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"WE ARE NOT FORMING PLANS FOR A DAY MONTH YEAR OR AGE, BUT FOR ETERNITY."
— JOHN DICKINSON
(WRITTEN DURING THE 1787 CONVENTION)

PROPOSING CONSTITUTIONAL AMENDMENTS

BY A CONVENTION OF THE STATES

A HANDBOOK FOR STATE LAWMAKERS

BY ROBERT G. NATELSON

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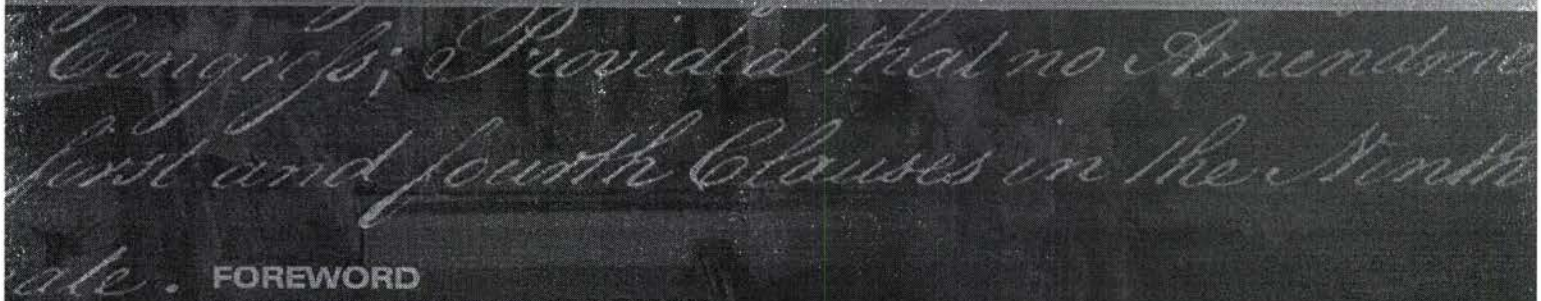

FOREWORD
BY INDIANA SENATOR **JIM BUCK**

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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.

About the Author

Rob Natelson is one of America's best known constitutional scholars. For 23 years, he served as Professor of Law at the University of Montana, where he taught Constitutional Law and became a recognized national expert on the framing and adoption of the United States Constitution. He pioneered the use of source material, such as important Founding Era law books, overlooked by other writers, and he has been the first to uncover key facts about some of the most significant parts of the Constitution. Rob has written for some of the most prestigious academic publishers, including Cambridge University Press, the *Harvard Journal of Law and Public Policy,* and *Texas Law Review.*

There are several keys to Rob's 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 hard to keep his historical investigations objective. Most critical, however, have been lessons and habits learned in the "real world"—before his academic career began, Rob practiced law in two states, ran two separate businesses, and served as a regular real estate law columnist for the *Rocky Mountain News.* Later, he created and hosted Montana's first statewide commercial radio talk show and became Montana's best known political activist—leading, among other campaigns—the most successful petition referendum drive in the history of the state. He also helped push through several important pieces of Montana legislation, and in June 2000, was the runner-up among five candidates in the party primaries for Governor of Montana. For recreation, Rob spends time in the great outdoors, where he particularly enjoys hiking and skiing with his wife and three daughters.

Rob currently serves as Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Golden, Colorado, Senior Fellow in Constitutional Jurisprudence at the Montana Policy Institute in Bozeman, Montana, and Senior Fellow at the Goldwater Institute in Phoenix, Arizona.

