



Wisconsin Grand Sons of Liberty Article V Convention FAQs

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Frequently Asked Questions (FAQs) regarding the details, powers, limitations and history of an Article V Convention with primary and secondary source citations.

“The formal amendment process set forth in Article V represents a domestication of the right of revolution.”

– Walter Dellinger III, Duke University Professor of Law and former Acting Solicitor General of the United States

DEFINING AN ARTICLE V CONVENTION (AVC)

1. Is an Article V Convention the same as a constitutional convention (con-con)?

This is probably the greatest misconception about the **amendatory** convention, or amend-con. A constitutional convention, or con-con, is a **plenipotentiary** convention, meaning full-powered. It is incorrect to refer to an amendatory Article V convention as a “constitutional convention” since an amend-con is of limited power.¹ The 1787 convention in Philadelphia was full powered and intended to be so from the beginning. During the 1787 convention, discussion was held on whether to make a provision for future plenipotentiary constitutional conventions – the idea was soundly and firmly rejected. The 1787 delegates chose, instead, to make a provision for a limited power convention to only propose amendments to the Constitution. The AVC is amendatory only and therefore of limited power.²

2. Can an AVC amend-con be turned into a con-con?

Because the Framers chose only to allow for amendatory conventions that are limited in power, the delegates of any modern or future amend-con are not empowered to change the limitations of the convention to a full-powered convention. Such an action is unconstitutional. All conventions have a stated purpose and/or agenda. The amendatory convention’s power derives from the grant of limited power from the state legislatures and this grant of limited power can be recalled or rescinded at will. The delegates, or commissioners, have credentials or commissions that detail their limited powers, instructions and grants of

¹ Robert Natelson, “Amending the Constitution by Convention: A Complete View of the Founders’ Plan,” p.3

² Robert Natelson, “A Response to the ‘Runaway Scenario’,” p.4

authority and these, like the convention agenda, may be revoked by their respective state legislature.³

3. Can the AVC become a “runaway convention”?

To do so requires that the delegates “go rogue” and violate their oaths of office. While this is indeed possible, their action would be moot as the proposed amendments adopted and forwarded to the States would still require the approval of 38 states. This ratification requirement is stated in the Constitution in Article V and cannot be changed without approval of at least 38 states. Such an event would require that the delegates be part of either a pre-planned conspiracy or able to find a way to circumvent the cautious, deliberative, multi-step procedure for proposal, debate, referral and ratification that has been in place for over two centuries.⁴ One would expect that the rogue delegates would find that they have mortally wounded their political careers by promoting, let alone carrying out, such an action. James Madison noted that the diversity of the nation, as represented by the makeup of the Congress, points to an example of why such a conspiracy would be unlikely and that the AVC overall would tend toward being moderate.⁵ Congress itself, in studying the Article V process in 1984, found that “...the notion of a ‘runaway’ convention, succeeding in amending the Constitution in a manner opposed by the American people, is not merely remote, it is impossible.”⁶ For the AVC to turn into a runaway, several things would have to occur. Some of the delegates would have to collude to rewrite the rules and then convince a majority of the other delegates to take part in the violation of their oaths. The delegates would have to accept that they would be committing political suicide as this would be the last act of their political careers. They would have to change the ratification process – something that will never happen as too many other societal institutions would not permit that action to take place. Constitutional scholar Robert Natelson describes this scenario as amounting to a coup d’etat.⁷ In a reasoned opinion, former U.S. Attorney General Edwin Meese, in a 1987 Department of Justice tract on the subject, speaking for the Department of Justice, stated “we believe that fears of a ‘runaway’ convention are not well founded.”⁸

4. Wasn’t the 1787 Philadelphia Convention a “runaway”?

This is the second greatest misconception concerning the AVC and its history. 48 of the 55 delegates to the 1787 Philadelphia Convention were given **plenary** power by their states to do as they felt necessary to improve the nation’s government. For the remaining 7 delegates, they were still able to attend, debate and make suggestions for the new proposed

³ Robert Natelson, “Amending the Constitution by Convention: A Complete View of the Founders’ Plan,” p.8-9

⁴ Joseph Story, *Commentaries on the Constitution of the United States*, Hilliard, Gray & Co., 1833, volume 3, p.688

⁵ James Madison, *The Federalist*, Number 10, “The Size and Variety of the Union as a Check on Faction,” pp.129-136

⁶ *Constitutional Convention Implementation Act of 1984*, 98th Cong. 2nd sess., S. Rept. 98-594, p. 29

⁷ Robert Natelson, “Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers,” p. 17

⁸ U.S. Dept. of Justice, “Report to the Attorney General: Limited Constitutional Conventions Under Article V of the United States Constitution,” Office of Legal Policy, Sept. 10, 1987, p.3

Constitution – and many did contribute to the writing of our Constitution. The finalized Constitution required adoption by $\frac{3}{4}$, or 9, of the 12 attending states (Rhode Island did not attend) to be adopted.⁹ The Philadelphia Convention was called with the intent of either modifying the Articles of Confederation or to “render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.”¹⁰ An examination of the commissions of the delegates shows that 10 of the 12 states that attended granted sufficient powers to their delegates to do exactly as they did. New York and Massachusetts were the exceptions.¹¹ Despite their limited instructions, Nathaniel Gorham and Rufus King of Massachusetts signed on behalf of their state and Alexander Hamilton of New York signed on his own behalf.¹²

5. Why did the 1787 convention give this power to the States; doesn't Congress already have the power to amend the Constitution?

The Framers of our Constitution had just gone through a Revolution and separation from a national government that had become, in the eyes of the Founding Fathers and the former colonists, oppressive and unresponsive to the people that it had governed. The Framers recognized that a future American federal government could become equally oppressive and unresponsive to the citizenry. Leaving the amending of the Constitution to the Congress alone left the people with no method of going around the unresponsive Congress while staying within the Constitution. Records of the Federal Convention in Philadelphia show that Framers George Mason of Virginia thought that, “no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.”¹³ Framers Elbridge Gerry of Massachusetts and Gouverneur Morris of New York agreed and proposed the States method of amending. The motion was adopted unanimously.¹⁴ By extending the power to amend to the States, who had created the federal government, a peaceful, constitutional method of restraining the federal government was provided to the people.¹⁵

6. What safeguards exist to prevent the runaway convention?

The States retain the power to instruct their delegations. Since Congress does not make the rules for the AVC, the States are free to restrain their delegates as they see fit. This includes recalling the delegate(s) as needed or limiting their capabilities. The States and the convention itself can limit the agenda of the AVC to a single issue prohibiting introduction, or

⁹ Robert Natelson, “Proposing Constitutional Amendments by Conventions: Rules Governing the Process,” 78 *Tennessee Law Review* 693, pp. 719-23 (2011)

¹⁰ Resolution of Congress, February 21, 1787

¹¹ Vol. 1, Farrand's Records, *The Records of the Federal Convention of 1787*, (1937), pp.560, 563, 565-7, 572, 574, 577, 581, 585-6

¹² United States Constitution, signatories

¹³ Vol. 2, *The Record Of The Federal Convention of 1787*, note 8, at 629

¹⁴ Vol. 2, *The Record Of The Federal Convention of 1787*, note 8, at 629

¹⁵ U.S. Constitutional Convention, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, reported by James Madison (Greenwood Press, Westport, CT: 1970, c.1920, Oxford University Press), hereinafter referred to as “*Madison's Notes*”.

even discussion, of any other issue or proposed amendment.¹⁶ In the event that an unpopular proposal was made and adopted by the convention, it would still require ratification by $\frac{3}{4}$ of, or 38, states.¹⁷ A supermajority of $\frac{2}{3}$ of the states is needed to call a convention; a supermajority of $\frac{2}{3}$ of the states is needed to adopt a proposed amendment in the convention (a simple majority can propose an amendment); a supermajority of $\frac{3}{4}$ of the states is needed to ratify a proposed amendment by the States.¹⁸ If an unusual amendment is indeed ratified, then one can safely say that the amendment is truly the will of the people.

