

PROPOSING
CONSTITUTIONAL AMENDMENTS
BY A CONVENTION OF THE STATES

Article

Vehicle. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose to the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, when ratified by the Legislatures of three fourths of the said States, or by Conventions in three fourths thereof, to be held by the Legislatures, or in the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment shall be proposed for more than eight years after the ratification thereof; and that no Amendment shall be proposed which shall not be in any Manner limited to the first and fourth Clauses in the Ninth Article, shall be deprived of its equal Suffrage in the Senate.

A
HANDBOOK

for STATE LAWMAKERS

BY ROBERT G. NATELSON

FOREWORD
BY SPEAKER LINDA UPMAYER

the same State with themselves. And they shall make a List of all the Persons voted for, and of the Numbers of Votes for each; which List they shall seal up, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President; if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President. No Person shall have a Majority, then from the five highest on the List, the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A Quorum for this Purpose shall consist of Two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, one shall be chosen from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been seven Years a Resident within the United States.

In Case of the Removal of the President from office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of his Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Declination of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly until the Office be renewed or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emoluments from the United States, or any of them.

Before he enters on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, on writing of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be called by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Admiralty, and in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and shall, at State of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall nominate Ambassadors and other public Ministers, he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section. 1. The judicial Powers of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Powers shall extend to all Cases of Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority— to all Cases affecting Ambassadors, other public Ministers and Consuls— to all Cases of admiralty and maritime Jurisdiction— to Controversies to which the United States shall be a Party— to Controversies between two or more States, between a State and Citizens of another State— between Citizens of different States— between Citizens of the same State claiming Lands under Grants of different States, or the Citizens thereof, and foreign Actors, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In All the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when no convenient Within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies giving them Aid and Comfort. No Person shall be convicted of treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of treason, but no Attacker of treason shall work Corruption of Blood, Treason, except during the life of the Person attacked.

Article IV.

Section. 1. Full Faith and Credit shall be given in every State to the public Acts, Records and judicial Proceedings of every other State.

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.



ABOUT THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

An Article V Handbook for State Lawmakers is published by the American Legislative Exchange Council, America's largest nonpartisan, voluntary membership organization of state legislators. Made up of nearly one-third of America's state elected officials, ALEC provides a unique opportunity for state lawmakers, business leaders and citizen organizations from around the country to share experiences and develop state-based, pro-growth models based on academic research, existing state policy and proven business practices.

The American Legislative Exchange Council is classified by the Internal Revenue Service as a 501(c)(3) nonprofit and public policy and educational organization. Individuals, philanthropic foundations, corporations, companies or associations are eligible to support ALEC's work through tax-deductible gifts.

ABOUT THE CENTER TO RESTORE THE BALANCE OF GOVERNMENT

Genuine accountability to hardworking taxpayers results when state and local legislators work with members of the community to determine a plan of action that is right for each individual state, city or town. Real solutions to America's challenges can be found in the states—America's fifty laboratories of democracy—not in one-size fits all federal government policies that disregard regional differences and local community needs. The Tenth Amendment to the U.S. Constitution encapsulates these ideas and serves as a Constitutional linchpin for federalism, one of the ALEC guiding principles.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

America has drifted away from our Founding Fathers' vision and has concentrated more power with national government structures. The amassing of power with the federal government has led to overregulation and redundant bureaucracy hindering economic growth and free markets; a ballooning national debt that threatens U.S. security; and federal mismanagement of this nation's most precious resource—the lands within America's borders. The solution to restoring the balance between the federal government and state and local governments is to return control over matters that appropriately and constitutionally rest with the states and municipalities back to them.

Chairman: Iowa Speaker of the House Linda Upmeyer
Center Vice President: Michael Bowman
Task Force Director: Karla Jones

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Phone: (703) 373-0933
Fax: (703) 373-0927
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Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers

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Nothing in this *Handbook* should be construed as legal advice; seek competent counsel in your own state.

To access current Article V model policy adopted by ALEC,
please visit alec.org/article-v.

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ABOUT THE AUTHOR



Professor Robert G. Natelson is one of America's best known constitutional scholars. His meticulous studies of the Constitution's history and meaning have been quoted repeatedly at the U.S. Supreme Court, both by parties and by justices.

He served as a law professor for 25 years at three different universities. Among other subjects, he taught Constitutional Law, Constitutional History, Advanced Constitutional Law and First Amendment. He became a recognized national expert on the framing and adoption of the United States Constitution and pioneered the use of source material previously overlooked. Professor Natelson has written for some of the most prestigious academic publishers, including Cambridge University Press and the *Harvard Journal of Law and Public Policy*. He is also the author of a book for the lay person: *The Original Constitution: What It Actually Said and Meant* (3d ed., 2014), an overview of the Constitution's meaning immediately after adoption of the Bill of Rights.

There are several keys to his success as a scholar. Unlike most constitutional writers, he has academic training not merely in law or in history, but in both, as well as in the Latin

classics that were the mainstay of founding-era education. He works to keep his historical investigations objective. Also critical have been lessons and habits learned in the "real world." Before his academic career began, he served as a journalist, practiced law for a decade, and ran two separate businesses. Later, he created and hosted Montana's first statewide commercial radio talk show and became the state's best known political activist—leading, among other campaigns—the most successful petition-referendum drive in Montana history. He also helped push through several important pieces of legislation. In June 2000, Professor Natelson was the runner-up among five candidates in the party primaries for Governor of Montana.

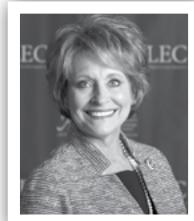
For recreation, he spends time in the great outdoors, where he particularly enjoys hiking and skiing with his wife and three daughters. He is also active in the Denver Lyric Opera Guild.

Professor Natelson currently serves as Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver, at the Montana Policy Institute in Bozeman and at the Heartland Institute in Chicago. He directs the Article V Information Center in Denver.

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

— James Madison, *The Federalist No.45*

FOREWORD



As the Chair of the American Legislative Exchange Council's Center to Restore the Balance of Government, I am proud to present to you the newest edition of the *Article V Handbook*. First published in 2011, the *Handbook* is an invaluable guide for state lawmakers who recognize that the states have the power and the duty to rein in a federal government that is unable and unwilling to reform itself. Much has been accomplished since this *Handbook* first appeared, and it has been wonderful to witness this progress. The idea of states serving as the catalyst to restore functionality to Washington continues to gain traction. Article V initiatives that got their start before the *Handbook*'s original release are closing in on the 34-state threshold to call an amendments convention, and new Article V initiatives have launched. However, there is a lot more work to be done, so the *Handbook*'s update could not have come at a better time!

Americans of all political persuasions can generally agree on one thing – dysfunction in Washington puts our nation's future at risk. A recent Gallup poll found that Congress's approval rating has plunged to 11 percent, which comes as no surprise to Americans living beyond the Beltway. National priorities around which lawmakers on both sides of the aisle once united are characterized by partisan bickering, and congressional legislative activity has dropped to record low levels as Members of Congress devote more time to fundraising than legislating. Meanwhile, America's problems grow. The national debt spirals upward on a course to bankrupt subsequent generations and even poses a national security threat. Leadership to reduce the debt must take place soon to prevent Social Security's insolvency in fewer than 20 years. And the debt is only one example of failed governance at the federal level.

The *Standard & Poor's* credit downgrade of the U.S. that occurred the year the *Article V Handbook* first appeared, resulted not just from America's fiscal crisis but from the rating firm's lack of confidence in, "the effectiveness, stability, and predictability of American policymaking and political institutions" to correct the problem. The United States' political landscape has become even more fractured since 2011 leading to the rise of "outsider" populist candidates on both sides of the political spectrum pledging to fix a broken Washington.

Fortunately, our Founding Fathers foresaw the possibility that Congress would be the problem rather than a source of solutions to the country's problems and included within Article V of the U.S. Constitution a method for states to propose constitutional amendments bypassing Congress. Americans realize that the nation is on the wrong path and that Congress lacks the political courage to address our challenges. Therefore, the time is right for the states to exert the constitutional authority provided to them by the Constitution's framers and to propose amendments that could set us on the right path again. For there is far more to fear from state inaction against a dysfunctional and overreaching federal government than there is to fear from states banding together to address some of America's most pressing problems. This *Handbook* can serve as your guide to correcting America's course.

Sincerely,

A handwritten signature in cursive script that reads "Linda Upmeyer".

Linda Upmeyer

Speaker of the Iowa House of Representatives
Chair, Center to Restore the Balance of Government
American Legislative Exchange Council

A CKNOWLEDGMENTS

The American Legislative Exchange Council wishes to acknowledge the following parties who also contributed to this Handbook:

We thank Iowa House Speaker Linda Upmeyer for her leadership at ALEC on federalism, including the establishment of the Center to Restore the Balance of Government. We also want to express our gratitude to Oklahoma Representative Gary Banz who has been a longstanding leader and educator on Article V in his state and at ALEC.

We thank Lisa B. Nelson, Michael Bowman, Karla Jones and the rest of ALEC staff who helped make this publication possible. The author would like to extend special recognition to Karla Jones of ALEC, for her tireless work in the cause of federalism.

E XECUTIVE SUMMARY

The American people are deeply dissatisfied with the federal government, and towering majorities favor fundamental reform. For example, polls by CNN, Fox News and Mason-Dixon show that nearly three-fourths of Americans favor a balanced budget amendment to the U.S. Constitution. Similar majorities favor amendments imposing term limits and other restraints.

Experience demonstrates that constitutional amendments can be a powerful and long lasting cure for political problems. Many people have tried to induce Congress to formally propose such amendments to the states for ratification. However, Congress—under control of both major parties—has consistently refused to approve limits on federal power. Fortunately, the Founders, anticipating just such a situation, provided a way to bypass Congress: Under Article V of the Constitution, the state legislatures may require a “Convention for proposing Amendments,” which in turn may propose needed amendments for ratification. Thus, the Founders gave the state legislatures a way to meet the nation’s challenges when the federal government fails to do so.

This *Handbook*, written by constitutional scholar Robert G. Natelson, provides state legislators with the tools to use the Article V convention process legally, effectively and safely.

In the first section of the book, Professor Natelson explains the fundamentals of the procedure by which state legislatures apply for a convention. He explains what the convention is: a diplomatic meeting of representatives from the state legislatures, subordinate to the Constitution, with

the sole power of *proposing* one or more amendments on subjects defined by the state legislatures. He explains that it is *not* a “constitutional convention.”

Professor Natelson tells us what a convention would look like today. He draws on the Founders’ understandings, two centuries of amendment practice, extensive judicial case law and the universal practices of the many previous “conventions of the states.”

He then takes us through the process step-by-step, from application to ratification. Readers will learn how best to prepare applications in their states.

Next, Professor Natelson addresses “runaway convention” fears. Those fears were first propagated widely during the 1970s by left-of-center spokesmen to insulate the federal government from restraint. Later, some conservatives bought into them. Professor Natelson explains in detail why those fears are baseless no matter which side resorts to them.

Finally, Professor Natelson provides practical recommendations for state legislatures that choose to apply for a convention. He encourages lawmakers to promote the right amendments, use the right amount of specificity and keep the process within state legislative control.

We hope that you will find this *Handbook* informative and useful as you embark on a mission to reclaim the American republic.

Article V



INTRODUCTION

Through Article V of the U.S. Constitution, our Founders opened a pathway for the American people, acting through their state legislatures, to bypass Congress and promote constitutional amendments. This is the Article V convention process. Recent debate over proposals to reform the federal government has provoked renewed interest in that process.

INTRODUCTION

This *Handbook* is written for state lawmakers, support staff and other interested Americans. Its goal is to help us employ the Article V convention process as the Founders intended: legally, effectively and safely. This *Handbook* offers well-researched, accurate and objective information, and it corrects common errors. Among those errors is the persistent mischaracterization of the gathering the Constitution calls the “Convention for proposing Amendments.”

Many Americans believe that the federal government has become dysfunctional. Besides amassing a huge debt, federal officeholders have disregarded individual liberty, limits on their own power and the constitutional role of the states. State lawmakers, on the other hand, increasingly appreciate that federalism works only if the states respond effectively when the central government exceeds or abuses its powers. They increasingly understand that the Founders gave us Article V as a crucial tool for state response.