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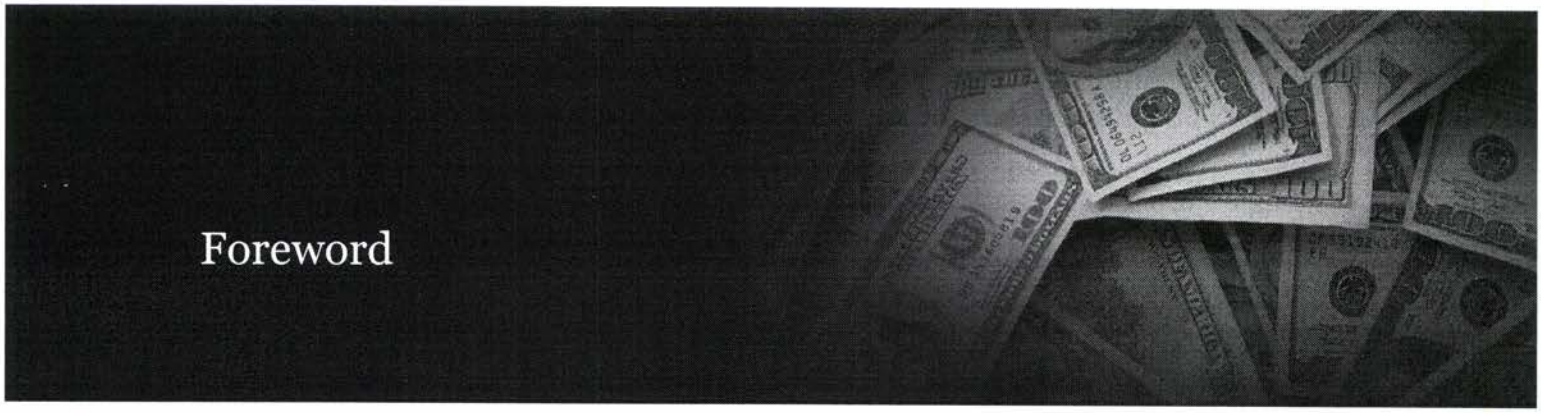

Foreword

Dear ALEC Member,

Time is running out. Our nation is trillions of dollars in debt without a credible plan to stop spending. The battle in Congress has escalated to a point where politics outweighs the cost of our economic future, and there is little hope our nation's leaders will make the tough choices that need to be made in order to reign in our debt and revive our economy. Fortunately, there is a solution outside of Congress—a solution that Professor Rob Natelson outlines in this Handbook.

Our Founders knew the importance of checks and balances. In the United States Constitution, they enumerated one of the most important roles states have in keeping the federal government in check. Under Article V, states are granted the right to require Congress to call a convention of the states, during which states can propose amendments to the Constitution. For decades we have allowed Congress to run rampant, spending as it pleases. In 30 years, Congress has managed to balance the budget only twice.

It is far too easy for the appropriators of our nation's funds to spend without limit and outside of reason, but that is something that can be remedied. The solution is an amendment to the Constitution that imposes greater accountability on Congress and requires a balanced budget. The stipulations of such an amendment would need to ensure spending does not exceed revenue and prohibit borrowing money to make up for any shortfalls. In 1957, my state of Indiana was the first to apply for a convention to propose a balanced budget amendment to the Constitution. Since then, many other states have followed suit.

Balancing our budget transcends party politics. No matter who controls Congress or the presidency, our $15 trillion dollar (and growing) national debt will remain an ever-present hurdle to economic growth and recovery. The problem won't be going away any time soon, either. More than 30 years of deficits cannot be solved with only one year of policy.

Today America faces an uncertain economic future. Millions of Americans are unemployed, and some even suggest America faces a new normal in economic mediocrity. Spending ourselves into more debt won't solve that problem; in fact, doing so will only make it worse. State legislators must take the long-sighted view and exercise our rights within the Constitution to limit Congress's ability to drive our nation into further economic decay. This Handbook is your guide to achieving that goal.

Sincerely,

Jim Buck
Indiana State Senator
Chair, Tax and Fiscal Policy Task Force
American Legislative Exchange Council

Executive Summary

The balanced budget amendment is overwhelmingly supported by the American people. Polls over the last several months by CNN, Fox News, and Mason-Dixon show that nearly three-fourths of Americans favor a balanced budget amendment to the U.S. Constitution. With the national debt reaching its peak of more than $15 trillion and rising, the time to balance the budget is now. Nearly every state in the nation is legally bound by their constitutions to balance their budgets. With experience in balancing budgets year after year, states are most suited to propose an amendment to the U.S. Constitution that requires a balanced *federal* budget. State legislators can accomplish this by calling an Article V Convention of the states.

The Handbook you are about to read, written by Constitutional Scholar Robert G. Natelson, provides state legislators the proper tools to use the Article V process legally and effectively. Additionally, it offers reliable information about the state application and convention process based on thorough and objective scholarship.

In the first section of the Handbook, Natelson lays the groundwork for the Article V process. Importantly, he explains what the convention process is not: "plenipotentiary," or the complete rewriting of our Constitution. Natelson also summarizes the Founder's intention behind including Article V in the Constitution and describes how history can be a lesson for what a convention would look like today. Many questions about the process concern the role of courts in Article V. Using both case law and his extensive constitutional law background, Natelson highlights how the courts might be involved in this process.

After discussing Article V history and its key players, Natelson takes state legislators through the process step-by-step. From making an application to ratification, state legislators will learn the minutia of the Article V process and how best to prepare an application in their states.