7. How is an AVC different from Congress proposing amendments?

When Congress proposes an amendment, the process is controlled by Congress until it reaches the ratification stage at which point the States take over. Congress debates and votes on the proposed amendment with a $\frac{2}{3}$ vote required of each chamber. Congress also stipulates whether the state legislatures or state ratification conventions vote on the proposed amendment(s). When the States propose an amendment, Congress' role is limited to issuing the "call" to a convention, to setting the date and place of the convention and to selecting the ratification method. The States perform all the rest of the process. The States set the rules of the convention, select the delegates, propose and debate the amendment(s), Congress then refers the proposed amendment(s) to either the state legislature or the state ratification convention for consideration.¹⁹

8. What kind of convention does Article V authorize?

There are two types of recognized conventions: a general or open convention in which the agenda is not set and any type of amendment may be proposed; a limited convention which may be a single-issue or a set number of issues that comprise the agenda and nothing else may be added. Some have said that the "runaway" convention is a third type but that version is not a planned event let alone desirable. The choice of the type of convention is dictated by the applications of the state legislatures.²⁰

9. Who has a role in the amendment process?

Congress, the state legislatures, state ratifying conventions and Article V Conventions for proposing amendments.²¹

¹⁶ U.S. Dept. of Justice, "Report to the Attorney General: Limited Constitutional Conventions Under Article V of the United States Constitution," Office of Legal Policy, Sept. 10, 1987, p.34

¹⁷ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.15

¹⁸ U.S. Dept. of Justice, "Report to the Attorney General: Limited Constitutional Conventions Under Article V of the United States Constitution," Office of Legal Policy, Sept. 10, 1987, p.20

¹⁹ United States Constitution, Article V

²⁰ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.10

²¹ Robert Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers*, Goldwater Inst. Policy Report No. 11-02, Feb. 2011, p.6

10. What powers are granted by Article V to the Congress, state legislatures, state ratifying conventions and Article V Conventions?

Per constitutional scholar Robert Natelson, there are eight enumerated powers granted. Four powers are granted at the proposal stage and four more powers are granted to the ratification stage. In the proposal stage, “the Constitution grants

1. To two-thirds of each house of Congress authority to propose amendments;
2. To two-thirds of the state legislatures power to require Congress to call a convention for proposing amendments;
3. To Congress power to call that convention (and requires it to do so); and
4. To the convention authority to propose amendments.

At the ratification stage, the Constitution

1. Authorizes Congress to select whether ratification shall be by state legislatures or state conventions;
2. (if Congress selects the former method) authorizes three-fourths of state legislatures to ratify;
3. (if Congress selects the latter method) empowers (and requires) each state to call a ratifying convention; and
4. Further empowers three-fourths of the conventions to ratify.”²²

POWERS OF THE CONVENTION AND DELEGATES

11. Can the delegates just replace the current Constitution of 1787?

No, Article V of our Constitution limits the power of the convention to proposing, and not passing, amendments. Ultimately, the States, through either the state legislatures or state ratification conventions, vote to pass or reject any proposed amendment. Writing and proposing a new constitution would be a *plenary* act, which is not a power granted in the current constitution. Such an act would be unconstitutional and perhaps treasonous! The delegates are bound by the existing constitution and supporting statutes.²³

12. Who picks the delegates to the AVC and how?

The States are empowered to select their own delegates by their own criteria.²⁴ The respective state legislatures will develop or already have developed their own rules for

²² Robert Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers*, Goldwater Inst. Policy Report No. 11-02, Feb. 2011, p.6-7

²³ Russell Caplan, *Constitutional Brinkmanship, Amending the Constitution by National Convention*, Oxford University Press (1988), p.147

²⁴ Congressional Research Service Report CRS 95-589 A (1995) *Amending the U.S. Constitution: by Congress or Constitutional Convention*, p.CRS-5

selecting their delegates.²⁵ This method is based on the practice of international diplomats that developed over centuries. Remember that the States are just that – States, which is what all countries are called. Until the American States adopted the Constitution, the States were considered as independent nations – even under the Articles of Confederation. It makes sense that some vestiges of international diplomatic protocol have become engrained in our parliamentary procedures.

13. Can delegates be bound by their states?

Yes, the States, through several court decisions, have the power to instruct their delegates and to make the instructions binding. The States may, and probably will, require the delegates to take an oath to pledge fidelity to their instructions as issued by the state legislature.²⁶ The delegates are the direct representatives of the state legislatures and not directly of the States or of their people themselves.

14. How many delegates are chosen from each state?

The States chose their own delegations, including the number of delegates. During the many debates in Congress on AVC procedures and rules, the subject of delegate apportionment was discussed. The suggestion was made to apportion the delegates equivalently to each state's Electoral College representation. This formula fails to respect that at the 1787 Philadelphia Convention, each state had a singular vote despite variation in the number of delegates in their respective delegations.²⁷ Article V gives equal weight to each state.

15. On what basis are the delegates chosen?

Each state sets its own requirements. The pattern set by the Philadelphia Convention of 1787 would probably be followed by the state legislatures.²⁸

16. Could delegates be selected by quotas for race, gender, ethnicity or other designation?

No, the Equal Protection Clause of the Fourteenth Amendment prohibits such discrimination. The States would determine the method of selecting their respective delegates without consideration of such physical attributes.²⁹

²⁵ http://www.leagle.com/decision/19751681390FSupp1291_11480.xml/DYER%20v.%20BLAIR Dyer v. Blair 390 F. Supp. 1291 (N.D. Ill. 1975 – Justice Stevens)

²⁶ U.S. Dept. of Justice, "Report to the Attorney General: Limited Constitutional Conventions Under Article V of the United States Constitution," Office of Legal Policy, Sept. 10, 1987, p.48

²⁷ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.30

²⁸ James K. Rogers, "The Other Way To Amend The Constitution: The Article V Constitutional Convention Amendment Process," *Harvard Journal of Law & Public Policy*, volume 30, number 3, p.1015

²⁹ United States Constitution, 14th Amendment

17. Would members of Congress or the State legislatures be eligible to be delegates?

Whether members of Congress may be delegates of the AVC has been a point of debate for decades. The Constitution contains a prohibition in Article I, Section 6, Clause 2 on Senators and Representatives holding any other federal office while serving in the Congress.³⁰ This prohibition was cited as a potential source of conflict during the 1993 House Judiciary Committee's hearings on the AVC.³¹ Others have made the case that members of Congress would bring a unique perspective to the debate and discussion of proposed amendments.³² State legislators would be eligible and would be well versed in the parliamentary procedure that would govern the operation of the convention. Inevitably, the rules and procedures formulated by the AVC Rules Committee such as have been discussed at the Mount Vernon Assembly and in the future scheduled meetings would determine eligibility of elected officials.

18. Can the AVC pass amendments?

No, the convention is strictly for the purpose of proposing, debating and forwarding the proposed amendments to the Congress for referral to the States for ratification. The function of the convention is analogous to that of Congress proposing and considering an amendment. The States are always the final arbiters of whether to amend our Constitution.³³

19. Once the subject matter has been addressed, may the AVC take up other business not mentioned in the applications of the States?

No, the call issued by Congress will reflect the subject matter of the applications of the States and set the agenda for the convention. When the convention convenes, the Rules Committee will be established and they will set the formal agenda and rules for conducting the convention. When the agenda is fulfilled, the convention will end – the Supreme Court addressed this issue in *United States ex rel. Widenmann v. Colby* in 1920.³⁴

20. Can an AVC be limited to a single topic or proposed amendment subject?

Yes. Each state submits an application to Congress for the Article V convention. When 2/3 of the States (currently 34 states) submit applications, Congress must call a convention for the express purpose of the applications. If 34 states submit applications calling for a convention for the explicit purpose of debating and proposing, for example, a Balanced

³⁰ U.S. Constitution, Article I, Section 6, Clause 2

³¹ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.20

³² Morris Forkosch, "The Alternative Amending Clause in Article V: Reflections and Suggestions," *Minnesota Law Review*, volume 51, issue 6, 1966-67, p. 1073 - Forkosch suggests that federal judges would also be eligible but he recommends against it.