The first edition of this *Handbook* was published in 2011. The time since has witnessed intense Article V activity. Several campaigns have arisen. State legislatures have approved a multitude of applications. The American people are now debating amendments to balance the federal budget and impose other fiscal restraints on the federal government; amendments imposing term limits on Congress, judges and other federal officials; an amendment to establish a “single subject” rule for Congress; and amendments to reverse overreaching court decisions.

Most Americans favor some or all of these changes. But why should we resort to the Article V convention process to adopt them? Won’t other methods work?

Part of the answer is that experience shows that reform requires more than electing the right people. It requires strengthening the basic rules. The Founders themselves understood this, which is one reason they created the amendment procedure. They saw amendments as more



This *Handbook*:

- Offers reliable information about the Article V convention process, based on thorough and objective scholarship;
- Corrects misinformation; and
- Makes it easier for state lawmakers to use the process legally and effectively.

than a way to keep the Constitution up to date. They also saw amendments as a way to resolve constitutional disputes and correct excesses and abuses. As history illustrates, Americans have adopted amendments for all of those reasons, and with very good results.¹

All amendments must be ratified by three-fourths (now 38 of 50) of the states. But before they can be ratified, they must be formally *proposed*. Because the Founders recognized that excesses and abuses could come from either the states or the federal government, they opened two alternative paths for proposal:

- A resolution adopted by two-thirds of both houses of Congress, and

- A resolution adopted by an assembly consisting of representatives from the state legislatures, and formally called a *Convention for proposing Amendments*. (Other acceptable names are *amendments convention*, *convention of the states* and *Article V convention*.)

The first proposal method has been used several times to correct state abuses. For example, Congress proposed the 14th, 15th, and 24th Amendments to restrain state oppression of minorities.² However, the state legislatures have never exercised their corresponding power to correct *federal* abuses. This is one reason the structure of American federalism has become so unbalanced.

To correct this imbalance, the American Legislative Exchange Council has recommended constitutional amendments to limit some of the worst abuses of federal power.³ But Congress has refused to propose these or any other decent reforms. In fact, aside from repeal of Prohibition, since

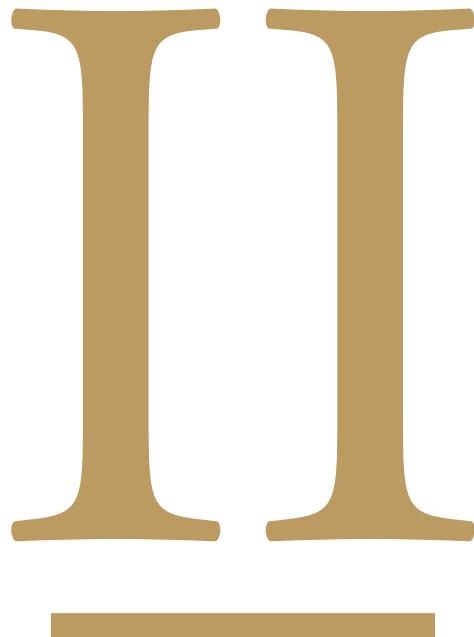
1789 Congress has *never* proposed an amendment curbing its own power. That is the other part of the answer: If Congress proves recalcitrant, the American people, acting through their state legislatures, must do the job—just as our Founders expected them to do.

Urged on by the American people, state lawmakers have initiated the Article V convention process many times, but have never carried it to completion. One reason has been misinformation spread about the process by opponents, academics and other writers who failed to do their homework.

The information and recommendations in this *Handbook* are based on more reliable sources. (See Appendix D). Taken together, they re-open the pathway the Founders blazed for us.



Article V



THE ARTICLE V CONVENTION PROCESS: THE BACKGROUND

Article V further empowers the convention to formally propose, and grants conditional ratification authority to, state legislatures and state conventions. When an assembly acts under Article V, the courts say that it exercises a “federal function.” However, it does not do so as a part of the federal government.

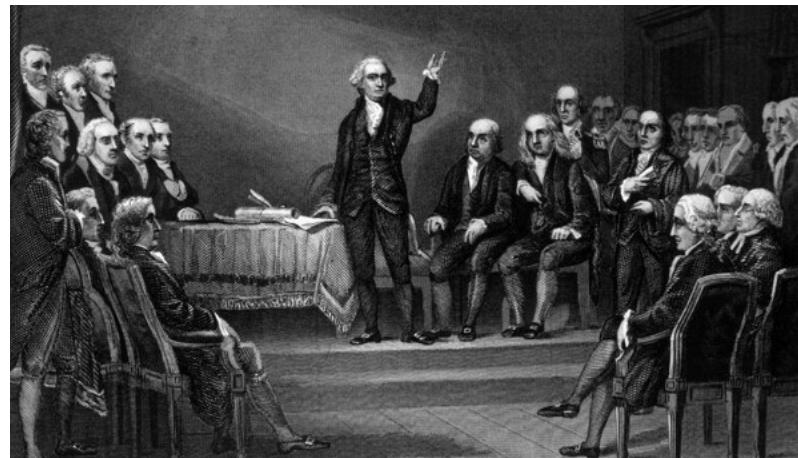
THE ARTICLE V CONVENTION PROCESS: THE BACKGROUND

The 55 Framers who met in Philadelphia during the spring and summer of 1787 understood that they were drafting a Constitution to last a very long time. “We are not forming plans for a Day Month Year or Age,” delegate John Dickinson wrote, “but for Eternity.”

Of course, a document designed to last a very long time must include a method of amendment. In crafting their amendment procedures, the Framers resorted to two mechanisms widely employed at the time: legislatures and conventions.

During the founding era, a “convention” was usually an *ad hoc* assembly designed to pinch-hit for a legislature. Today when we think of a convention we tend to think of a constitutional or political convention, but during the founding era most conventions served entirely different purposes. *Ratifying* conventions were called to approve or reject policy or legal recommendations. The Constitution authorizes ratifying conventions to approve or reject the Constitution itself and to approve or reject amendments. *Proposal* conventions were task forces designed to work out the initial recommendations. The Constitution authorizes one kind of proposal convention: the “Convention for proposing Amendments.”

The Constitution does not explain the role, composition or procedures for a convention for proposing amendments. This was not because the matter was unclear. It was because it was too clear to need explanation. Everyone knew that a convention for proposing amendments was a convention of the states. (The Supreme Court confirmed this understanding in *Smith v. Union Bank*, decided in 1831.) Everyone knew exactly what that meant, because over the previous century there had been at least thirty conventions among states or (before Independence) among colonies.⁴ States met in convention an average of every three to four years.



A convention of the states was (and is) an assembly based on international diplomatic practice. It is composed of state delegations (“committees”) of “commissioners” responsible to their respective state legislatures and selected, chosen and instructed as their state legislatures determine. As in other diplomatic meetings among multiple sovereignties, the convention is bound to a pre-set agenda. Because sovereigns are formally equal, it decides issues on the basis of one state/one vote. It is assigned one or more problems and asked to produce recommendations—much like a modern task force. The convention adopts its rules, deliberates about solutions and considers whether and what to recommend.

The pre-set agenda is fixed by the participating state legislatures. The agenda for most conventions of states has been fairly narrow. In fact, the agenda for the 1781 interstate convention held in Providence, Rhode Island was limited to military supplies for a single year. Most of the Founders expected the agenda for amendments conventions to be somewhat narrow as well. As James Madison made clear, it was not to have “plenipotentiary” (very wide) powers. This is one reason it is incorrect to refer to a convention for proposing amendments as a “constitutional convention.” They are very different creatures.⁵

To obtain a convention for proposing amendments, Article V of the Constitution lays out two steps: (1) state legislative application and (2) congressional call. Once a sufficient number of state legislatures have applied, the call is mandatory; Congress has no choice.

This procedure was based on several precedents. For example, Article 63 of the 1777 Georgia Constitution granted to a majority of the state's counties the power to petition for an amendment. Once a majority had so petitioned, "the assembly [legislature] shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid." Thus, the Georgia Constitution enabled the counties to designate what kind of amendment they wanted, ordered the legislature to call the convention and empowered that convention to write the specific language.

The Framers adapted the Georgia procedure to federal purposes. Instead of a majority of counties petitioning the state legislature, two-thirds of state legislatures (now 34 of 50) would make "Application" to Congress. Notice that the Framers changed "petition" to "Application." We are not certain why. However, during the founding era, to "apply" to a person was merely to address that person, while to "petition" could suggest a request from an inferior to a superior. The Founders may have used "Application" instead of "petition" to avoid implying that in this process the state legislatures were inferior to Congress, or that Congress could ignore their demand. Hence the Article V language:

The Congress . . . on the Application of the Legislatures of two thirds of the several States, *shall call* a Convention for proposing Amendments . . .⁶

After the new Constitution was ratified, the new federal government rendered it unnecessary for states to meet in convention quite so often. Nevertheless, states did meet several times. The New England states gathered in Hartford, Connecticut in 1814 to discuss a response to the then-current war with Great Britain. Most of the Southern states met in convention in Nashville, Tennessee in 1850 and again in Montgomery, Alabama in 1861. A general (national) convention of the states gathered in Washington, D.C., also in 1861. Seven Western states convened in 1922

to negotiate the Colorado River Compact. Most of the 1922 sessions were held in Santa Fe, New Mexico.

All of these gatherings followed the same basic protocols used by conventions before and during the founding era. The Washington Convention of 1861 is a particularly useful precedent because it was a national conclave that, in all respects but constitutional authority, was identical to a



In summary, please note:

- Just as other parts of the Constitution grant Congress certain listed ("enumerated") powers, Article V also grants enumerated powers. Article V grants them to *named assemblies (conventions and legislatures)* and not to states or the federal government as a whole.⁷ The executive branch of federal and state governments does not have any role in the amendment process.
- Proposing amendments through a convention, as in Congress, is still only a method of *proposing* amendments. No amendment is effective unless ratified by three-fourths of the states (now 38 of 50).
- To be duly *ratified*, an amendment first must be duly *proposed* by Congress or by an interstate convention called at the behest of two-thirds (now 34) of the state legislatures.
- A convention for proposing amendments has precisely the same power that Congress has to propose amendments. Its power to propose is limited by the subject matter specified in state applications—but by no other authority whatsoever. The convention is a deliberative body whose members answer to the state legislatures they represent.
- The convention for proposing amendments is basically a drafting committee or task force, convened to reduce one or more general ideas to specific language.

“Convention for proposing Amendments.” Under very difficult circumstances, the Washington Convention succeeded in recommending an amendment that, if adopted, might have prevented the Civil War.

Only in recent times have people become confused about the nature and protocols of interstate conventions. Until the mid-twentieth century, no one would have claimed, as so many uninformed writers have, that the 1787 constitutional convention is our “only precedent,” or that the states cannot limit their convention to a preset agenda.

In addition to the lessons of history, we have nearly 50 reported court cases interpreting the Constitution’s Article V amendment procedure. The courts tell us that Article V grants specific roles to Congress, state legislatures, state conventions and to the convention to propose amendments. Article V gives Congress authority to propose amendments and to choose among two modes of ratification. It also commands Congress to call a convention for proposing amendments when two-thirds of the state legislatures tell it to. Article V thus empowers state legislatures to force Congress to call an amendments convention.

Article V further empowers the convention to formally propose, and grants conditional ratification authority to, state legislatures and state conventions. When an assembly acts under Article V, the courts say that it exercises a “federal function.” However, it does not do so as a part of the federal government.

In fact, the cases affirm that when Article V grants authority to Congress or to a state legislature, it does not grant that authority to the federal government or to the states as such.⁸ Article V instead empowers specific assemblies—legislatures and conventions—as freestanding entities.⁹ Thus, when Congress proposes amendments and selects a mode of ratification it acts as a freestanding body, not as a branch of the federal government. Similarly, when a convention or state legislature acts under Article V, it does so as an independent assembly, not as a branch of any government. For that reason, Article V resolutions are not subject to the veto of the president or of any governor, and no Article V power may be transferred to another body, including the people acting through the initiative and referendum process.¹⁰

In a convention of the states, the “commissioners” (delegates) represent the state legislatures. The state legislatures instruct them and specify the majority of the state’s delegation necessary to cast that state’s vote at the convention. In an Article V convention of the states, the legislatures and the commissioners are subject to the Constitution, but their procedures or conclusions may not be dictated by pre-existing federal or state laws.

