted history, overcoming fear and lack of education surrounding Nullification is no easy task.

Participation by the States:

Whereas Article V requires 3/4 of the States to ratify any amendment, Nullification can be achieved on a State by State basis. However, many staes that would at first glance be thought to be inclined to resist federal encroachment are often controlled by “federal supremacists,” those who believe that the federal government is superior to the states. Many state legislators do not understand the true nature of the states’ relationship to the federal government and they understand the states’ right and duty to interposition even less.

Federal Enforcement of Unconstitutional Acts

One more roadblock to nullification is the acquiescence to federal bullying and bribery. The dirty little secret is that the feds generally do not have the resources to enforce most of its dictates; it must co-opt state and local resources. This is done primarily through bullying and legalized bribery. The feds use state EPA, state DOE, state and local law enforcement elements to enforce its demands. In most cases the state and local entities comply. Without such compliance the federal dictates would be ineffective and in most cases unenforceable. The most obvious attempt at forced compliance will be through the withholding of federal funds. Any State who intends to maintain their supremacy over the federal government will have to be able to become self-sufficient in the face of federal funding withdrawal and brave leaders will have to be willing to call the bully's bluff. In an arena where it's all about the money and in a political system where politicians climb the ladder of power by giving and receiving favors this is also a significant obstacle.

Runaway Nullification

Sometimes opponents of nullification characterize the concept as "ignoring laws you don't like." The question at issue in nullification is not whether we like the law or not, the question is whether the law is constitutional or not. A possible danger is that states may wish to "nullify" inherent natural rights, such as those protected in the bill of rights from the abuse of the federal government. When such tyranny arises on the state level, the citizens must be ready to resist this tyranny as well, or else choose to live as slaves.

The REAL Solution lies with properly understanding BOTH processes!

What Article V conventions cannot do to stop tyranny right now nullification can accomplish with near immediate effect. Where Nullification ends, Article V provides a long term solution to strengthening the restraints on the federal government, if done by the right people for the right reasons in the right way. If we DO NOT engage in Nullification now, we will never survive as a republic long enough for the Article V Convention to have any hopes. If we just engage in Nullification and do not follow through with shoring up the established boundaries, I believe we will dissolve into individual sovereign States and the Republic will die and we lose the intended benefits of a strong union.
We will not succeed if we are so caught up in our own causes that we have to defeat everyone else's. That is egocentric and immature. Truth be told, we will not succeed without all the efforts of all the people working together in the defense of Liberty. We need nullification daily to maintain the Republic, yet if we continue to allow the foundation to erode, we may indeed need a convention to right the ship.

I have confidence that when all is said and done, our future will look back and say, "Coming up with a new and better form of government was nearly impossible. The original Constitution itself was not the problem; it was the ignorance of the people that lived under it."

Additional Reading:

1. Vermont Constitution of 1786, CH. 2, ART. 40
2. Records of the Federal Convention
3. Charles Pinckney, Observations on the Plan of Government, 1787
4. Edmund Randolph to Speaker of Virginia House of Delegates, 10 Oct. 1787
5. Federal Farmer, no. 4, 12 Oct. 1787
6. James Madison, Federalist, no. 43, 296, 23 Jan. 1788
7. Debate in Massachusetts Ratifying Convention, 30 Jan. 1788
8. James Madison, Federalist, no. 49, 338--43, 2 Feb. 1788
9. Debate in Virginia Ratifying Convention, 5--6 June 1788
10. Debate in North Carolina Ratifying Convention, 29 July 1788
11. St. George Tucker, Blackstone's Commentaries 1:App. 371--72, 1803