³³ Michael Almond, "Amendment by Convention: Our Next Constitutional Crisis?" *North Carolina Law Review*, volume 53, issue 3, February 1975, p.507

³⁴ *United States ex rel. Widenmann v. Colby* 265 F. 998 (D.C. Cir. 1920) affirmed as 257 U.S. 619 (1921)

Budget Amendment, then the convention's business is limited to that particular business.³⁵ The Supreme Court ruled in the *In Re Opinion of the Justices* decision in 1933 that an AVC may be limited.³⁶ The Philadelphia Convention discussed and concluded that a "single proposition" was acceptable.³⁷

CONGRESS' ROLE IN AN AVC

21. What role, if any, does Congress play in an AVC?

Congress was given a very limited role. They collect the applications from the States and compile them. The Clerk of the House of Representatives and/or the Secretary of the Senate typically receive the applications and advise the leadership when the requisite 34 states have applied for a convention. (There is no official rule as to who must receive and tally the count.)³⁸ The applications are called "Memorials" in the Congress.³⁹ These memorials are assigned a number and the full text is printed in the *Senate Record*⁴⁰ and the *House Congressional Record*.⁴¹ Congress MUST issue a "call" to a convention when the 2/3 of the States number is reached – they have no discretion on this point. Congress selects the date on which the convention begins and the location of the convention. Finally, Congress stipulates the method of ratification of any proposed amendments.⁴² Per Article V of the Constitution, either state legislatures or state ratification conventions are held to vote on the proposed amendments. Congress has, over the years, claimed powers and responsibilities that include: receiving, judging and recording applications; establishing procedures to summon a convention; setting the time allotted to deliberations; determining the number and selection of delegates; setting internal convention procedures and the transmission of proposed amendments to the state legislatures. The validity of these congressional claims to power remains in question.⁴³

³⁵ Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Inst. Policy Report No. 241, Sept. 2010

³⁶ *In Re Opinion of the Justices* 204 N.C. 306, 172 S.E. 474 (1933)

³⁷ Alexander Hamilton, *The Federalist*, Number 85, p.572

³⁸ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.12

³⁹ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.28

⁴⁰ <http://rules.senate.gov/public/index.cfm?=RuleVII> *Standing Rules of the United States Senate*, Rule VII, paragraph 1

⁴¹ <http://www.rules.house.gov/singlepages.aspx?NewsID=133&rsbd=165> *Rules of the House of Representatives*, Rule XII, clause 3

⁴² Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.22

⁴³ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.1

22. Does Congress control an AVC?

No, Congress is more of a “processor” of the applications. They have no input on the material discussed. They do not set the rules or the agenda.⁴⁴ Constitutional scholar James Kenneth Rogers put it best, “The original purpose of Article V was to give States the power to circumvent a recalcitrant or corrupt Congress. It thus makes little sense for it to give Congress broad power to control a convention.”⁴⁵ Further, some aspects of the process have been claimed by Congress through the Supreme Court’s establishment of the ‘political question doctrine’ but as Rogers notes, “Even assuming the validity of the political question doctrine, however, Congress still lacks authority over the convention process [Citing the SCOTUS three part test for the political question doctrine]. But, the political question doctrine does not apply to congressional control of a convention because it fails the first part of the test: the issue has not been constitutionally committed to Congress, but to the States.”⁴⁶

23. Can Congress prevent or refuse an AVC amend-con?

No, the Supreme Court has ruled in four separate cases that Congress cannot refuse the States’ demand for a convention.⁴⁷ In the event that Congress refuses to call the amend-con, the States have at least two options: they can sue in the Supreme Court as the court of original jurisdiction using a number of legal means or they may try to simply convene the convention on their own. The problem lies in enforcement; what mechanism is there for compelling the Congress to act to call a convention? This point has been debated by constitutional scholars.⁴⁸ The debate in the Philadelphia Convention included discussion on whether the Congress could refuse to call an AVC. Rogers states that, “In the face of congressional inaction, the States could circumvent the national legislature to propose needed amendments.”⁴⁹ The Constitution itself permits judicial enforcement of making

⁴⁴ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.24

⁴⁵ James K. Rogers, “The Other Way To Amend The Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law & Public Policy*, volume 30, number 3, p.1011

⁴⁶ James K. Rogers, “The Other Way To Amend The Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law & Public Policy*, volume 30, number 3, p.1014

⁴⁷ See <http://supreme.justia.com/cases/federal/us/282/716/> United States v. Sprague 282 U.S. 716 (1931); <http://supreme.justia.com/cases/federal/us/256/368/case.html> Dillon v. Gloss 256 U.S. 368 375 (1921); <http://supreme.justia.com/cases/federal/us/253/221/> Hawke v. Smith No. 1 253 U.S. 221 (1920) and <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=59&invol=331> Dodge v. Woolsey 59 U.S. 331 (1855)

⁴⁸ Cyril Brickfield, House, Committee on Judiciary, 85th Cong. 1st sess., *Problems Relating to a Federal Constitutional Convention*, US GPO (1957), p.27

⁴⁹ James K. Rogers, “The Other Way To Amend The Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law & Public Policy*, volume 30, number 3, p.1015

Congress issue a call to a convention.⁵⁰ The Supreme Court has the power to issue a declaratory judgment, a writ of mandamus or an injunction among other options.⁵¹

24. Who decides where and when the AVC meets?

Congress is granted the power by Article V to determine the location and starting date of the convention.⁵²

25. Does Congress have to call an AVC if the 34 applications are received?

Yes, the wording of Article V makes clear it that the call is **mandatory**; Congress has a duty to call an AVC and therefore has no choice in the matter. The article reads, "...on the Application of the Legislatures of two thirds of the several States, [Congress] *shall* call a Convention for proposing Amendments..."⁵³ Alexander Hamilton noted that, "the Congress will be obliged... to call a convention for proposing amendments... The words of this article are *peremptory*... Nothing in this particular is left to discretion."⁵⁴

26. When does Congress have to call an AVC?

Traditionally, as soon as the Clerk of the House of Representatives notifies the House leadership that the States have met the 34 states threshold, Congress is obligated to set a date and a location. The question of how long into the future the date may be set is unknown. If Congress is resistant, the issue may be settled by the Supreme Court. Due to the lack of a precedent, the AVC process has never reached the stage where Congress has had to call a convention and therefore consider how far into the future to set the date. Several factors will influence this decision. The convention delegates will need to reference numerous government documents and resources in order to complete their business. The Library of Congress, the U.S. Archives, the Congressional Research Service, the Federal Judicial Center and many other government repositories will be called upon to produce necessary documentation in the form of charters, court records, congressional records, convention histories and other sources of information. The various federal agencies, bureaus, commissions, administrations, departments and offices will need to be directed to provide timely and accurate information to the AVC. These actions may require either an executive order or the passage by Congress of an enabling act to direct their respective resources to be at the disposal of the AVC. Federal lawyers (especially constitutional lawyers) will need to be dispatched to the convention to be available for consultation by the delegates. All of these actions, and more, will require time to prepare, meaning that the convention may not be scheduled for at least a year between the congressional call and the actual convening of the AVC delegates.

⁵⁰ United States Constitution, Article III, Section 1, Clause 1

⁵¹ *Powell v. McCormick*, 395 U.S. 486 (1969); *Roberts v. U.S. ex rel. Valentine*, 176 U.S. 221, 232 (1900); *Cooper v. Aaron*, 358 U.S. 1 (1958)

⁵² United States Constitution, Article V

⁵³ United States Constitution, Article V

⁵⁴ Alexander Hamilton, *The Federalist*, number 85, "Conclusion", p.546

27. Is the Congress required to forward the proposed amendments from the AVC to the States for consideration of ratification?

Between the 1970s and the 1990s, Congress considered many bills that were introduced for the purpose of establishing the procedures of an AVC. Included in the debate of these bills, was discussion as to whether Congress was obligated to forward any or all proposed amendments to the States. Initially, Congress claimed the right to reject any amendment that Congress believed was outside of the scope of the limited AVC.⁵⁵ Subsequent legislation included verbiage that recognized that Congress did not have discretion to reject an amendment for any reason beyond that of confirming that a proposed amendment was within the mandate of the convention. Also, it is acknowledged that the States could bring suit on the Congress for failing to refer the proposed amendments to the States for ratification consideration. Lastly, the legislation proposed the added timeframe of 30 days by Congress to call a convention or to forward the proposed amendments.⁵⁶

28. What compels the Congress to act on setting the method of ratification and promulgating the amendment(s) to the States?

The Supreme Court has ruled in the past that Congress has no choice in the matter of Article V conventions.⁵⁷ The debates in the 1787 convention covered this possibility and concluded that Congress, like the call upon receiving sufficient applications from the States, “shall” promulgate the proposed amendments on to the States.⁵⁸

29. Could Congress delay promulgating the proposed amendment(s) indefinitely?

No, although there is no legal precedent to cite, the Supreme Court would find this issue outside the political question doctrine and therefore justiciable. The Court would undoubtedly view such obstruction as an unconstitutional violation of Article V.