WHY NOT JUST LEAVE AMENDMENTS TO THE DISCRETION OF CONGRESS ALONE?

The records of the Constitutional Convention show that the delegates initially considered a plan under which *only* an interstate convention drafted and ratified amendments. On the suggestion of Alexander Hamilton of New York, the Framers altered the scheme so that Congress became the sole drafter and the states became ratifiers. Hamilton argued that Congress should have the power to propose because its daily activity would suggest needed changes.

However, George Mason of Virginia observed that Congress might become oppressive and refuse to propose corrective amendments—particularly amendments limiting its own power. So by a unanimous vote of the states, the delegates added an amendments convention to allow the states to bypass Congress. The final wording of Article V is mostly the work of James Madison.



In summary, please note:

- The principal reason for the Article V convention process is to enable the states to check an oppressive or runaway federal government—although the Constitution does not actually limit the process to that purpose.
- The Framers explicitly designed the process to enable the states to substantially *bypass* Congress.

Article V



JUDICIAL REVIEW

The courts, including the U.S. Supreme Court, generally have interpreted the language and procedures of Article V to accord with historical practice. That means that even if an issue has not yet been litigated, the lengthy history of interstate conventions may tell us how the judiciary will resolve it.

JUDICIAL REVIEW

Despite some language to the contrary from an old Supreme Court decision,¹¹ it is now clear that *the courts can and will resolve Article V disputes*. There are, in fact, nearly 50 reported Article V cases from state and federal tribunals, including several decided by the Supreme Court. Possible judicial issues in the Article V convention process include whether a legislative resolution qualifies as an “application,” whether the number of applications on a particular topic is sufficient to require Congress to call a convention and whether a convention resolution is a valid “proposal” that can be ratified.

For state lawmakers, the bad news in judicial review is that groups opposed to amendments may sue to block them. The good news outweighs that, because it is preferable that the courts, rather than Congress, define and enforce

the amendment procedure. If Congress refuses to carry out the duties mandated by Article V, the courts can order Congress to do so. In addition, judicial review should protect the constitutional role of the state legislatures. Recall that the central purpose of the Article V convention process is to enable state legislatures to bypass Congress in proposing amendments. Courts routinely construe legal provisions to further their central purposes.

A further piece of good news associated with judicial review is this: The courts, including the U.S. Supreme Court, generally have interpreted the language and procedures of Article V to accord with historical practice. That means that even if an issue has not yet been litigated, the lengthy history of interstate conventions may tell us how the judiciary will resolve it.



Article V



THE ARTICLE V CONVENTION PROCESS: STEP-BY-STEP

- A. Making an application
- B. How long does an application last?
- C. The applications in Congress and the “call”
- D. Selection of commissioners
- E. The Convention
- F. Ratification

THE ARTICLE V CONVENTION PROCESS: STEP-BY-STEP

A.

MAKING AN APPLICATION

What is an application? A state legislature seeking an amendments convention adopts a resolution called an “application.” The application should be addressed to Congress. It should assert specifically and unequivocally that it is an application for a convention pursuant to Article V. The resolution should not merely request that Congress propose a particular amendment. It should not merely request that Congress call a convention.

An example of effective language is as follows:

The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states . . .

Who may apply? The Constitution grants the right to apply exclusively to the state *legislatures*. Applications need not be signed by the governor, and may not be vetoed, anything in the state constitution or laws notwithstanding. Moreover, applying cannot be delegated to the people via initiative or referendum, anything in the state constitution or laws notwithstanding. However, the signature of the governor does not invalidate an application, nor does an initiative or referendum that is purely *advisory* in nature.

The scope of the convention sought. A legislature may apply for an open or unlimited amendments convention—that is, not limited as to subject matter. Such an application might read:

The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a

convention of the states for proposing amendments to the Constitution.

Few people, however, want an open convention or a convention for the sake of a convention. Generally, the goal is to advance amendments of a distinct type, with the convention limited to that purpose. An application for a limited convention might read:

The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing an amendment to the Constitution of the United States requiring [*here state general nature of the amendment*].¹²

Although applications may limit a convention to one or more subjects, the existing case law *strongly* suggests that an application may not attempt to dictate particular wording or rules to the convention nor attempt to coerce Congress or other state legislatures. The courts have ruled repeatedly that assemblies acting under Article V (Congress, state legislatures and conventions) are entitled to some deliberative freedom. An application may suggest particular language or rules for the convention, but to avoid both confusion and potential claims that the application does not aggregate with others, it is better practice to place suggestions only in separate, accompanying resolutions.

Some applications, while not attempting to impose specific language on the convention, attempt to dictate the details of the amendment’s terms. The more detail the application mandates, the more likely a court will void it as attempting to restrict unduly the convention’s deliberative freedom. Additionally, the more terms an application specifies, the less likely it will match the terms of other applications, resulting in congressional or judicial refusal to aggregate them together toward the two-thirds threshold.

Thus, a pair of complementary rules governs legislatures applying under Article V: (1) Legislatures may limit the subject matter of the convention but (2) they may not dictate particular wording. These boundaries make sense if you think of the convention's mission: It is a committee or task force charged with recommending solutions to designated problems. In business or government, when you charge a task force you inform its members of the problems you want them to address. You do not tell them to investigate anything they wish. And unless the task force is a sham, you do not dictate their recommendation in advance. Nor do you tell them, "Here's what we want, decide only 'yes' or 'no.'" To serve its purpose the task force has to be given specific problems to address and be free to consider different solutions.



In summary, please note:

- An "application" is a state legislative resolution directing Congress to call a convention for proposing one or more amendments.
- Applications may limit the scope of the convention to particular subject matter.
- Applications may recommend, but not dictate, particular wording to the convention.
- Applications setting forth detailed terms for the amendment are inadvisable both on legal and practical grounds.
- Recommendations are best stated in accompanying resolutions.

B.

HOW LONG DOES AN APPLICATION LAST?

Although some have argued that older applications grow "stale" after an unspecified time and lose their validity, an application probably lasts until it is duly rescinded. The power to rescind continues until the two-thirds threshold is reached, or perhaps shortly thereafter.¹³

An application probably may provide that it is automatically terminated as of a particular date or on the occurrence of a specific event—as long as the terminating condition is not an effort to coerce Congress, other states or the convention. Thus, a provision is most likely valid if it says, "This application, if not earlier rescinded, shall terminate on December 31, 2019." Also valid would be this language: "This application, if not earlier rescinded, shall be null and void if Congress shall propose an amendment to the U.S. Constitution limiting the scope and jurisdiction of the federal government." On the other hand, courts may deem some kinds of automatic terminations to represent efforts to coerce the convention, and therefore void. A clear example would be a provision automatically terminating the application unless the convention followed specified rules or adopted an amendment in specified language.

C.

THE APPLICATIONS IN CONGRESS AND THE "CALL"

"Aggregation" of applications. When 34 state legislatures have submitted applications on the same subject, the Constitution *requires* Congress to call a convention for proposing amendments. Both the historical and legal background of Article V and modern commentary clarify that the congressional role at this point is merely "ministerial" rather than "discretionary." In other words, the Constitution assigns Congress a routine duty it must perform. Note that the congressional receipt of 34 applications is not sufficient; those applications must relate to the same subject matter.

In past years, some members of Congress have floated excuses for refusing to call a convention under any circumstances.¹⁴ Congress may refuse to "aggregate" toward the two-thirds threshold any applications that try to dictate to the convention different ways of solving the same problem. If 17 states have applied for a convention to consider term limits generally and another 17 have applied for a convention limited to considering term limits for no more than 12 years, Congress may refuse to treat both groups as addressing the same subject. The more differences exhibited by the applications, the more justification Congress has in refusing to aggregate them.

One way to forestall this behavior is to specify in the application that it be aggregated with certain other state applications. For example, an application may include the following language:

This application is to be considered as covering the same subject matter as any other application for congressional term limits, irrespective of the terms of those applications, and shall be aggregated with them for the purpose of reaching the two thirds of states necessary to require the calling of a convention.

An alternative might be to name applications already submitted by other states:

This application is to be considered as covering the same subject matter as presently-outstanding balanced budget applications from Nebraska, Kansas and Arkansas, and shall be aggregated with them for the purpose of reaching the two-thirds of states necessary to require the calling of a convention.

This process is for the states, not Congress. In the past, well-meaning members of Congress have introduced bills to resolve issues properly within the discretion of the state legislatures or the convention. These bills would have dictated how delegates are selected, how many each state may choose and the convention's voting and procedural rules.

Several factors render that kind of legislation unconstitutional. First, congressional efforts to control the convention would handicap its fundamental purpose as a way for the state *legislatures* to amend the Constitution without congressional interference. Second, the historical record shows that such prescriptions exceed the scope of authority incidental to the constitutional power to "call."¹⁵ That authority encompasses power to count and categorize the applications by subject matter, announce the subjects on which the two-thirds threshold has been reached and set the time and place of the gathering. It does not empower Congress to control the convention further.

D.

SELECTION OF COMMISSIONERS

The Founders modeled the convention of states on international diplomatic practice. As in diplomatic meetings, each sovereignty decides how to select its own commissioners and how many to send. Of course, the size of the delegation does not alter a sovereignty's equal vote. The records of the founding-era interstate conventions tell us that states selected commissioners in several ways:

- 1) Election by one house of the state legislature, subject to concurrence by the other;
- 2) Election by joint session of both houses of the state legislature;
- 3) Designation by the executive, pursuant to legislative authorization and
- 4) Selection by a legislatively-designated committee.

The 1861 Washington Convention served as a "dry run" for an amendments convention. Although some state legislatures selected their own commissioners for that gathering, because of the very limited time available (the convention was called hastily to try to stave off the Civil War), some authorized the executive to appoint commissioners, with or without approval by the state senate. In states in which the legislature was not in session, the governor made the appointment.¹⁶ Without legislative authorization, gubernatorial appointment is probably not permissible under Article V.

Election by legislative joint ballot has several advantages. First, it makes sense for the legislature to select commissioners, because they serve as legislative agents subject to legislative instruction and removal. Second, joint ballot elections are less prone to deadlock than election by each chamber *seriatim*. Third, because the basic policy questions are defined largely by the applications and legislative instructions, a commissioner's principal roles are to persuade, negotiate and draft. These roles call for diplomatic skills and technical ability. State lawmakers will know which individuals possess those abilities.

Each commissioner is empowered to act by a document called a "commission," issued in such manner as the state legislature directs.

E. THE CONVENTION

All states, not merely the applying states, are entitled to send committees to a convention for proposing amendments. The convention is, as James Madison once asserted, “subject to the forms of the Constitution.” In other words, it is not “plenary” (or “constitutional”) in nature. Accordingly, a convention for proposing amendments has no authority to violate Article V or any other part of the Constitution. Article V prescribes that the convention may not propose a change in the rule that each state has “equal Suffrage in the Senate.”¹⁷ Nor may the convention alter the ratification procedure, as some alarmists have suggested.¹⁸

Prior rules and practice governing interstate conventions tell us that conventions must limit themselves to the scope of the subject matter they are charged with addressing. In the case of an Article V proposal convention, the scope of the subject matter is set by the limits in the applications. Congress should reflect that scope in its call, but the convention is so limited whether or not Congress does so.

American conventions generally may elect their own officers and adopt their own rules. This has been universally true of conventions of the states. These rules govern the standards of debate, daily times of convening and adjourning, whether the proceedings are open or secret and other procedural matters. A convention generally will specify a source of “default rules” that govern questions outside adopted rules. Possible sources of default rules are *Mason’s Manual of Legislative Procedure*, *Robert’s Rules of Order* and *Thomas Jefferson’s Manual of Parliamentary Practice*. Additional questions are governed by the parliamentary common law, a body of rules long embedded in American jurisprudence.¹⁹ The American Legislative Exchange Council (ALEC) has adopted a Model Policy that offers principles to underlie convention rules.²⁰ Your author has written a more complete set of rules,²¹ which he prepared for the “Convention of States” project of Citizens for Self-Governance—a project supported by ALEC.²² A few aspects of those rules are tailored for the “Convention of States” application, but most are usable for a convention on any subject.

Interstate conventions always have determined substantive issues according to “one state/one vote.” Although in theory a convention could, by a one state/one vote roll call, alter the rule of suffrage, none has ever done so. The convention may limit how many commissioners from each state can occupy the floor at a time.