30. Does the Congress have the power to veto or reject the proposed amendments?

No, if it did, then the AVC would become nothing more than an auxiliary debating forum and an advisory council to the Congress. This type of arrangement was rejected in the 1787 Philadelphia Convention.⁵⁹ Ultimately, the purpose of the Article V Convention is to go around the Congress when it is not being responsive to the people and the States. All

⁵⁵ Sam Ervin, Jr., “Proposed Legislation to Implement the Convention Method of Amending the Constitution,” *Michigan Law Review*, volume 66, issue 5, March 1967-1968 (sic), p.882

⁵⁶ See S. 119, Section 15, 98th Cong., Constitutional Convention Implementation Act of 1984 or S. 214, Section 11(c), 102nd Cong., Constitutional Convention Implementation Act of 1991

⁵⁷ <http://supreme.justia.com/cases/federal/us/282/716/> United States v. Sprague 282 U.S. 716 (1931)

⁵⁸ Merrill Jensen, et al., *The Documentary History of the Ratification of the Constitution*, volume 5, (1976), pp.678, 682

⁵⁹ Morris Forkosch, “The Alternative Amending Clause in Article V: Reflections and Suggestions,” *Minnesota Law Review*, volume 51, issue 6, 1966-67, p. 1079

amendments must be ratified by the States – Congress does not get to choose what proposed amendments are acceptable from the AVC.⁶⁰

31. Does Congress have to choose either method of ratification or give a reason for preferring one method over the other?

No, Congress has complete freedom to choose either method and no justification is required for the choice. The ad hoc state ratification convention method has been used only once – to ratify the 21st Amendment to repeal the 18th Amendment. The choice was included in Article V as a measure of checks and balances.⁶¹

STATES' ROLE IN AN AVC

32. How specific must the state legislatures be in the wording of the application?

In order to assure that the Clerk of the House counts the States' applications correctly, it is recommended that the applications share common wording. By using very specific language, the States get an exact count as to the number of applicants and no application can be ignored or discounted by the Clerk.⁶² Constitutionally, there is no mandate for identical wording; the impetus on identical wording is intended to counter opposition.⁶³

33. Do the applications from all the States have to be worded identically?

It is not required that the language of multiple applications from the several States be identical but it would help to make sure that the count is achieved as soon as possible and that all applications are counted properly.⁶⁴

34. Is there a finite time period in which all the state applications must be made?

It is unknown how long an application remains active before it becomes "stale", if it even becomes stale at all. Many constitutional scholars recommend that the validity of the application should have a limited life commensurate with the length of time usually given to secure ratification of a proposed amendment sent to the States – that of seven years.⁶⁵ A

⁶⁰ Gerald Gunther, "The Convention Method of Amending the United States Constitution," *Georgia Law Review*, volume 14, number 1, Fall 1979, p.23

⁶¹ <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-6.pdf> U.S. Congress *The Constitution of the United States, Analysis and Interpretation*, (Washington: GPO, 2004), p. 952

⁶² S. 214, 102nd Cong., 1st sess., "Constitutional Convention Implementation Act of 1991", Section 3(a)

⁶³ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.7

⁶⁴ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.7

⁶⁵ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.10

better argument is that an identically worded application form decades past should be counted as valid if the issuing state has not rescinded the application.

35. How is the validity of the state applications determined?

The Supreme Court ruled in *Prigg v. Commonwealth of Pennsylvania* in 1842 that the validity of a state's application cannot be questioned. Congress must accept the application. The only question unresolved is how to classify the application, that is, does the application contain such specificity to a single issue that the application is included in the count of all state applications for a convention on a specific issue?⁶⁶ Any congressional decision or rejection would be subject to judicial review.

36. Who determines whether the applications are valid?

In the *Jarrolt v. Moberly* decision of 1880, the Supreme Court held that the application is always valid by virtue of its origin in the state legislature.⁶⁷

37. Can States limit the actions of their respective delegates through binding instructions?

Yes, the States are empowered to limit the actions of the delegates through instructions from the legislature. This has been the situation throughout dozens of interstate conventions and compact conventions extending back through the Colonial Period.⁶⁸

38. Can the States rescind their call for an AVC?

This is unknown but many states have rescinded one or more of their applications over the years. It is logical that a state could rescind their application if they feel that the need for the convention no longer existed or if the state disliked the anticipated agenda. Constitutional scholars have debated that if a state may rescind at will, then when the state would rescind is the critical point. The consensus seems to be that a state could rescind either before the 34 states count is reached or after the application effort has failed but not once the 34 states count is reached and Congress has called the AVC.⁶⁹ The Supreme Court included in its *Coleman v. Miller* decision that the ability of the States to rescind an application came under the "political question doctrine" and therefore was beyond the Court's purview.⁷⁰

⁶⁶ <http://supreme.justia.com/cases/federal/us/41/539/case.html> Prigg v. Commonwealth of Pennsylvania 41 U.S. 539 (1842)

⁶⁷ <http://supreme.justia.com/cases/federal/us/103/580/> Jarrolt v. Moberly 103 U.S. 580 (1880)

⁶⁸ Robert Natelson, "Amending the Constitution by Convention: A Complete View of the Founders' Plan," p.4

⁶⁹ Dwight Connely, "Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?" *Arizona Law Review*, volume 22, issue 4, 1980, pp. 1033-1034

⁷⁰ <http://supreme.justia.com/cases/federal/us/307/433/case.html> Coleman v. Miller 307 U.S. 433 (1939)

39. Does the state application to Congress have to specify the purpose of the AVC?

No. A state may make an application for a general or open convention for the purpose of addressing a multitude of issues. This has been done many times by most states.⁷¹

40. Can state applications dictate the exact wording of proposed amendments?

No. The purpose of the convention is to discuss, debate and write the amendment. Determining the wording before the convention defeats the purpose of the convention.⁷² The idea of requiring exact wording has been proposed several times in Congress.⁷³

41. Could a state delegation be recalled by its state legislature?

Yes, since the States determine their own rules for their delegations, the States may recall their delegations or individual delegates at any time. There are some constitutional scholars that argue delegates cannot be recalled or even limited due to the Speech and Debate Clause of the Constitution. But this clause applies to members of Congress and not AVC delegates.⁷⁴

42. How do the States pass their bills for an application?

Each state sets its own criteria for passage, but typically, the same margin for passage of a statute is used for an AVC application bill. The margin varies by state.⁷⁵ Typically, the States pass resolutions with accompanying enabling statutes that cover the selection and duties of the delegates.

43. Can the States submit 'conditional' applications to Congress?

Yes, in the 1980s, an effort to pass a Balanced Budget Amendment (BBA) through Congress was failing so several states proposed an AVC to address the issue. Many of those states issued applications that specifically stated that if Congress passed a BBA, their applications would immediately be rescinded.⁷⁶ Other states included wording that made clear that the application was for a single-issue AVC.⁷⁷ Still other states issued resolutions

⁷¹ <http://supreme-court-cases.findthebest.com/l/1013/Ullmann-v-United-States> Ullmann v. United States 350 U.S. 422 (1956)

⁷² Walter E. Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention", *Yale Law Journal*, volume 88, issue 8, July 1979, p.1632

⁷³ Congressional Research Service Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*

⁷⁴ United States Constitution, Article I, Section 6, Clause 1

⁷⁵ S. 1272, 93rd Cong., 2nd sess., "Federal Constitutional Procedures Act", Section 3(a)

⁷⁶ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.6

⁷⁷ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993), p.6

that called for a BBA, stating that if Congress failed to pass a BBA, then the resolution should be considered an application for an AVC.⁷⁸

44. Could the States propose amendments ahead of the convention with defined wording and then instruct their delegates to accept only that specific wording?

To do so would circumvent the purpose of the deliberative aspect of the convention. If the wording is already set, then the convention does not, and cannot, perform its function of debating the proposed amendment and instead becomes part of the ratification process. In the 1993, the Senate Judiciary Committee studied the Article V Convention process and rejected this approach.⁷⁹ Constitutional scholars have argued that delegates coming to the convention with a pre-written amendment would make the convention pointless and would violate the intended checks and balances that the Framers put into Article V.⁸⁰ The Courts have addressed this several times in *State ex rel. Harper v. Waltermire*;⁸¹ *AFL-CIO v. Eu*;⁸² *Miller v. Moore*;⁸³ *Gralike v. Cook*;⁸⁴ *Barker v. Hazeltine*;⁸⁵ *League of Women Voters of Maine v. Gwadosky*⁸⁶ and *Donovan v. Priest*.⁸⁷

45. Would non-states such as the District of Columbia or the U.S. territories and protectorates have a vote or a delegation in the AVC?