Like other diplomatic personnel, convention commissioners are subject to instruction from home—in this case from the legislature or the legislature’s designee.²³ The designee could be a committee, the executive, or another person or body. Although state applications cannot require exact wording for an amendment, a state may instruct its commissioners to refuse to agree to any amendment that does not include certain language. In accordance with traditional practice and the convention’s purpose, each state should pay its own commissioners.

The convention may opt to propose one or more amendments within the designated subject matter or it may adjourn without proposing anything. Unless altered by convention rule, proposal requires only a majority vote. Some have argued that a formal proposal requires a two-thirds convention vote—or that Congress may impose such a rule—but there is nothing in law or history to support this argument. On the contrary, adding supermajority votes in addition to those required by Article V improperly clogs the process and upsets the constitutional balance.²⁴

The Constitution does not require that a proposal be transmitted to Congress or to any other particular entity; the proposal is complete when the convention says it is. Because Congress must choose a mode of ratification, however, the convention should officially transmit the proposal to Congress.

Once the commissioners decide definitively what amendments to propose—or when it becomes clear that the convention will propose none at all—the purpose of the convention is served. It must adjourn.



In summary, please note:

- Each state sends a committee of commissioners to the convention, chosen by the state legislature or as the state legislature directs.
- The convention elects its own officers and sets its own rules. To the extent the rules do not answer the question, it is answered by the convention's designated source of default rules or by parliamentary common law.
- Initial suffrage is one state/one vote with decisions made by a majority of states, but the convention theoretically could change both rules by a simple majority of states voting.
- The convention must follow the rules of the Constitution, including those in Article V. The convention cannot change the ratification procedure.
- The commissioners must remain within the charge as set by the applications and (derivatively) by the congressional call.
- Within the charge and during the convention, each committee is subject to instruction from its home state legislature or the legislature's designee and is subject to recall as well.
- Within the charge, the commissioners may propose one or more amendments, or may propose none at all. Once that decision is made, the convention must adjourn.

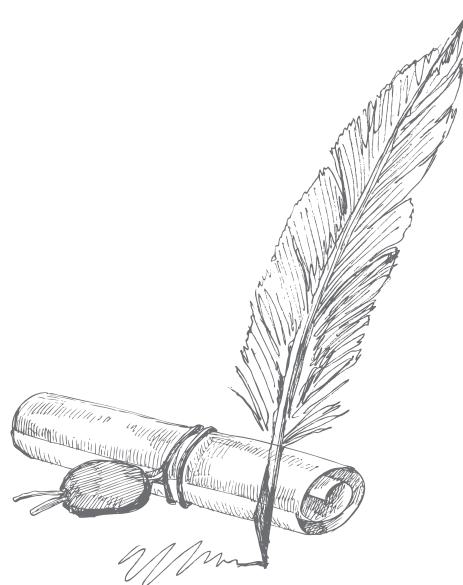
F.

RATIFICATION

Ratification of convention-proposed amendments is the same as that for congressionally-proposed amendments.

If the convention validly proposes one or more amendments, Article V *requires* Congress to select one of two “Mode(s) of Ratification” for each. Congress may decide that the amendments be submitted to state conventions elected for that purpose (the mode selected for the 21st Amendment, repealing Prohibition) or to the state legislatures (selected for all other amendments). The obligation of Congress to select between the two modes should be enforceable judicially. However, Congress has unfettered discretion to choose between them. Neither the applying state legislatures nor the convention may dictate which method Congress selects.

The congressional duty to choose a mode does not arise until there is a valid “proposal.” A proposal would not be valid if, for example, it exceeded the scope of the subject matter defined by the applications or if it altered equal suffrage in the Senate or the Constitution’s rules of ratification. Congress would be under no obligation to select a mode for such a “proposal.” Nor would it have the legal right to do so.



Article V



THE MYTH OF A RUNAWAY CONVENTION

The runaway convention scenario was conjured up in the early 20th century to dissuade state lawmakers from using the Article V convention process to bypass Congress. The scenario became famous during the 1970s, when liberal activists, legislators and academics used it to defeat application campaigns for a balanced budget amendment and for amendments reversing activist Supreme Court decisions. In one of the ironies of history, some deeply conservative groups now promote the scenario as well.

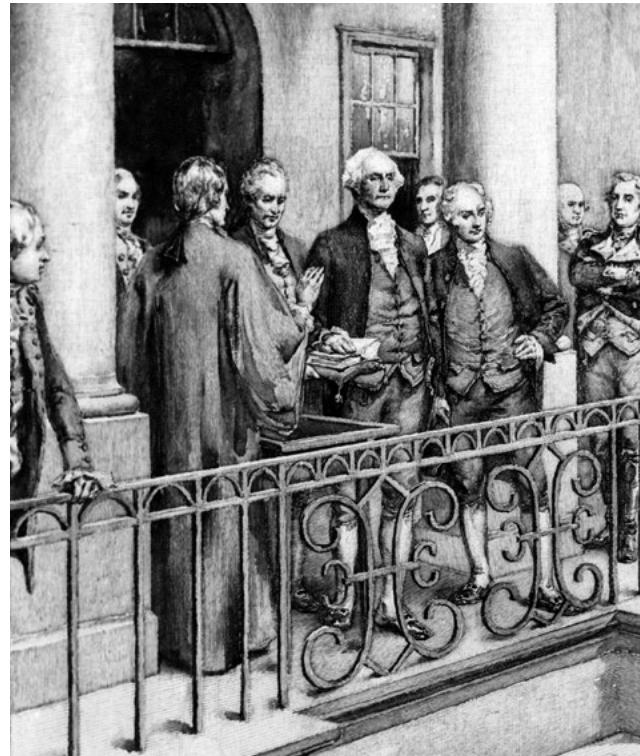
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In the runaway convention scenario, state legislatures attempt to limit the convention through their applications, but once the convention meets the commissioners disregard the applications and their subsequent instructions. Heedless of their reputations, their political futures and all ties of honor, the commissioners propose amendments that are *ultra vires*—that is, beyond their legal authority. These amendments may reinstate slavery, abolish all or parts of the Bill of Rights or otherwise fundamentally alter the American form of government. Even though those proposals are outside the convention’s scope, a compliant Congress nevertheless chooses a mode of ratification and sends the proposals to the states. Three-fourths of the states proceed to ratify amendments they did not authorize and do not want. No one challenges any of this in court, or if they do, the courts refuse to intervene.

Believe it or not, that is the more *moderate* version of the runaway scenario. In the more extreme versions peddled by some lobbying groups, the convention alters the method of ratifying to prevent the states from blocking its proposals. While the Congress, the president, the courts and the military all inexplicably sit by and permit this *coup d'état* to unfold, the convention imposes a new, more authoritarian, government on America.

Both versions of the runaway convention scenario reveal slender regard for political reality. At the very least, commissioners who betray their trust would suffer severe loss



of reputation and probably compromise their political futures. This may explain why, in the long history of the hundreds of American state and interstate conventions, only an odd handful of delegates actually have suggested “going rogue.” Even Congress—which, unlike a convention, may propose amendments at any time—has refrained from offering amendments of the kind envisioned by the runaway scenario.

Alarmists do not dispute this, but argue that the 1787 Constitutional Convention disregarded its instructions. This charge, however, is substantially false. (See endnote 35.) Alarmists also evoke memories of “stampedes” at national party conventions. However, a convention of states shares nothing with a national party convention but the name “convention.” A national party convention consists of a mob of thousands of, mostly unsophisticated, delegates. The commissioners at a convention of states will consist of

perhaps 250 state legislative nominees instructed and selected for their political skills.²⁷

In addition to the constraints of practical politics, there are redundant *legal* protections against *ultra vires* proposals:

- 1) Because convention commissioners are subject to state legislative instruction and recall, legislatures can remove any who attempt to exceed their power.
- 2) If, nevertheless, legislatures fail to do this AND the convention purports to adopt an *ultra vires* amendment, it would not be a constitutionally valid “proposal.” Hence Congress would not be obligated to select a mode of ratification—and, indeed, would have no right to do so. (Recall that Congress is an institutional rival of the convention and has no motive to encourage it.)
- 3) If state legislatures fail to stop commissioners from acting beyond their powers, AND if the convention reports an *ultra vires* amendment, AND if Congress nevertheless selects a mode of ratification, the courts could declare Congress’s decision void. (Recall that the courts actively adjudicate Article V issues.)
- 4) If the state legislatures do not stop their commissioners from acting beyond their powers, AND if the convention reports an *ultra vires* amendment, AND if Congress still selects a mode of ratification AND if the courts fail to declare Congress’s decision void, then the states could refuse to ratify it. Of course, refusal to ratify by only 13 states (or perhaps by only 13 legislative chambers) kills the proposal.
- 5) In the unlikely event that the states insist on ratifying a proposal (i) for which they did not apply, and (ii) made contrary to their instructions, the courts—or, indeed, any government agency—could treat the “amendment” as void.

In sum: Those who promote the runaway scenario are either uninformed of Article V law and convention history or are preying on those who are. In the real world, there are far more political and legal constraints on a runaway convention than on the runaway Congress.



Article V



PRACTICAL RECOMMENDATIONS FOR THE ARTICLE V CONVENTION PROCESS

The constitutional amendment procedure can be messy. Indeed, people occasionally argue that one or more existing amendments never were approved properly. Nonetheless, lawmakers employing the Article V convention process must try to follow the rules as closely as possible. There are too many politicians, lobbying groups and judges willing to seize on technical mistakes to block amendments they do not favor.

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The constitutional amendment procedure can be messy. Indeed, people occasionally argue that one or more existing amendments never were approved properly. Nonetheless, lawmakers employing the Article V convention process must try to follow the rules as closely as possible. There are too many politicians, lobbying groups and judges willing to seize on technical mistakes to block amendments they do not favor.

Here are some practical rules to follow:

• PROMOTE THE RIGHT AMENDMENTS

Most people have one or more causes dear to their hearts that they would love to see written into the Constitution. But the Article V convention process is no place for unpopular, ineffective or idiosyncratic causes. Each potential amendment should comply with at least four criteria:

- 1) Like most amendments already adopted, it should move America toward more compliance with Founding principles.
- 2) It should promise substantial, rather than merely symbolic or marginal, effect on public policy.
- 3) It should be widely popular.
- 4) It should be a subject that most state lawmakers, of any political party, can understand and appreciate.

The most successful application campaign ever—for direct election of U.S. Senators—met all of these criteria. The cause was widely popular and well understood by state lawmakers because, year after year, legislative election of Senators had fostered legislative deadlocks, corruption, and submersion of state elections by federal issues. Direct election advocates represented the campaign as necessary

to restore Founding principles and predicted substantial improvement in the quality of government.

As of this writing, all four criteria probably are met by a balanced budget amendment and a proposal to term-limit federal judges. An amendment to return Senate elections to the state legislatures, whatever its theoretical merits, probably does not meet the popularity criterion.

• DON'T WORK ALONE

Some of America's most successful reform campaigns were based on close cooperation among states. For example, the American Revolution was coordinated first through interstate "committees of correspondence." In the application campaign for direct election of U.S. Senators the legislatures of a few states coordinated the national effort by erecting standing legislative committees that prepared common forms and assisted the common effort.

Future application campaigns will succeed only if state legislatures work together. Due to modern communications, this is much more practical than it was during the direct election campaign. Applications should follow standard forms. (See Appendix A.) Applications should be sent to as many recipients as possible, especially (of course) Congress. Legislatures should communicate with each other on issues such as choice of commissioners, convention rules and the size of state delegations. This enables lawmakers to address differences in advance of the convention, maintain momentum, control the process and protect it from congressional interference.

Fortunately, all this is happening now, through groups like the American Legislative Exchange Council, the State Legislators' Article V Caucus and the Assembly of State Legislatures.

• DON'T MAKE APPLICATIONS TOO GENERAL

A convention for proposing amendments is basically a problem-solving task force, and it rarely makes sense to tell a task force to find any problems anywhere they choose. Moreover, few lawmakers want a convention merely for the sake of a convention or because they think the Constitution needs a complete overhaul. Applications should specify the subject of the proposed convention. If the legislature wishes to address several subjects, those subjects should be in separate applications, or at least follow an established form. In that way, the defeat of one application will not compromise others.

• DON'T MAKE APPLICATIONS TOO SPECIFIC; LET THE CONVENTION DO ITS WORK

Once a task force is told the problem to address, it should be allowed to do its job. In other words, although the task is preset, the precise solution cannot be. Both founding-era practice and modern court decisions tell us that it is unconstitutional for some assemblies working under Article V (such as legislatures) to try to dictate solutions to others (such as conventions). The courts almost certainly will invalidate applications that require the convention to adopt specific wording and may well void applications that require an up or down vote on specific wording.²⁸

There also are practical reasons for avoiding too much detail. The more specific an application is, the more difficult it is to garner the broad coalition necessary to induce 34 states to approve it. Further, the more specific it is, the more likely it deviates enough from other applications to give Congress a reason to refuse to aggregate it with other applications. Finally, the convention probably will do a better job of drafting an amendment than dispersed state lawmakers. Comprised of experienced personnel from all states, the convention may very well craft a solution more deft—and more politically palatable—than any recited in the applications.

Consider a balanced budget application as an example. An application could seek to dictate detailed terms to the convention (spending caps, rules for tax increases, planning or

appropriation details) or it could call simply for a balanced budget amendment prescribing “that Federal outlays for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year.” If a state legislature adopts the more specific route, the legislature may find it difficult to persuade other state legislatures to follow suit. Moreover, Congress or the courts may treat the application as invalid. If the state legislature passes the more general application, other legislatures are more likely to join in. Neither Congress nor the courts will have any excuse for holding the application invalid. Representatives from the state legislature seeking the specific language can advocate for it at the convention. The convention is free to adopt that language—or, perhaps, wording that is even better.

• DON'T MAKE APPLICATIONS CONDITIONAL

Some applications are conditional on a prior event (e.g., congressional failure to report a similar amendment). These are probably valid, but in the absence of a court decision on point, we cannot be certain. Applications that use conditions to try to coerce other bodies in the Article V process are more surely invalid. Thus, the application should not assert that it is void unless the convention adopts particular wording or a particular rule, or unless Congress adopts a particular mode of ratification.

An application stating that it is void after a particular date or if a particular (non-coercive) event has occurred is probably acceptable legally. However, it would be better to leave out conditions entirely. The legislature can rescind the application later, if necessary.

• MOVE FAST

America is deeply in debt, and sinking deeper. Congress is often deadlocked. In some respects, the executive and judicial branches are out of control. These situations call for corrective action now.

Do not allow alarmism to dissuade you. Do not delay in the hope that Congress may propose an amendment limiting its own power. Experience shows this is exceedingly unlikely.

Older applications should be renewed from time to time. Some people have argued that applications automatically expire or “grow stale” over time. There is little constitutional basis for this argument, but some in Congress have advanced it to weaken the Article V convention process. If possible, an entire application campaign should be planned for completion in three to four years.

• KEEP THE APPLICATION AS SIMPLE AS POSSIBLE

As previously noted, an application should not be overly specific: State the problem and let the convention do its job. Do not try to dictate particular wording or specific approaches.

Do not include recommendations or statements of understanding in your legislature’s applications. If you wish to issue a non-binding recommendation to Congress, other state legislatures or the convention, do so in a separate resolution.

Admittedly, a recommendation or statement of understanding in an application does not necessarily void that application. In fact, several of the state conventions ratifying the Constitution included recommendations and declarations without affecting the validity of their ratifications. But recommendations and similar wording are not always clearly distinguished from substance. Opponents may claim that they invalidate the application or prevent it from being aggregated with other applications toward the two-thirds threshold.

Therefore, recommendations, declarations and statements of understanding should be adopted in resolutions separate from the application. Appendix A provides a form resolution for that purpose.

• RETAIN STATE CONTROL OVER THE CONVENTION

The Article V convention process was designed specifically as a way for state legislatures to bypass Congress. Unfortunately, some past members of Congress have expressed willingness to interfere with or control the process. For the sake of the Constitution, this must not be allowed to happen.

State legislators applying for a convention must send a clear message to Congress that this procedure is within the control of the states. Congress’s obligations are to count the applications, call the convention on the states’ behalf and choose a mode of ratification. Congress has no authority to define the convention’s scope, its rules or the selection of its commissioners. Those are the prerogatives of the state legislatures and of the convention commissioners responsible to the state legislatures.

• THE STATE LEGISLATURE SHOULD CHOOSE ITS OWN COMMISSIONERS

The founding-era record, supplemented by subsequent practice, tells us that when an interstate convention is called, each state legislature decides how many commissioners will make up its delegation or “committee,” and how they are selected.

Legally, the legislature may delegate selection to a popular vote or to the executive. In the case of a convention for proposing amendments, however, such delegation makes little sense. Since the policy agenda for the convention is fixed by the applications and by subsequent legislative instructions, convention service requires more diplomatic, negotiation and drafting skill than passion or popular political appeal. Ideally, commissioners will be seasoned and tested leaders of unquestioned probity.

Another reason for legislative selection is that the commissioners are subject to state legislative instructions and recall.

Some state legislatures will encounter pressure for popular election. If a legislature does opt for popular election, it must clarify that a commissioner’s failure to follow legislative instructions could lead to his or her removal. This discipline is required to accomplish the core purpose of the Article V convention process—that is, to enable state legislatures to promote amendments targeted at problems those legislatures have identified.

Some have suggested that states adopt statutes providing that commissioners who exceed the scope of the convention or disregard legislative instructions are deemed immediately recalled. Court decisions suggest that those laws may not be completely enforceable. They can, however,

serve educational functions; and if not overridden explicitly during the Article V process, they may be deemed as accepted implicitly.²⁹

• DON'T GET CAUGHT IN THE SUPERMAJORITY TRAP

Some argue that votes at a convention, or on applications or ratification, should be determined by supermajorities (e.g., two-thirds) rather than by simple majorities. This is a constitutional and practical error.

Article V already provides for supermajority votes at several decision points—two-thirds of the states to consider, two-thirds of Congress to propose and three-fourths of the states to ratify. Article V's silence on other decision points is not the result of oversight: The Founders expected resolution by a simple majority. This is part of a carefully balanced procedure.

The proposal process illustrates that balance: If Congress wishes to offer an amendment, it may take up the subject by only a majority vote. But it requires two-thirds of each house for Congress to propose. In the convention process, the requirements are reversed, but balanced against those applicable to Congress: It requires two-thirds of the states for a convention to consider an amendment, but only a majority to propose.

Impeding Article V with additional supermajorities upsets that balance. Hindering the Article V convention process also undercuts the Founders' objective of allowing state legislatures to offer amendments as readily as Congress may. Adding additional supermajorities to the states' amendment procedure would severely disadvantage the states vis-à-vis Congress.

• RESPOND TO THE “MINORITY RULE” ARGUMENT

James Madison famously stated in Federalist No. 39 that the Constitution is partly national and partly federal (a point he actually borrowed from John Dickinson). That

means the Constitution is partly based on popular majorities and partly based on the states. As Madison also wrote, Article V is a good example of this duality. For example, amendments may be proposed either by Congress (mostly a popular method) or by a convention of the states (mostly a federal method).

Despite the fact that the Constitution empowers state legislatures in this way, if history is any guide opponents will judge the Article V convention process exclusively by “popular” standards. They will claim it promotes minority rule. This is because, in theory, states with a minority of the American population could trigger a convention.

Advocates may respond that we already have another way of proposing by popular majority (Congress) and this is the “federal” (state) alternative. But it is probably more persuasive to point out that any amendment will require overwhelming public support to pass.

At the application stage, two-thirds of all states are required. Political realities place some larger states on the same side as smaller ones. A heavily populated state like Texas is much more politically akin to a sparsely populated state like South Dakota than to another heavily populated state like New York. This renders it highly unlikely that even the first step—an application campaign—can succeed without wide ranging national popular support.

Further, the application stage is only an initial step in a three-step process. The convention will meet in the glare of publicity. The commissioners are unlikely to propose measures most Americans find distasteful and that, therefore, are unlikely to be ratified. After all, ratification requires 38 states—including, in all probability, some states that failed to apply. Again, heavily and lightly populated states will fall on both sides. Any amendment that succeeds at ratification will almost certainly be supported by a supermajority of the American people.

Article V

VII

CONCLUSION

It is the federal analogue to the initiative process at the state level: Just as the voter initiative enables the people to make reforms the state legislature refuses to make, the Article V convention process enables the state legislatures to propose reforms Congress refuses to propose.

C CONCLUSION

The Framers did not insert the Article V convention process in the Constitution merely to increase the document's length. It was an important component—perhaps the most important component—in the federal balance between states and the central government. It was, in Madison's terms, the ultimate constitutional way for curbing an abusive or out-of-control federal government. It is the federal analogue to the initiative process at the state level: Just as the voter initiative enables the people to make reforms the state legislature refuses to make, the Article V convention process enables the state legislatures to propose reforms Congress refuses to propose.

If we could address one or more of the Founders today, we might tell them what has happened to American federal-

ism—that the states are increasingly mere administrative subdivisions for the convenience of Washington, D.C. After we related the situation, those Founders doubtless would ask, "Well, have you ever called an amendments convention under Article V?" And when we admitted we never had, they might well respond, "In short, you refused to use the very tools we gave you to avoid this situation. The sad state of American federalism is clearly your own fault."

They would tell us that responsibility for reclaiming constitutional government is very much our own.



Appendix



Annotated Forms



This Appendix offers forms for state legislative resolutions for the Article V and convention process. Among the forms are applications for a convention, separate resolutions for legislative declarations and recommendations, and commissioner credentials.

These forms are not intended to be definitive and certainly do not represent legal advice. They are designed to serve as a starting point for legislative drafters familiar with the law and usages in each state.

SAMPLE FORM: THE APPLICATION IN GENERAL

(With a Balanced Budget Amendment (BBA) application to Illustrate)

An application should be kept as simple as possible. Extra language may lead to confusion, invalidity, or congressional refusal to aggregate the application with those from other states. If a state legislature wishes to make recommendations or issue declarations or statements of understanding, those items should appear only in an accompanying resolution. Credentialing of and instructions to commissioners also should be placed in separate resolutions.

One of the applications recommended by ALEC is a form for a convention to consider a balanced budget amendment. When it was prepared, the drafter (your author) based it on one of two forms commonly employed by state legislatures during their highly successful application campaign for direct election of U.S. Senators.³⁰ The BBA wording is similar to that used in some currently outstanding states' BBA applications from the late 1970s and early 1980s. Additional material has been added. The language in italics is optional.



APPLICATION UNDER ARTICLE V OF THE U.S. CONSTITUTION FOR A CONVENTION TO PROPOSE A BALANCED BUDGET AMENDMENT AND FURTHER FISCAL RESTRAINTS

Application under Article V of the U.S. Constitution For a Convention to Propose a
Balanced Budget Amendment and Further Fiscal Restraints

SUMMARY

The resolution will address a specific amendment to be voted on at an Article V Convention. The amendment would require that in the absence of a national emergency, total federal appropriations made by Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year. The presently outstanding applications in many states regarding balanced budget applications are considered of the same subject matter. They shall be included with those outstanding amendments for the purpose of attaining two-thirds of states necessary to require the calling of a convention.

MODEL RESOLUTION

Section 1. The legislature of the State of [INSERT STATE] hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing an amendment to the Constitution of the United States requiring that in the absence of a national emergency the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year, together with any related and appropriate fiscal restraints.

Section 2. The Secretary of State is hereby directed to transmit copies of this application to the President and Secretary of the Senate and to the Speaker and Clerk of the House of Representatives of the Congress, and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislative houses in the several States, requesting their cooperation.

Section 3. This application is to be considered as covering the same subject matter as the presently-outstanding balanced budget applications from other states, including but not limited to previously-adopted applications from Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Kansas, Maryland, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, and Texas; and this application shall be aggregated with same for the purpose of attaining the two-thirds of states necessary to require the calling of a convention, but shall not be aggregated with any applications on any other subject.