Since Article V discusses only the States and makes no mention of territories or protectorates, the text makes clear that the States only have a say in the process.⁸⁸ The status of being a State is elevated over that of a territory or protectorate and therefore has additional benefits not afforded to a territory or protectorate.⁸⁹

⁷⁸ Gerald Gunther, "The Convention Method of Amending the United States Constitution," *Georgia Law Review*, volume 14, number 1, Fall 1979, p.3

⁷⁹ U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993) p.6

⁸⁰ Walter Dellinger, "The Recurring Question of the 'Limited' Constitution Convention," *Yale Law Journal*, volume 88, issue 8, July 1979, p. 1632

⁸¹ <https://www.courtlistener.com/mont/5v6F/state-ex-rel-harper-v-waltermire/> *State ex rel. Harper v. Waltermire* 691 P.2d 826 (1984)

⁸² *AFL-CIO v. Eu* 686 P.2d 609 (Cal. 1984)

⁸³ *Miller v. Moore* 169 F.3d 1119 (8th Cir. 1999)

⁸⁴ http://www.oyez.org/cases/2000-2009/2000/2000_99_929 *Gralike v. Cook* 191 F.3d 911 924-25 (8th Cir. 1999) affirmed as *Cook v. Gralike* 531 U.S. 510 (2001)

⁸⁵ <http://www.sdbar.org/Federal/1998/1998dsd037.htm> *Barker v. Hazeltine* 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998)

⁸⁶ *League of Women Voters of Maine v. Gwadosky* 966 F. Supp. 52 (D. Me 1997)

⁸⁷ <http://opinions.aoc.arkansas.gov/WebLink8/docview.aspx?id=198889&dbid=0> *Donovan v. Priest* 931 S.W. 2d 119 (Ark. 1996)

⁸⁸ United States Constitution, Article V

⁸⁹ Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.31

OPERATION OF THE AVC

46. What weight of vote does each state have?

Traditionally, since the 1787 convention, the rule has been “one State, one vote” and the rules of the convention will, most likely, not change that tradition.⁹⁰ The Rules Committee established by the AVC delegates could choose to change the weighting of the votes of each state to reflect some other criterion such as population.

47. How many votes are required to pass a proposed amendment on to the States?

A simple majority could suffice to propose an amendment, but the convention may adopt rules that require a greater majority. It was decided by the Supreme Court in *National Prohibition Cases* in 1920 that a quorum of delegates present and voting would suffice for Congress and constitutional scholars have argued that the same would hold for an AVC.⁹¹ There has been much discussion over the last three decades as to whether the AVC would need a supermajority of 2/3 of the quorum’s votes to adopt a proposed amendment but no legislation has been successfully passed in Congress.⁹²

48. Who funds the AVC?

The States will generally fund the convention as it is a convention of the States and not the federal government. The federal government is permitted to fund the convention by federal statute and past convention procedure bills presented in Congress called for federal funding. Federal agencies are also directed to provide assistance and funding as requested.⁹³ It is in the States’ best interest to fund the operation of the AVC themselves and avoid the undue financial influence of the federal government.

49. Who is responsible for organizing and running the AVC?

The States are responsible acting through the convention delegates. The Rules Committee established by the AVC will determine the structure and operation of the convention. The courts have decided that there are implied powers granted to the convention.⁹⁴

⁹⁰ Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, Goldwater Inst. Policy Report No. 241, Sept. 2010, p.26

⁹¹ <http://supreme.justia.com/cases/federal/us/253/350/> National Prohibition Cases 253 U.S. 350 (1920)

⁹² Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, p.31

⁹³ Congressional Research Service, Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, p.27

⁹⁴ State ex rel. Donnelly v. Myers 127 Ohio St. 104, 186 N.E. 918 (1933)

50. Who determines the rules of the AVC?

A committee of the delegates chosen by the delegates from among their own members will draw up the rules. The Mount Vernon Assembly and the upcoming Indianapolis meeting are working to determine the rules ahead of time so that they can be presented to the delegates for their approval at the beginning of the convention. Federal Courts have ruled in *United States v. Thibault* that the Article V Convention is controlled by the States and not the federal government and therefore the federal government has no control or interest in the operation of the convention.⁹⁵ This opinion was backed up by now Supreme Court Justice Stevens in a federal district court case in *Dyer v. Blair* in 1975.⁹⁶

51. Do all states need to be physically represented at the Article V Convention to consider the business of the AVC?

No, a quorum of the AVC is analogous to a quorum in Congress therefore a quorum of 2/3 or 34 states is necessary to convene the convention according to a Supreme Court decision in *State of Rhode Island v. Palmer*, one of the *National Prohibition Cases* of 1920.⁹⁷ In 1787, Rhode Island did not attend the convention.

52. If an AVC is its own authority, could the delegates do whatever they want?

This is the third greatest issue with the AVC and the root of the idea that the convention can “go rogue” and become a “runaway.” Since the delegates are issued instructions by their respective states, and the States retain the ability to recall any and all of their delegates, the impact of a delegation going rogue is negligible. Several states to date have passed legislation that restricts the discretion of its delegates.^{98,99} As a last resort, whatever output in the form of proposed amendments is generated can be stopped by just 13 states rejecting a proposed amendment. The amendatory convention is an agent of the state legislatures; it must remain within its stated scope. Anything done outside of the prescribed purpose is not binding and is considered a mere ‘recommendation.’¹⁰⁰

53. If there is an agenda for the AVC determined ahead of the convention, then will there be no debate of the issue or the particulars of the proposed amendment(s) considered?

The agenda is necessary to set limits on the operation of the AVC and to keep the focus of the delegates within the instructions of their respective states. The agenda outlines the topic(s) to be considered, not the particulars of the topic. As an example, a Balanced Budget Amendment could very well be the issue discussed at the AVC. There are many possible

⁹⁵ http://www.leagle.com/decision/193121647F2d169_1163 United States v. Thibault 47 F. 2d 169 (2d Cir. 1931)

⁹⁶ http://www.leagle.com/decision/19751681390FSupp1291_11480.xml/DYER%20v.%20BLAIR Dyer v. Blair 390 F. Supp. 1291 (N.D. Ill. 1975 – Justice Stevens)

⁹⁷ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=253&invol=350> State of Rhode Island v. Palmer 253 U.S. 320 (1920)

⁹⁸ David Long, Amending the U.S. Constitution by State-Led Convention: Indiana’s Model Legislation, p.7

⁹⁹ Senate Enrolled Act No. 224, Indiana (2013); Senate Enrolled Act No. 225, Indiana (2013)

¹⁰⁰ Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, Goldwater Inst. Policy Report No. 241, Sept. 2010, p.26

variations of a BBA and the AVC would be focused on discussing and debating the details and ramifications of the various versions. Eventually, a consensus would be, hopefully, reached and the wording would be refined resulting in a proposed amendment sent to the Congress to be referred to the States. Undoubtedly, this complex issue would be a passionately and heatedly debated – the idea that a boilerplate amendment would be adopted without debate is both worrisome and unlikely as every state has a vested interest in the outcome and will, assuredly, seek to voice their concerns and obtain assurances as to the impact on their state. A deliberative convention is guaranteed by court decisions.¹⁰¹

LEGAL ASPECTS OF THE AVC

54. What role does the Supreme Court play in the process?

Constitutionally, the Supreme Court of the United States (SCOTUS) plays no role in the process. However, in the past, the States, several times, moved toward an AVC on certain issues and the Congress, sensing a threat to their power, responded by passing the very amendment that the States sought to discuss in an AVC. This is known as ‘prodding.’ Each time that this occurred, some point or another was brought up that had no known answer and the result was a lawsuit brought in the SCOTUS to address and resolve the point. On all issues of the Constitution and constitutionality, the SCOTUS is the court of original jurisdiction according to Article III, Section 2 of the United States Constitution.¹⁰² There is a significant body of law which has developed regarding the AVC despite the lack of an actual AVC having taken place.

55. Are there any legal guidelines for an AVC?

Several cases have been adjudicated by the SCOTUS to cover such points as the selection of delegates, state’s instructions to the delegates, power of the AVC, conclusion of the AVC, etc. While not all issues are resolved, the basic structure of the convention exists in law. The Congressional Research Service has published several tracts on the issue.¹⁰³ Additionally, the various notes from the Philadelphia Convention of 1787 provide guidelines for how the AVC could be structured. The notes of delegates Alexander Hamilton, Rufus King, James Madison, James McHenry, William Paterson, William Pierce, Robert Yates and historian Max Farrand’s Record of the Federal Convention of 1787 provide much detail on the minutiae of the convention.