Section 4. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject. *It supersedes all previous applications by this legislature on the same subject.*



Note the following:

- For completeness, the word “appropriations” in this form should be changed to “outlays.”
- Observe how simple this application is. It does not include a lengthy preamble (“whereas” clauses), which might be construed as creating limitations or qualifications on the application.
- Although the application provides that the convention is to be limited to the subject of a balanced budget amendment, it does not require the convention to adopt, or reject, particular wording. If it did, it might be void.³¹
- This application also avoids listing other specific terms. Insertions of additional requirements—such as a two-thirds requirement for Congress to raise taxes—may critically reduce support among lawmakers and the public.
- Adding additional terms also reduces the chances of obtaining 34 matching applications, thereby offering Congress a reason not to call a convention.
- This application refers to the convention as a “convention of the states.” This was a common way of referring to a convention for proposing amendments during the founding era and for many years after. The phrase clarifies that the convention is a *federal* meeting of delegations from the several states rather than a “national,” popularly-elected convocation.
- The resolution does not have a condition stating that it is void if the convention is called for any other subject. Such condition may compromise the legality of the application. Moreover, applications probably cease to exist (and therefore are not terminable) once the convention is called. A limitation on subject matter appears in Section 1 and can be enforced, if necessary, through instructions to commissioners, by the decision of Congress not to choose a mode of ratification, by public opinion and by legal action.
- Section 4 clarifies the legislative intent that the application shall not grow “stale” with the passage of time. The application always can be rescinded.

- The *italicized* wording is an option for lawmakers desiring to “clear the deck” of previous BBA applications from their state.
- The language “together with any related and appropriate fiscal restraints” enables the convention to consider limits on taxes, spending and the like.
- We do not recommend that the application cite specific caps on federal spending as a share of the economy. This is because:
 - It raises the odds that different state applications will vary in wording and therefore not be aggregated toward the required 34.
 - If the percentage expenditure limit is as high as what the federal government has spent during any year in recent decades (e.g., 18 percent or more of GDP), courts may read the amendment as “constitutionalizing” all federal spending programs in force as of when the Congress was last spending that percentage of GDP. In other words, such an amendment might forestall future challenges to the validity of programs otherwise outside federal authority.

ALEC ARTICLE V MODEL POLICY:

The model policies in this *Handbook* are samples to illustrate the author’s guidelines for Article V applications. For a comprehensive portfolio of Article V model policy adopted by the American Legislative Exchange Council, please visit alec.org/article-v.

SAMPLE FORM: RESOLUTION OF DECLARATIONS, STATEMENTS OF UNDERSTANDING AND RECOMMENDATIONS

Sometimes legislatures submitting applications decide to insert declarations or understandings of how they expect the Article V convention process to work. For example, the legislature may wish to state that it expects the convention to apply the rule of “one state/one vote.” It may wish to make recommendations pertaining to the convention, to the language of the amendment or to the mode of ratification.

For reasons discussed earlier, a legislature desiring to issue recommendations or declarations should do so in resolutions *separate* from the application.

Following is a sample declaratory and recommendatory resolution:



DECLARATORY AND RECOMMENDATORY RESOLUTION TO ACCOMPANY APPLICATION FOR A CONVENTION TO PROPOSE A BALANCED BUDGET AMENDMENT

Whereas, the legislature of the State of _____ has applied to Congress under Article V of the United States Constitution for a convention to propose an amendment to the Constitution requiring a balanced budget;

Whereas, a convention for proposing amendments has not previously been held;

Whereas, in the interest of clarifying uncertainties it is desirable for the legislature to declare its understandings and expectations for the convention process;

Whereas, if the convention decides to propose a balanced budget amendment, then the convention will have the task of drafting same; and

Whereas, it is desirable for the legislature to issue recommendations as to the content of any such proposed amendment,

Be it resolved by the legislature of the State of _____:

Section 1. The legislature hereby declares its understanding that:

- a) A convention for proposing amendments is a device included in the Constitution to enable the state legislatures to advance toward ratification amendments without the substantive involvement of Congress;
- b) the convention is a gathering of representatives appointed pursuant to state law or practice, with an initial suffrage rule of one vote per state;
- c) the convention's delegates are commissioners commissioned by the state legislatures that send them and are subject to instructions therefrom;
- d) the scope of the convention and of any proposals it issues are limited by the scope of the applications issued by the states applying for the convention; and
- e) commissioners from the State of _____ will be recalled from any convention that purports to exceed the scope defined in the applications.

Section 2. The legislature hereby recommends that:

- a) Each state send not more than five commissioners to the convention;
- b) The convention retain the suffrage rule of "one state/one vote" throughout its proceedings, with decisions made by a simple majority of states present and voting;
- c) Any proposed amendment include provisions as follows:
 - (i) requiring that total outlays not exceed total estimated receipts for any fiscal year;

- (ii) requiring the setting of a fiscal year total outlay limit;
- (iii) providing that, for reasons other than war or other military conflict, the limits of this amendment may be waived by law for any fiscal year if approved by at least two thirds of both houses of Congress;
- (iv) allowing for the provisions of the amendment to take effect within specified time periods;
- (v) providing for the waiver of the provisions of the amendment for any fiscal year in which a declaration of war is in effect or the United States is engaged in military conflict that causes an imminent or serious military threat to national security;
- (vi) allowing for congressional enforcement; and
- (vii) preventing the courts from ordering Congress to raise any taxes or fees as a method of balancing the budget.

Section 3. This declaratory and recommendatory resolution is not a part of the application, and shall not be deemed as such.



Note to Declaratory and Recommendatory Resolution:

- The “Whereas” clauses form a preamble setting forth the reasons for the application. Lengthy preambles are best kept out of the applications.
- Section 1 sets forth the legislature’s general understanding of the nature of the convention.
- Section 2 includes items inappropriate for an application, but recommendations for the convention to consider. They are only examples. ALEC does not endorse them.
- Items (c) (i) – (vi) in Section 2 are taken from a proposed application known as Florida Senate Concurrent Resolution No. 4 (2011), adopted by the Florida Senate but not by the House. That resolution attempted to include these items as mandates; in this form, however, they are restated as recommendations. Item (vii) is another often-recommended provision.

SAMPLE FORM: RESOLUTION ELECTING COMMISSIONERS (WITH “TRAP DOOR”)

As noted earlier, the mode of commissioner selection is determined by the state legislature, with the best alternative probably selection by joint ballot of the legislature itself. Some lawmakers have suggested that one way to reassure those skeptical of a convention is for an applying state to announce in an accompanying resolution who its commissioners will be. Hence the following form:



RESOLUTION ELECTING COMMISSIONERS TO CONVENTION FOR PROPOSING A BALANCED BUDGET AMENDMENT

Whereas, the legislature of the State of _____ has applied to Congress under Article V of the United States Constitution for a convention to propose an amendment to the Constitution requiring a balanced budget; and

Whereas, the legislature has decided to select its commissioners to the convention, if such is held:

Be it resolved by a joint session of the Senate and the House of Representatives of the State of _____,

That (commissioner 1), (commissioner 2), (commissioner 3), (commissioner 4), and (commissioner 5) are hereby elected commissioners from this state to such convention, with power to confer with commissioners from other states on the sole and exclusive subject of whether the convention shall propose a balanced budget amendment to the United States Constitution and, if so, what the terms of such amendment shall be; and further, by the decision of a majority of the commissioners from this state, to cast this state's vote in such convention.

Be it further resolved that, unless extended by the legislature of the State of _____ voting in joint session of the Senate and House of Representatives, the authority of such commissioners shall expire at the earlier of (1) December 31, 2019 or (2) upon any addition to the convention agenda or convention floor consideration of potential amendments or other constitutional changes other than a balanced budget amendment to the United States Constitution.



Note to Electing Commissioners Resolution:

- No legislature can bind a later legislature in this way; therefore this resolution can be rescinded later.
- The selection method in this resolution is by a joint vote of both houses.
- The resolution limits the length of the commissioners' terms.
- The resolution also includes a "trap door" by which designation ceases if the convention goes beyond the specified purpose.

Appendix

B

Definitions of Terms



Amendments convention

a common synonym for *convention for proposing amendments*, which is the official name used by the Constitution.

Application

the legislative resolution whereby a state legislature tells Congress that if it receives applications on the same subject from two-thirds of the state legislatures (34 of 50), Congress must call a convention for proposing amendments on the subject.

Article V

the Constitution, not counting amendments, contains seven principal divisions called “articles.” Article V is the division that prescribes the amendment procedure. The term “Article V” today often refers specifically to efforts to convene a convention for proposing amendments.

Article V convention

a common synonym for *convention for proposing amendments*, which is the official name the Constitution gives to that gathering. Technically, state conventions to ratify amendments also are Article V conventions because Article V is the part of the Constitution that authorizes them.

Commissioner

the formal title of a delegate to a convention for proposing amendments, so named from his or her empowering commission.

Committee

a state’s delegation to a convention for proposing amendments.

Constitutional convention

a convention charged with writing a new Constitution; a kind of plenipotentiary convention.

Convention

originally just a synonym for “meeting.” As used by the Founders and in the Constitution itself, *convention* means a legal assembly that pinch-hits for a legislature in performing designated tasks.

Convention for proposing amendments

a general convention of representatives of the state legislatures meeting to propose one or more amendments on one or more subjects specified in the state legislative applications and (derivatively) in the congressional call. A

convention for proposing amendments is a limited convention serving as an *ad hoc* substitute for Congress proposing amendments.

Convention of [the] states

a generic term referring to any general or regional convention of three or more states or state legislatures. There were numerous inter-colonial conventions held before 1776, eleven conventions of states held between 1776 and 1787 and at least five conventions of states since 1787. Since 1787, the term “convention of the states” has been commonly used as a synonym for a convention for proposing amendments.

General Convention

the founding-era term for a convention of the states (or, before Independence, of the colonies) to which states from all regions of the country are invited. General conventions met in 1754, 1765, 1774, 1780, 1786, 1787 and 1861. A gathering limited to states from one region can be called a regional or partial convention; about 30 of those have been held. A convention for proposing amendments is a general convention.

Interstate convention

a convention of the states.

Mode of ratification

Article V permits Congress to select between ratification of amendments by state legislatures or by specially-elected in-state conventions. Article V calls each method a “Mode of Ratification.”

Plenipotentiary convention

a founding-era term borrowed from international diplomatic practice. It refers to a convention where the commissioners have unlimited or nearly unlimited power to represent their respective sovereignties. The First Continental Congress was a plenipotentiary convention. As to most of the commissioners, the 1787 Constitutional Convention was close to plenipotentiary. Most interstate conventions have been more restricted.

Propose

in Article V, *propose* can mean either (1) the power of Congress or a convention for proposing amendments to validly tender a suggested amendment to the states for ratification, or (2) the power of Congress to designate whether proposed amendments will be sent to the state legislatures or to state conventions for ratification.

Ratify, ratification

in Article V, *ratification* refers to the process by which state legislatures or state conventions convert a proposed amendment into a legally-effective part of the Constitution. Approval by three-fourths (38 of 50) of either state legislatures or state conventions is necessary for ratification.



Appendix



Responses to Frequently Asked Questions



A tactic employed by promoters of the “runaway convention scenario”³² is to challenge lawmakers with a list of supposedly unanswerable questions.³³ Several lists are used and they vary somewhat, but all appear to be based on questions published in 1979 by Professor Lawrence Tribe of Harvard Law School, a liberal opponent of conventions for proposing amendments.³⁴

Although it is claimed the questions are unanswerable, most actually do have good answers. Because state lawmakers may encounter them while considering Article V applications, those questions, supplemented by a few others, are listed in this Appendix. They are organized by topic, although the questions can be presented in any order. *The questions are reproduced verbatim. Where the phrasing is odd or the depictions inaccurate, this is not attributable to Professor Tribe, but to the unfamiliarity of those who re-stated them.* An answer immediately follows each question.

Q&A

RESPONSES TO FREQUENTLY ASKED QUESTIONS

QUESTIONS PERTAINING TO APPLICATIONS

Q₁. How is the validity of applications from the states to be determined?

A. Initially by Congress, although congressional decisions are subject to judicial review.

Q₂. How specific must the state legislatures be in asking for an amendment?

A. The legislatures may apply either for an unrestricted convention or one devoted to particular subject matter. There is no ironclad rule as to specificity, except that the more a legislature tries to dictate the specific language of the amendment (as opposed to the general topic), the more it endangers the application's validity.

Q₃. Must all the applications be in identical language?

A. No. It is enough that they identify the same problem(s) or subject(s). However, prudence suggests that state legislatures coordinate with one another.

Q₄. Within what time period must the required number of applications be received?

A. Adoption of the 27th amendment—proposed over 200 years earlier—has convinced most observers that there is no time period. Because, however, some still claim that applications can go “stale,” prudence suggests that a campaign be completed within a few years. The application campaign for direct election of senators took 13 years.

QUESTIONS PERTAINING TO CONGRESS

Q₅. Can Congress refuse to call a convention on demand of two-thirds of the states, and if it does, can it be compelled to act by the courts?

A. Congress may not refuse. Supreme Court precedent strongly suggests that the courts can compel it to act.

Q₆. Would Congress decide to submit Con Con [sic] amendments for ratification to the state legislatures or to a state constitutional convention as permitted under Article V of the constitution?

A. There is an error in the question: The convention that ratifies an amendment is a “state ratifying convention,” not a “state constitutional convention.” Article V specifies that—as is true of any amendment—Congress determines whether ratification is by state legislatures or state conventions.

Q₇. Can Congress use its power under the Constitution’s Necessary and Proper Clause to control how delegates are selected or otherwise set rules for the convention?

A. No. By its specific terms, the Necessary and Proper Clause applies only to certain enumerated powers, and the powers delegated by Article V are not among them. Even if Congress could use the Necessary and Proper Clause, its authority still would be limited to specifying the topic based on the applications and fixing the initial time and place for the convention.

QUESTIONS PERTAINING TO DELEGATES AND DELEGATE SELECTION

Q₈. Who are the delegates, and how are they to be chosen? (Other versions of this are (1) *How would Delegates be selected or elected to a Constitutional [sic] Convention?* and (2) *What authority would be responsible for electing the Delegates to the convention?*)

A. Delegates (more properly called “commissioners”) are representatives of their respective state legislatures and are chosen as the state legislature directs.

Q₉. What authority would be responsible for determining the number of delegates from each state?

A. This and related questions are determined in each state by that state’s legislature—just as is true for delegates to other conventions, such as state conventions for ratifying amendments.

Q₁₀. Would delegates be selected based on population, number of registered voters, or along party lines?

A. See the answer to Q9.

Q₁₁. Would delegates be selected based on race, ethnicity or gender?

A. The Due Process Clause of the Fifth Amendment and the Supreme Court cases interpreting it forbid election on these grounds. The Equal Protection Clause of the Fourteenth Amendment probably does not apply, but if it does, then it would have a similar effect.

QUESTIONS PERTAINING TO CONVENTION ORGANIZATION AND PROCEDURE

Q₁₂. Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment? (Other versions are (1) *Would proposed amendments require a two-thirds majority vote for passage?* and (2) *How would the number of votes required to pass [or propose] a Constitutional Amendment be determined?*)

A. The convention acts by a simple majority of the represented states. The convention may, by a simple majority of the represented states, alter that voting rule, although history shows this to be highly unlikely.

Q₁₃. How is a convention to be financed, and where does it meet? (Related versions are (1) *What authority would be responsible for selecting the venue for the Convention?* and (2) *Where would the Convention be held?* and (3) *Who will fund this Convention?*)

A. A convention for proposing amendments is a conclave of state “committees,” each made up of state commissioners. It therefore is financed by the states. Congress, in the convention call, specifies the initial meeting place, but the convention may alter that meeting place.

Q₁₄. May the convention propose more than one amendment?

A. Yes—but only if they are all within the agenda of the convention, as prescribed by the applying states.

Q₁₅. Is there a time limit on the proceedings, or can the convention act as a continuing body?

A. The convention can meet until it decides whether to propose amendments and which ones to propose. But a convention is, by definition, not a continuing body. It has no authority beyond deciding whether to propose amendments within the subject matter prescribed in the applications. Once that is performed, it must adjourn. Additionally, states may recall and/or replace their commissioners at any time.

Q₁₆. What authority would be responsible for organizing the convention, such as committee selection, committee chairs and members, etc.? (A related question is, *How would the Chair of the Convention be selected or elected?*)

A. Organizational details such as these are fixed in rules adopted by the convention itself, in accordance with nearly universal American convention procedures. Conventions universally elect their own permanent officers.

Q₁₇. How would the number of delegates serving on any committee be selected and limited?

A: See answer to Q16.

Q₁₈. What authority will establish the Rules of the Convention, such as setting a quorum, how to proceed if a state wishes to withdraw its delegation, etc.?

A. See answer to Question 16. To the extent the adopted rules do not cover a situation, they will be governed by the convention’s source of default rules, or by parliamentary common law.

Q₁₉. Would non-Delegates be permitted inside the convention hall? (A related version is, *Will demonstrators be allowed and/or controlled outside the convention hall?*)

A. Just as with a legislature, the assembly’s rules govern inside the convention hall. The outside environment is subject to the same rules governing the space outside any public body, convention or legislature.

Q₂₀. What would happen if the Con Con [sic] decided to write its own rules so that two-thirds of the states need not be present to get amendments passed?

A. This question is confused. First, nothing requires the convention to follow a two-thirds adoption or quorum rule for *proposing* an amendment. In accordance with universal practice, adoption and quorum rules are set by each convention. Most conventions of states have decided principal questions by a majority of states present and voting. As for the *ratification* procedure: According to both the constitutional text and the U.S. Supreme Court, the convention receives all its power from the Constitution. So it cannot alter the rules in the Constitution that specify the ratification procedure. See also the preceding answers.

Q₂₁. Could a state delegation be recalled by its legislature and its call for a convention be rescinded during the convention?

A. The legislature may recall its commissioners. The rest of the question inaccurately assumes the states “call” the convention; actually, the states apply and Congress calls. It is unlikely a state could withdraw its application after two-thirds of the states have acted on it. However, if a state disagrees with amendment language crafted during the convention, it can instruct its commissioners to oppose it and can vote against it during the ratification process.

A QUESTION PERTAINING TO THE COURTS**Q₂₂. Can controversies between Congress and the convention over its powers be decided by the courts?**

A. This question also is based on a false premise. The states, not Congress, fix the scope of the convention’s powers. Controversies in this area may be decided by the courts. The most likely area of controversy between Congress and the convention would be if the convention suggests an amendment that Congress believes is outside the convention’s agenda as defined in the state applications. If (as is proper) Congress then refused to prescribe a “Mode of Ratification” for the suggested amendment, the courts could resolve the dispute.

QUESTIONS BASED ON HISTORICAL CLAIMS MADE ABOUT JAMES MADISON AND THE 1787 CONVENTION**Q₂₃. Didn’t James Madison express uncertainty about the composition of an Article V convention, and wasn’t he “horrified” at the prospect of one?**

A. Quite the contrary. Madison later promoted the convention idea as a reasonable way to resolve constitutional disputes. It is true that during the Constitutional Convention debate he initially expressed uncertainty as to how amendments conventions were to be constituted. But he must have been satisfied with the answer he received, since he dropped his objections. It is also true that he was “horrified” by a 1789 New York proposal for an unlimited convention to rewrite the entire Constitution with *over 30 amendments*. Who wouldn’t be? However, Madison repeatedly asserted that his objection was directed only at that particular proposal at that particular time.

Q₂₄. Isn’t it true that the 1787 Constitutional Convention was a “runaway”—that Congress convened it under the Articles of Confederation only to propose amendments to the Articles, but it ended up drafting an entirely new Constitution?

A. The truth is quite to the contrary: Most commissioners had full authority to recommend a new Constitution, as explained in the article cited in this endnote.³⁵

Appendix

D

Where Does this Handbook Get Its Information?



As observed in Part I (Introduction), most writing on the Article V convention process has been poorly-researched, agenda-driven or both. Fortunately, though, not everything published on the subject has been biased or shallow.

Serious scholarship began in 1951 with an extraordinary Ph.D. thesis written by the late William Russell Pullen, then a political science graduate student at the University of North Carolina and later a distinguished academic librarian. The Pullen study suffered from the author's lack of legal or historical training (Pullen was a political science graduate student, not a historical or legal scholar), but his study presented an excellent and thorough summary of applications and history up to that time.³⁶

More recent scholarship (defined as work that makes a serious attempt to marshal the historical and legal evidence) falls chronologically into two groups. The first group of studies was published during the 1970s through the 1990s. It included a research report from the American Bar Association; a lengthy legal opinion composed by John M. Harmon at the Office of Legal Counsel at the U.S. Department of Justice; and Russell Caplan's book, *Constitutional Brinksmanship*, published by Oxford University Press.³⁷ Although the findings of these studies differed in detail, they all agreed on some important con-

clusions—including the conclusion that state legislative applications could limit the scope of the convention.

The latest group of studies includes articles published between 2011 and 2014. Written by several scholars including this author, they report extensive new research findings. This author's work, for example, encompasses full-length articles published by *Florida Law Review* and *Tennessee Law Review*, a chapter in an academic book, an essay for the *Harvard Journal of Law and Public Policy* and a legal treatise on Article V, at articlevinfocenter.com. This is in addition to numerous shorter works available at articlevinfocenter.com.

This new research takes into account (1) convention history, including re-discovered journals of 17th, 18th and 19th century conventions of colonies and states, (2) records from the Constitution's ratification debates, (3) the records of the Continental and Confederation Congresses, (4) other formerly-neglected historical information and (5) more than two centuries of judicial decisions.

The latest research partly corroborates the conclusions of the better work published in the 1970s, '80s and '90s, but also makes many corrections. The accompanying endnote tells the reader where to obtain this research.³⁸

{Endnotes}

- 1 The success of the amendment process is discussed in Robert G. Natelson, *The Lamp of Experience: Constitutional Amendments Work*, at <http://articlevinfocenter.com/the-lamp-of-experience-constitutional-amendments-work/>.
2. The Fourteenth Amendment extended certain federal guarantees to all citizens; the Fifteenth Amendment protected the right to vote, despite “race, color, or previous condition of servitude;” and the Twenty-Fourth Amendment eliminated the poll tax system sometimes used to suppress voting by minorities.
- 3 ALEC has recommended, among others, (1) various balanced budget approaches including one advanced by a state compact, (2) the Vote on Taxes Amendment (2010), (3) the National Debt Relief Amendment (2011) (which requires approval by a majority of the state legislatures before the federal government can go deeper into debt), (4) the Repeal Amendment (2011) (permitting two thirds of state legislatures to invalidate federal laws and regulations), (5) An Accountability in Government Amendment (1996) (limiting federal mandates on states), (6) a Government of the People Amendment (1996) (similar to the Repeal Amendment, but with a seven-year repeal limit), (7) a States’ Initiative Amendment (1996) (permitting three quarters of the states to propose amendments without a convention, subject to congressional veto) and (8) the application proposed by the “Convention of States” project of Citizens for Self-Government. The application calls for a convention to impose fiscal restraints on the federal government, reduce its size and jurisdiction, and impose term limits.
- 4 For a survey of 18th century conventions, including the rules that governed them, see Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 Fla. L. Rev. 615 (2013), available at <https://www.i2i.org/wp-content/uploads/2013/09/Conventions-FLR-2.pdf>.
- 5 The founding-era evidence for distinguishing an Article V convention from a “constitutional convention” is overwhelming. See Robert G. Natelson, *Amending the Constitution by Convention: A More Complete View of the Founders’ Plan* (Independence Institute, 2010) (updated and amended version of an earlier paper published by the Goldwater Institute), available at http://constitution.i2i.org/files/2010/12/IP_7_2010_a.pdf.
- 6 U.S. Const., Art. V.

- 7 Article V is not unique in this regard: The Constitution grants various powers to persons and entities that are not federal departments or officers, including state governors, state legislatures, and the Electoral College. *Ray v. Blair*, 343 U.S. 214 (1952) (holding that presidential electors, who ultimately derive their power from the Constitution, exercise a federal function but are not federal officers or agents). Two articles at the Article V Information Center clarify this further:
- *The Constitution's Grants To Persons and Entities Outside the U.S. Government*, at <http://articlevinfocenter.com/the-constitutions-grants-to-persons-and-entities-outside-the-u-s-government/>, and
 - *No, the Necessary and Proper Clause Does NOT Empower Congress to Control an Amendments Convention*, at <http://articlevinfocenter.com/the-necessary-and-proper-clause-grants-congress-no-power/>.

- 8 The courts, including the Supreme Court, have affirmed this repeatedly.