¹⁰¹ Roger Hoar, *Constitutional Conventions: The Nature, Powers, and Limitations*, (1917), note 1, pp. 127-9

¹⁰² United States Constitution, Article III, Section 2

¹⁰³ Congressional Research Service, Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*; Congressional Research Service Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*; and Congressional Research Service Report CRS 95-589 A (1995) *Amending the U.S. Constitution: by Congress or Constitutional Convention*

56. Could the AVC open up ratification to the people by referendum?

The Supreme Court has been clear since 1855 in *Dodge v. Woolsey* that the issues addressed and the amendment(s) proposed are subject to ratification by only two methods as detailed in Article V: state legislatures or state ratification conventions are the only permissible methods of ratification. Referendum by the people is not legally permissible as the people, through the adoption of the Constitution "...have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them,..."¹⁰⁴

57. Could an outside third party set the rules of the AVC?

No. The AVC is considered a federal function performed by the States.¹⁰⁵ The States, and the States alone, have the power, through their legislatures to apply for, conduct, set the rules for and conclude the AVC. The Supreme Court addressed the issue in both *Leser v. Garnett*¹⁰⁶ and in *Dyer v. Blair*¹⁰⁷ and in lower courts.¹⁰⁸

58. Are there any exceptions to the amendment process?

Yes, there are two. The Equal Suffrage of the States in the Senate cannot be changed¹⁰⁹ and the prohibition on altering the status of slavery before 1808 could not be changed.¹¹⁰ The passage of time has made obsolete the alteration of slavery before 1808. Thus, there is currently but one issue that the AVC cannot propose amending.¹¹¹

59. Are the actions of the AVC subject to judicial review?

This question is extremely important. In today's legal environment, it is highly probable that some party will challenge the work of the AVC by waging "lawfare" to stop the ratification of the proposed amendment(s). The SCOTUS will have jurisdiction over the challenge.¹¹² They may decide that the particular issue falls under the "political question doctrine" and thereby decline to consider the case. If the challenge appears to be technical in nature, then the court may take up the case and add to the body of law covering the AVC and settle the issue.

¹⁰⁴ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=59&invol=331> *Dodge v. Woolsey* 59 U.S. 331 (1855)

¹⁰⁵ <http://supreme.justia.com/cases/federal/us/253/221/> *Hawke v. Smith* No. 1 253 U.S. 221 (1920)

¹⁰⁶ <http://supreme.justia.com/cases/federal/us/258/130/case.html> *Leser v. Garnett* 258 U.S. 130 (1922)

¹⁰⁷ http://www.leagle.com/decision/19751681390FSupp1291_11480.xml/DYER%20v.%20BLAIR *Dyer v. Blair* 390 F. Supp. 1291 (N.D. Ill. 1975 – Justice Stevens)

¹⁰⁸ *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977); *State ex rel. Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933); and *Prior v. Noland*, 188 P. 727 (Colo. 1920)

¹⁰⁹ United States Constitution, Article V

¹¹⁰ United States Constitution, Article I, Section 9, Clause 1 (now moot due to the passage of time)

¹¹¹ Madison's Notes from the Constitutional Convention of 1787, pp.540, 575

¹¹² United States Constitution, Article III, Section 2

60. Does the state law of the hosting state prevail over the AVC or does federal law?

No, the SCOTUS has ruled in *Leser v. Garnett*¹¹³ that the AVC is a federal action by the States, and as such, the hosting state has no authority to rule or overrule the convention or any particular aspect of its operation. The AVC operates under the authority granted by Article V and is therefore a federal action with supremacy to state law.

61. What if the AVC proposes amendment(s) that are unconstitutional?

Several results will occur. First, the Congress will most likely refuse to select a mode of ratification or promulgate the proposed amendment to the States although technically, they cannot do so. Second, there will be, in all likelihood, a judicial challenge in the Supreme Court. Third, the States will presumably reject such an amendment out of hand by either a down vote or by refusing to take up a debate and a vote on the amendment. Fourth, Congress may take up the issue and move quickly to draft, debate and pass either a cleaner version of the amendment or a different amendment to prevent the AVC amendment being proposed.¹¹⁴

62. Could the AVC create and prescribe an entirely new ratification method that allows them to amend the Constitution and go around the States?

No. To create a new amendment process that bypasses the current method and “hijacks” the AVC would require amending Article V itself. This cannot be done in the AVC – it would have to first be accepted and ratified by the States. No matter what anyone tries to do to amend the Constitution, it ultimately requires the States to approve the action – just 13 states can stop any such action cold. The Supreme Court dealt with the issue of changing the ratification process in *United States v. Sprague*¹¹⁵ and *Hawke v. Smith*¹¹⁶ and ruled it impermissible.

63. Can an amendment be proposed that “clarifies” other parts of the Constitution?

Yes, the Twelfth, Twentieth and Twenty-fifth Amendments all clarify the sections dealing with the election of the President.

64. Could an amendment be proposed that repeals other amendments or sections of the Constitution?

Yes, the Twenty-first Amendment repealed the Eighteenth Amendment.

¹¹³ <http://supreme.justia.com/cases/federal/us/258/130/case.html> *Leser v. Garnett* 258 U.S. 130 (1922)

¹¹⁴ Robert Natelson, “Proposing Constitutional Amendments by a Convention of the States,” p.18

¹¹⁵ <http://supreme.justia.com/cases/federal/us/282/716/case.html> *United States v. Sprague* 282 U.S. 716 (1931)

¹¹⁶ <http://supreme.justia.com/cases/federal/us/253/221/> *Hawke v. Smith* No. 1 253 U.S. 221 (1920)

MISCELLANEOUS QUESTIONS

65. What role does the executive branch play in the process?

None. In the earliest SCOTUS case involving Article V, *Hollingsworth v. Virginia*, the Court ruled in 1798 that the Presentment Clause does not apply to amendments as there is no mention anywhere in the Constitution of the President being involved in the process.¹¹⁷

66. How long after the AVC occurs will the States have to ratify any proposed amendment?

Since the proposal of the 18th Amendment, Congress has allotted seven years for ratification by the States. This was confirmed by the Supreme Court in two cases, *Dillon v. Gloss* in 1921¹¹⁸ and *Coleman v. Miller* in 1939.¹¹⁹ This seven year allotment of time became a standard practice starting with the 23rd Amendment and did not appear in the wording of proposed amendments after the 23rd Amendment.¹²⁰ When Congress sends the proposed Amendment to the States, it will be through a ‘concurrent resolution’ which most likely will have attached a limitation on the ratification time.¹²¹

67. If the federal government does not follow our Constitution now, how will new amendments help – won’t they just ignore those too?

This is the most pertinent question that can be asked at this time. If the answer is that the Congress and the President will simply ignore the new amendment – and that the new amendment has no “teeth” for enforcement – then the AVC is moot. The solution is that any new amendment must not be worded to say, using the example of the BBA, something like “Congress shall not pass a budget that is not balanced.” Enforcement mechanisms must be built into the amendment that includes consequences and provisions for actions by the States in response to the failure of Congress to balance the budget. Continuing the example of the BBA, the amendment might read as, “Congress shall pass no budget that is not balanced, OR the States shall be empowered to do the following:

- Reject the proposed federal budget and impose a budget as constructed by a simple majority vote of a Convention of the States, and/or,
- Revert to the last balanced federal budget, and/or,

¹¹⁷ <http://supreme.justia.com/cases/federal/us/3/378/case.html> *Hollingsworth v. Virginia* 3 U.S. (3 Dall.) 378 (1798)

¹¹⁸ <http://supreme.justia.com/cases/federal/us/256/368/case.html> *Dillon v. Gloss* 256 U.S. 368 375 (1921)

¹¹⁹ <http://supreme.justia.com/cases/federal/us/307/433/case.html> *Coleman v. Miller* 307 U.S. 433 (1939)

¹²⁰ <http://www.gpoaccess.gov/constitution/pdf2002/015.pdf> “Article V: Ratification” in *The Constitution of the United States, Analysis and Interpretation*, 108th Congress, Senate Document 108-17 (Washington: GPO, 2004)

¹²¹ <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-6.pdf> U.S. Congress *The Constitution of the United States, Analysis and Interpretation*, (Washington: GPO, 2004), p. 950

- Withhold funds collected on behalf of the federal government by the States and the States use the funds for their ultimate purpose (an example being highway maintenance taxes collected on gasoline), and/or,
- The States will assume and exercise control of certain functions of the federal government in the interim occurring during the period without a federal budget (an example being education, veterans' affairs, insurance regulation and oversight, health care or any other non-defense related activity)."