Note that Article V grants eight distinct enumerated powers, four powers at the *proposal* stage and four at the *ratification* stage. At the proposal stage, the Constitution (1) grants to two-thirds of each house of Congress authority to propose amendments; (2) grants to two thirds of the state legislatures power to require Congress to call a convention to propose amendments; (3) then empowers (and requires) Congress to call that convention and (4) authorizes that convention to propose amendments.

At the ratification stage, (1) the Constitution authorizes Congress to select whether ratification shall be by state legislatures or state conventions; (2) if Congress selects the former method, the Constitution authorizes three-fourths of state legislatures to ratify; (3) if Congress selects the latter method, the Constitution empowers (and requires) each state to call a ratifying convention and (4) the Constitution further empowers three-fourths of those conventions to ratify.

- 9 There are numerous cases so holding. See Robert G. Natelson, *A Treatise on the Law of Amendment Conventions: State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* §3.7 (2014), available at <http://constitution.i2i.org/files/2014/11/Compendium-3.01.pdf>.

- 10 Some people have wondered whether the Supreme Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S.Ct. 2652 (2015) changes this rule, thereby allowing the people to use the initiative and referendum process to apply for a convention or to ratify amendments. The answer is "no." In that case, the Court pointed out that the term "legislature" has two separate meanings in the Constitution. Although it means the general legislative power (and therefore includes initiative and referendum) in some parts of the document, it continues to mean "the state representative assembly" in Article V. For an explanatory essay, see Robert G. Natelson, *Although Chief Justice Roberts' Dissent in the Arizona Legislature Case Cited My Research, I Actually Agree With the Majority!*, at <http://articlevinfocenter.com/although-chief-justice-roberts-dissent-in-the-arizona-legislature-case-cited-my-research-i-actually-agree-with-the-majority/>.

- 11 *Coleman v. Miller*, 301 U.S. 483 (1939). That language was not part of the ruling, but only dicta (non-authoritative side comments) by four justices.

- 12 Appendix A contains model resolutions that can be used to apply for a convention to consider a balanced budget amendment.

- 13 Congress proposed what became the Twenty-Seventh Amendment in 1789 and some state ratifications came shortly thereafter. Both the proposal and the initial ratifications remained alive until three-fourths of the states had ratified, over 200 years later. This precedent has convinced most observers that, unless an Article V resolution (proposal, application, or ratification) contains an expiration date, it remains in effect until rescinded. Exactly when the power to

rescind an application terminates has not been determined judicially, but presumably it terminates when the application triggers larger legal consequences—i.e., when the 34-state threshold is reached, Congress calls the convention, or the convention actually meets. Once the 34-state threshold is reached, the call and meeting become merely “ministerial” (not discretionary), which would suggest that the power to rescind ends as soon as 34 states have applied.

- 14 The late Senator Sam Ervin (D-NC) reported disapprovingly on the obstructionism of some of his senatorial colleagues during the 1960s. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 878 (1968-68).
- 15 An “incidental” power is an unmentioned and subordinate power implicitly granted along with a power expressly granted. The link is created by the intent behind the document, generally shown by custom or necessity. When the Constitution grants a specified power it generally grants incidentals as well. The Constitution’s direction to Congress to call a convention of the states includes authority to set the time and place because that authority is properly incidental. On the other hand, some powers are too substantial to be incidents of a mere power to call, such as prescribing convention rules and methods of delegate selection. On incidental powers and the Constitution, see Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, and Guy I. Seidman, *The Origins of the Necessary and Proper Clause* (Cambridge University Press, 2010). Chief Justice Roberts followed this analysis of incidental powers in NFIB v. Sebelius, 132 S.Ct. 2566, 2591-93 (2012) (the “ObamaCare” case). Note, however, that the doctrine of incidental powers inheres in Article V because of the nature of the Constitution, not because of the Necessary and Proper Clause. Strictly speaking the Necessary and Proper Clause does not apply to the enumerated powers in Article V. See Robert G. Natelson, *No, the Necessary and Proper Clause Does NOT Empower Congress to Control an Amendments Convention*, at <http://articlevinfocenter.com/the-necessary-and-proper-clause-grants-congress-no-power/>.
- 16 Robert G. Gunderson, *The Washington Peace Conference: The Selection of Delegates*, 24 J. Southern Hist. 347 (1958).
- 17 U.S. Const., Art. V. (“Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). This means that an amendment may not alter the Constitution’s rule that each state has equal weight in the U.S. Senate. An amendment could increase the number of Senators from each state to three, or require voting by state delegations. But it could not, for example, give New York more voting power than Nebraska.
- 18 *Id.* (“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 Convention in three fourths thereof”).
- 19 Robert G. Natelson, *A Treatise on the Law of Amendment Conventions: State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters* §3.14.4 (2014), available at articlevinfocenter.com.
- 20 <https://www.alec.org/model-policy/rules-for-an-article-v-convention-for-proposing-amendments/>.
- 21 The rules are available at <https://www.i2i.org/wp-content/uploads/2015/01/proposed-rules-2015-1206-clean.pdf>.
- 22 *Application for a Convention of the States under Article V of the Constitution of the United States*, <https://www.alec.org/model-policy/article-v-convention-of-the-states/>.
- 23 State legislative authority to instruct state commissioners has been universal to all interstate conventions, both during the founding era and at subsequent conventions. See also *Ray v. Blair*, 343 U.S. 214 (1952) (upholding state authority to instruct members of the Electoral College).

- 24 Robert G. Natelson, *Trying to Alter the Traditional Amendments Convention Voting Rule is a Mistake*, <http://articlev-infocenter.com/trying-to-alter-the-traditional-amendments-convention-voting-rule-is-a-mistake/>.
- 25 Notable among those publicizing the scenario were Yale's Charles Black and Harvard's Lawrence Tribe; Supreme Court Justices Warren Burger and Arthur Goldberg; Senators Joseph Tidings (D-MD) and Robert F. Kennedy (D-NY); and individuals within the "Kennedy circle," such as Goldberg and speechwriter Theodore Sorenson. The story is told in Robert G. Natelson, *The Liberal Establishment's Disinformation Campaign Against Article V—and How It Misled Conservatives*, available at <http://constitution.i2i.org/files/2015/03/Campaign-Against-Article-V.pdf>.
- 26 The 2011 edition of this *Handbook* predicted, "One can expect both liberal and conservative opponents to promote [the runaway scenario] again if another application campaign begins to gain traction." This is precisely what has happened in the interim.
- 27 Historically, the average number of commissioners per state has been between four and five. In no convention have all states participated, but if all 50 participate in the next one and each sends five commissioners, the attendance would be 250. Moreover, convention rules may limit the number of commissioners from any state on the floor at the time.
- 28 The cases emphasizing that assemblies (legislatures and conventions) meeting under Article V must have a certain amount of deliberative freedom are legion. See, e.g., *Hawke v. Smith*, 253 U.S. 221 (1920); *In Re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933); *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984); *AFL-CIO v. Eu*, 36 Cal.3d 687, 206 Cal. Rptr. 89 (1984), *stay denied sub nom. Uhler v. AFL-CIO*, 468 U.S. 1310 (1984); *Donovan v. Priest*, 931 S.W. 2d 119 (Ark. 1996), *cert. denied*, 117 S.Ct. 181 (1997) (no official report) (requiring an assembly that can engage in "intellectual debate, deliberation, or consideration"); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me. 1997); *Barker v. Hazetine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998) ("Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota's congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost."); *Gralike v. Cooke*, 191 F.3d 911, 924-25 (8th Cir. 1999), *aff'd on other grounds sub nom. Cook v. Gralike*, 531 U.S. 510 (2001); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999). Cf. *Kimble v. Swackhamer*, 439 U.S. 1385, *appeal dismissed*, 439 U.S. 1041 (1978) (Rehnquist, J.) (upholding a referendum on an Article V question because it was advisory rather than mandatory); *Dyer v. Blair*, 390 F.Supp. 1291, 1308 (N.D. Ill. 1975) (Justice Stevens) (upholding a rule of state law on an Article V assembly, but only because the assembly voluntarily adopted it).

Two scholars have argued that the original understanding of the Constitution permits the state legislatures to direct an up-or-down vote on specific wording. I do not think this is accurate, but even if it were, the modern cases militate against it. See my two part essay, *May state legislatures limit an Article V convention to a specifically-worded amendment?* Part I is available at <http://constitution.i2i.org/2013/09/04/may-state-legislatures-limit-an-article-v-convention-to-a-specifically-worded-amendment-part-i/> and Part II at <http://constitution.i2i.org/2013/09/12/may-state-legislatures-limit-an-article-v-convention-to-a-specifically-worded-amendment-part-ii-answer-probably-not/>.

- 29 See *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

- 30 The form was developed by the Minnesota legislature, and originally read as follows:

SECTION 1. The legislature of the State of Minnesota hereby makes application to the Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention to propose an amendment to the Constitution of the United States *making United States Senators elective in the several States by direct vote of the people*.

Notice how simple and direct the italicized wording is; drafting details are left to the convention. As it turned out, however, Congress rather than a convention drafted the details. After nearly two-thirds of the states had approved similar applications, the U.S. Senate, which had resisted the change, finally consented to congressional proposal of what became the 17th Amendment.

- 31 In proposing other amendments, it is equally important to avoid trying to mandate particular wording. Consider the proposed National Debt Relief Amendment, for which ALEC has model policy. *Constitutional Amendment Requiring State Approval for Increases in Federal Debt* at <https://www.alec.org/model-policy/a-constitutional-amendment-requiring-state-approval-for-increases-in-federal-debt/>. It provides that “An increase in the federal debt requires approval from a majority of the legislatures of the separate States.” An application might describe the subject matter as “an amendment to the Constitution of the United States forbidding increases in the debt of the United States unless approved by a specified proportion of state legislatures.”
- 32 See Part V: “The Myth of a Runaway Convention.”
- 33 Thus, one list trumpets: “If these questions cannot be answered (and they CANNOT!), then why would any state legislator even consider voting for such an uncertain event as an Article V Constitutional Convention?”
- 34 Lawrence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 Pac. L.J. 627 (1979) (republishing earlier legislative testimony). Although the author is very distinguished, in this article he offers little supporting evidence from the historical record or case law.
- 35 The facts appear in Robert G. Natelson, *Proposing Constitutional Amendments by Conventions: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 719-23 (2011), available at http://constitution.i2i.org/files/2011/08/Rules_for_Art_V_Conventions.pdf and Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,” 65 Fla. L. Rev. 615 (2013), available at <https://www.i2i.org/wp-content/uploads/2013/09/Conventions-FLR-2.pdf>. More detailed discussions of the “runaway scenario” and claims that the Constitutional Convention exceeded its powers appear in the following articles:
 - *A Response to the “Runaway” Scenario*, at <http://articlevinfocenter.com/a-response-to-the-runaway-scenario/>.
 - *The Constitutional Convention Did Not Exceed Its Power and the Constitution is not “Unconstitutional,”* at <http://articlevinfocenter.com/the-constitutional-convention-did-not-exceed-its-power-and-the-constitution-is-not-unconstitutional/>.
- 36 William Russell Pullen, *The Application Clause of the Amending Provision of the Constitution* (Univ. of North Carolina, 1951) (unpublished). Pullen worked largely from the long-collected files of his mentor, Professor W.S. Jenkins.
- 37 The citations of the studies are as follows: *Amendment of the Constitution by the Convention Method Under Article V* (American Bar Ass’n, 1974); John M. Harmon, *Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution*, 3 Op. Off. Legal Counsel 390 (1979); Russell Caplan, *Constitutional Brinksmanship* (Oxford University Press, 1988).
- 38 The studies by the author of this *Handbook* are available at / <http://constitution.i2i.org/articles-books-on-the-constitution-by-rob-natelson/> (second topic). See also Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012).

the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign, certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President; if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President. But if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing President, the Votes shall be taken by States, the Representation from each State having one Vote; A Quorum for this Purpose shall consist of a Majority of Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, one shall be chosen from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been seven Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Office be again filled, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emoluments from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, on writing of the principal Officer in each of the executive Departments, relating to any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Justice, and in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and shall, at State, call a Convention for this Purpose, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 4. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, under their Authority;—to all Cases of Admiralty;—to all Cases of Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and Maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, or the Citizens thereof;—and foreign States, Citizens and Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime was committed; but where no State exists within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort; No Person shall be convicted of Treason unless upon the testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

Article. V.