68. Why do we need an AVC, don't we just need to enforce the Constitution?

The federal government is not acting within the Constitution, it is not treating the Constitution as law, it is not confining its activities to constitutionally limited areas, it is not respecting civil rights or the States' rights, and it is encroaching on the States' powers. The only constitutional mechanism for reining in the federal government, short of revolution or insurrection, is the Article V convention. Other proposed methods such as nullification or interposition do not work, have not worked and are not supported by the courts on any level. AVCs were included by the Framers as our "nuclear option" for an out-of-control, unresponsive federal government – it is there to be used in an emergency, which we currently find ourselves experiencing.¹²² The balance of power between the States and the federal government has been greatly disturbed. The only societal institutions with the size and power to resist the growth of the federal government are the state legislatures. The States have the requisite power to enact amendments with enforcement provisions and to duly exercise that power to enforce the entire Constitution. Many of the proposed solutions to our national problems involve measures that limit or reduce the power of Congress or the courts, such as a balanced budget, term limits, or curbing judicial activism. Congress will not act to take away even a small measure of its own power. An AVC is the only way to go around Congress and enact these changes.¹²³ Constitutional scholar James Rogers argues that, "A balanced budget amendment would make it more difficult for members of Congress to use government spending to benefit their constituents in exchange for political support. Term limits would limit the tenure of members of Congress and force many of them out of office. An amendment prohibiting unfunded mandates that affect the States would limit Congress's power to control the States."¹²⁴

69. If there has never been an AVC, how can we know what will happen?

A pseudo-precedent exists in the form of the 1861 Peace Conference in Washington D.C. With the Civil War looming, Virginia made an application for an AVC in late 1860. Events moved quickly and other states, sensing that time was short, replied directly to Virginia that they would attend. In February of 1861, 21 of the 28 remaining states (6 had already seceded) sent representatives to attend the conference held at the Willard Hotel in

¹²² Congressional Research Service, Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, p.1

¹²³ Arthur Taylor, *Fear of an Article V Convention*, 20 *BYU J. Pub. L.* 101, P. 124-131

¹²⁴ James K. Rogers, "The Other Way To Amend The Constitution: The Article V Constitutional Convention Amendment Process," *Harvard Journal of Law & Public Policy*, volume 30, number 3, pp.1020-21

D.C. For 3 weeks, they followed the rules used in the 1787 Philadelphia Conference and stuck to the singular issue of proposing an amendment that resolved the slavery issue. When a delegate attempted to introduce a new subject, the body threatened expulsion and returned to the agenda. The conference concluded with a proposed amendment that it forwarded to Congress. The Senate voted on the issue, rejecting it. The House never took up the matter as Lincoln had been inaugurated and Fort Sumter besieged. The example shows that with a set agenda and rules, the fear of a runaway convention or of unusual or unplanned activities is unfounded.¹²⁵

70. Why take the risks?

The best answer is that the political situation is already so bad that one must ask if an AVC can make it any worse? With the federal government ignoring many provisions and requirements of the Constitution and the power of the States diminishing, time is of the essence to restore federalism, state sovereignty, the checks and balances of federal power vis-à-vis the States and the Rule of Law. If the States do not act within the Constitution to restrain and limit the federal government, we will progress through a post-constitutional republic to a tyranny. Inaction is the least effective option – and the most dangerous.

Disclaimer: This FAQ was compiled and researched by the members of the Wisconsin GrandSons of Liberty. We are not attorneys or professors of law; for the most accurate and current information, consult with legal professionals.

WiGOL/FAQ-015/Rev_3-3/02/14-/tjd

¹²⁵ Robert Gunderson, *The Old Gentlemen's Convention*, Greenwood Press, (1981)



Wisconsin Grand Sons of Liberty Findings of Court Cases Related to Article V of the United States Constitution

Findings of Court Cases Related to Article V of the United States Constitution

Rev. 0 – 2 Mar 2014

Covering relevant state, federal and US Supreme Court cases that either involved or apply to Article V of the US Constitution. Written in laymen's language for the general public with the key findings in each case as it relates to an Article V Convention in bold print. The name and reference of the case itself is the citation, the footnotes provide additional information pertinent to the case reference.

- 1) *AFL-CIO v. Eu*, 686 P. 2d 609 (Cal. 1984)

Financial penalties on delegates or legislators are invalid. Article V “envisions legislators must be free to vote their best judgment.” Rejected the “political question doctrine” (see *Coleman v. Miller* below). Also held that ballot initiatives to force an Article V Convention are not permissible.

- 2) *Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998)

Article V is the only constitutional method of amending the US Constitution. Initiatives and referenda are not permissible (the case involved setting congressional term limits) as citizens do not possess a direct role in amending. Use of ballot notation of either the support or non-support of term limits constituted a violation of the Speech and Debate Clause in the US Constitution.

- 3) *Coleman v. Miller*, 307 U.S. 433 (1939)

This case has been called “an aberration” by law professors and constitutional scholars such as Walter Dellinger.¹ Dictum in this case **produced the “political question doctrine”** wherein the Supreme Court will not address an issue that the Court sees as of a political nature and not of a constitutional law nature and is therefore, not justiciable. The political question doctrine has been applied erratically. Decision included the topic of the time limitation for ratification. Ruling held, “But it does not follow that, whenever Congress has not exercised that power, the Court should not take it upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications.” Also, disavowed the “staleness” language of the prior *Dillon* decision.

¹ Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*. 97 Harvard Law Review 386, 389 (1983)

- 4) *Dillon v. Gloss*, 256 U.S. 368 (1921)

Ratifications, to be valid, must occur within the time frame that Congress has specified. This stipulation, however, appears to apply only to those proposed amendments that congress has made and sent to the States and not to those proposed amendments that originate in an Article V Convention.² The day that the last required state ratifies the proposed amendment, that amendment becomes part of the Constitution and takes effect.

- 5) *Dodge v. Woolsey*, 59 U.S. 331 (1855)

Amendatory conventions may be single issue. The Court determined that the amendment process was an act by the States and not the people, who are represented by the delegates/commissioners or by the Congress depending on the mode of consideration and passage.³ The usual interpretation of the ruling is that **the States and/or the people cannot dictate the amendments** as that power rests in the hands of either Congress or the convention delegates. Dodge is often cited as an early proof of the inviolable validity of state applications as no branch is empowered to overrule the Constitution. Therefore, **a state application is valid solely because it was made by the state.**⁴

- 6) *Donovan v. Priest*, 931 S.W. 2d 119 (Ark. 1996)

Ruling requires that any assembly be more than a rubber stamp for pre-written amendment. **The assembly must engage on “intellectual debate, deliberation, or consideration” of any proposed amendment.** Applies to an Article V Convention. Also, rejected ballot labeling similar to *AFL-CIO v. Eu* and *League of Women Voters of Maine*.

- 7) *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975)

Per now Justice Stevens, who presided over the case and wrote the opinion, “the delegation [from Article V] is not to the States but rather to the designated ratifying bodies.” Stevens explicitly rejected the “political question” portion of *Coleman* in this decision. Thus, **state constitutional provisions that cover legislative supermajorities and referenda do not apply to Article V applications;** only the Article V convention itself may impose such restrictions on itself.

- 8) *Gralike v. Cooke*, 191 F. 3d 911 (8th Cir. 1999) affirmed on other grounds sub nom. *Cook v. Gralike*, 531 U.S. 510 (2001)

“Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislature’s actions.” Thus, **Article V Conventions cannot be prohibited from deliberation and consideration of a proposed amendment and thereby limited to pre-written wording.**

² Robert G. Natelson, Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers (Part 3 of 3), Goldwater Institute Report No. 11-02, 22 Feb 2011, p.19

³ Found at p.348

⁴ James Madison, *The Federalist*, No. 85.

9) *Hawke v. Smith*, (I) 253 U.S. 221 (1920), (II) 253 U.S. 231 (1920)

Article V is a bestowal of power on the state legislature for ratification and for the selection of delegates. **The legislative ratification method cannot be replaced by public referendum.** No legislature of convention itself has the power to alter the ratification procedure – that is fixed by Article V.

10) *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)

Since the Constitution does not specify a role for the executive in the amendment process, the Presentment Clause does not apply. **No signature of the President is required for a constitutional amendment to be valid and complete.** The precedent was established with the passage and adoption of the Bill of Rights in 1791.⁵

11) *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981) vacated as moot by *Carmen v. Idaho*, 459 U.S. 809 (1982)

Congress may not manipulate or change the ratification process. Article V makes clear that there are only two methods of ratification and Congress must choose one or the other mode. The ruling is similar to that of *U.S. v. Sprague*. Congress had first set a time limit of seven years for ratification of the Equal Rights Amendment, then, failing to achieve the necessary $\frac{3}{4}$ of the States ratifications, extended the time period. Also, **a state may withdraw its application any time before two-thirds of the states have applied.**

12) *In Re the Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933)

The state may rely on custom to select delegates to ratifying conventions. By implication, they may also rely on their own particular customs to choose how to select their delegates to Article V Conventions. Along with this power is the ability to establish the convention's rules, elect its own officers, fix the hours of sitting, judge the credentials of the members, and other housekeeping. Held that the ratification convention has the power to determine questions relating to the qualifications of the delegates and to fill vacancies. Case stems from the attempt to use a public referendum to bind a ratifying convention and prevent deliberation.

13) *In Re Opinion of the Justices*, 204 N.C. 306, 172 S.E. 474 (1933)

An Article V Convention may be limited in purpose to a single issue or to a fixed set of issues. Thus, the state may limit the authority of the ratifying convention.

14) *Jarrolt v. Moberly*, 103 U.S. 580 (1880)

Any attempt to suppress a state application due to its timeliness, age, subject matter, or any other reason is in violation of Article V. "A constitutional provision should not be construed so as to

⁵ Robert G. Natelson, Learning from Experience: How the States Used Article V Applications in America's First Century (Part 2 of 3), Goldwater Institute, 4 Nov 2010, p.7

defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed.”

15) *Kimble v. Swackhamer*, 439 U.S. 1385, appeal dismissed 439 U.S. 1041 (1978)

Held that **any public referendum was advisory only** and could not dictate to the delegates. (See also *AFL-CIO v. Eu.*)

16) *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997)

Similar to *AFL-CIO v. Eu* in the attempt to force term limits by ballot initiative. Court rejected claim saying that, **“A direct role in the constitutional amendment process for "citizens" was not envisioned by the Framers.** The citizen's function is to elect competent legislators, who in turn, when necessary, can amend the Constitution pursuant to the authority granted under Article V.”

17) *Leser v. Garnett*, 258 U.S. 130 (1922)

The Supreme Court held that the ratification of the 15th Amendment was no longer open to question. This was addressed in relation to the validity of the 19th Amendment. Additionally, **the state legislature’s discretion could not be supplanted by the rules imposed by a third party.** When a convention acts under Article V, it performs a “federal function” and this transcends any state limitations.

18) *Miller v. Moore*, 169 F. 3d 1119 (8th Cir. 1999)

Another ballot labeling case with the twist that a First Amendment claim to the right to influence elected representatives through ‘popular instructions’ is made. Court found that this issue was addressed in the Grand Convention of 1787 and **rejected as stifling debate and compromise.**

19) *National Prohibition Cases*, 253 U.S. 350, 40 S. Ct. 486, 64 L. Ed. 946 (1920)

Congress is empowered to set the threshold in vote percentage for passage of an amendment within the houses of Congress. Covered seven cases lumped together that all involved the 18th Amendment and the Volstead Act. Also, referendum provisions of state constitutions and statutes do not apply in the ratification and rejection of proposed amendments.

20) *Opinion of the Justices to the Senate*, 373 Mass. 877, 366 N.E. 2d 1226 (1977)

The governor plays no role in the approval process of an Article V Convention application from the state. He cannot therefore veto the application. The Article confers powers on the assemblies not the executives. Additionally, the Founders expected that the States would specify the purpose and subject matter of the applications.

21) *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 539 (1842)

No one is authorized to question the validity of a state’s application for an Article V Convention. To attempt to do so is an attempt to circumvent the Convention Clause. “The Court may

not construe the Constitution so as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”

22) *Prior v. Noland*, 68 Colo. 263, 188 P. 727 (1920)

Referendums may not be used to ratify amendments.

23) *Smith v. Union Bank of Georgetown*, 30 U.S. 518 (1831)

An Article V Convention is a “convention of the States” and is therefore endowed with the powers of an interstate convention as were all of its many predecessors. The case itself dealt with a probate issue but specifically referred to changing the existing law through an amendment by a convention of the states.⁶

24) *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933)

Other enumerated powers in the Constitution have certain “incidental” authority or implied powers, likewise, so do the powers of Article V. This can be understood as an application of the “Necessary and Proper Clause” which grants the power requisite to carry out the Article V Convention. This includes, but is not limited to, the ability to set its hours, judge credentials of delegates, determine its agenda and order of business, elect its own officers and establish its own rules, among other powers.

25) *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P. 2d 826 (1984)

The people of the state have no power to limit the deliberative process of the convention, therefore any limitations imposed by an initiative or referendum is invalid.

26) *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W. 2d 895 (1933) cert denied 290 U.S. 679 (1933)

When Congress proposes ratification by conventions for an amendment, though it does not provide how and by whom such conventions shall be assembled, **Congress’ direction necessarily implies authority to provide for assembling of such conventions.**

27) *State of Ohio ex rel. Erkenbrecher v. Cox*, 257 F. 334 (D. Ohio 1919)

There is no duty on the part of the governor of a state to forward the proposed amendment promulgated by Congress and accompanied by the ratification method prescription on to the state legislature. It is for this reason that the Congress usually sends a copy of the Joint Resolution of Congress to the state legislatures.

28) *State of Rhode Island v. Palmer*, 253 U.S. 320 (1920)

This is one of the National Prohibition Cases. The two-thirds vote required in Congress for proposing amendments is two-thirds of a quorum present and voting, not of the entire membership of

⁶ Found at p. 528 of the record in 30 U.S. (5 Pet.) 518.

the legislative body. Therefore, **the Article V Convention will require only two-thirds of the quorum present to conduct business.**

29) *Trombetta v. State of Florida*, 353 F. Supp. 675 (M.D. Fla. 1973)

An action by a state to delay consideration of a proposed constitutional amendment until after some criterion is met by the legislature is unconstitutional.

30) *Ullmann v. United States*, 350 U.S. 422 (1956)

The amendment and ratification processes cannot be changed to circumvent the Article V Convention. “Nothing new can be put into the Constitution except through the amendatory process, and nothing old can be taken out without the same process.”

31) *United State v. Chambers*, 291 U.S. 217 (1934)

The Supreme Court considers it to the “province and duty” of the Court to determine what the Constitution is including amendments. If an amendment is putative, or alleged, the Court will determine its validity. In this case, the ratification of the 21st Amendment was questioned and the Court settled the issue. This case serves as a counter point to *Coleman*.

32) *United States ex rel. Widenmann v. Colby*, 265 F. 398 (D.C. Cir. 1920) affirmed 257 U.S. 619 (1921)

The functions of an Article V Convention are complete when the convention has fulfilled its stated purpose. There is no requirement for any other officials to proclaim that completion or closure of the convention.

33) *United States v. Sprague*, 282 U.S. 716 (1931)

The power granted by Article V is to the Congress specifically and not to the federal government as a whole. Similarly, the power granted by Article V is to the amendatory convention. “The fifth article does not purport to delegate any governmental power to the United States...On the contrary... that article is a grant of authority by the people to the Congress, and not to the United States.” It should be noted that “Sprague addressed specifically not the entirety of Article V, but only unambiguous language where no construction or supplement was necessary.”⁷ Also, the congressional authority over calling a convention is less than that over ratification process. **The selection by Congress of the mode of ratification is unreviewable.**

⁷ Robert G. Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers* (Part 3 of 3), Goldwater Institute Report No. 11-02, 22 Feb 2011, p.29

34) *United States v. Thibault*, 47 F.2d 169 (2d Cir. 1931)

The federal or national government is not concerned with how an Article V Convention of a state legislature is constituted. Therefore, **the Article V Convention is empowered to organize and conduct its business as the delegates or commissioners see fit.**

Disclaimer: This Findings Summary was compiled and researched by the members of the Wisconsin GrandSons of Liberty. We are not attorneys or professors of law; for the most accurate and current information, consult with legal professionals.

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