Further, this Handbook debunks the myth of a runaway convention. Natelson makes a compelling argument for why states should not worry about critics' fears that a convention of the states would result in a complete take-over of the U.S. Constitution.

Finally, Natelson provides practical recommendations for states that choose to apply for a convention through the Article V process. Natelson encourages legislators to promote the right amendments, use the right amount of specificity, and keep the process within the states' control.

We hope that you will find this Handbook informative and useful as you embark on an adventure never before accomplished in our nation's history. We wish you the best of luck.

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I. Introduction

Through Article V, our American Founders added a way for the states to promote amendments to the Constitution directly, rather than by merely petitioning Congress. This is called the *state application and convention process*. Recent debate over a balanced budget amendment to the Constitution has provoked interest in this procedure. This Handbook is your guide to understanding and using it.

> "Federalism works only if the states respond effectively when the federal government exceeds or abuses its powers."

This Handbook is written for state lawmakers, support staff, and other interested Americans. The goal is to enable state lawmakers to employ the state application and convention process as the Founders intended: legally, effectively, and safely. This Handbook offers accurate, well-researched information about the process, including how to trigger it, valuable safeguards, and legal forms. This Handbook also corrects common myths about the procedure—perhaps the foremost of which is that the convention authorized by Article V is a "constitutional convention."

Many state lawmakers, like Americans generally, believe that politicians in Washington, D.C. have not successfully controlled spending in recent years. That helps to explain strong public interest in a balanced budget amendment, among other proposals. Besides amassing a huge debt, federal officeholders often have disregarded individual liberty and constitutional limits on their own power. Moreover, many federal officeholders seem to neglect the constitutional role of the states. Increasingly, state lawmakers understand what the Founders said repeatedly: *Federalism works only if the states respond effectively when the federal government exceeds or abuses its powers.*

This Handbook:

- offers reliable information about the state application and convention process, based on thorough and objective scholarship;
- corrects misinformation; and
- makes it easier for state lawmakers to use the process legally and effectively.

One reason the Founders inserted into the Constitution a method of amendment was to enable future generations

to keep our Basic Law up to date—but that was not the only reason. The Founders also inserted the amendment procedure as a tool for resolving constitutional disputes and for correcting excesses and abuses. Because they recognized that excesses and abuses could come from either the states or the federal government, they fashioned two alternative ways for proposing amendments for state ratification:

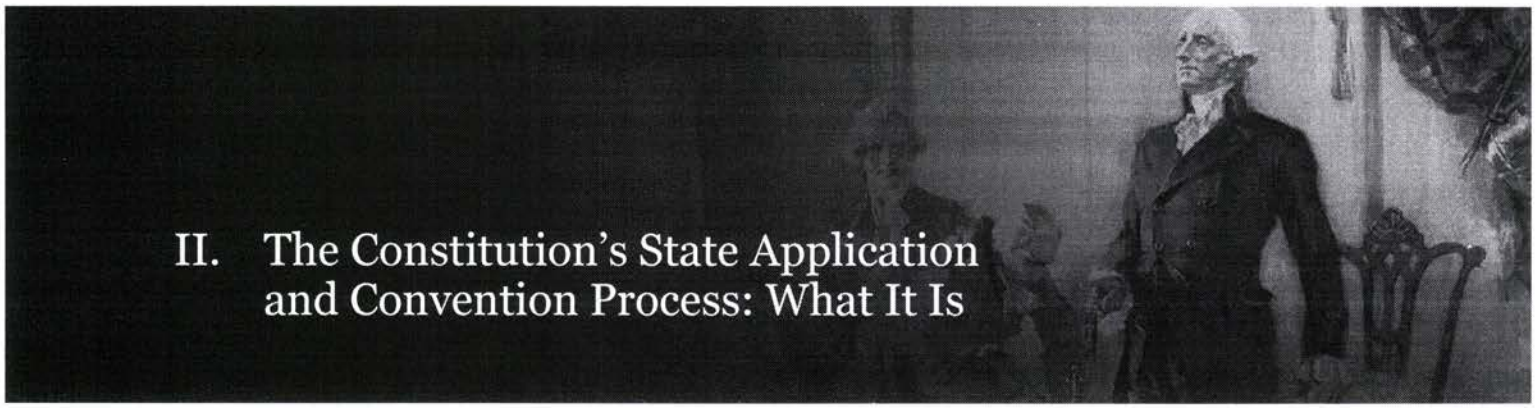
- by a resolution adopted by two-thirds of both houses of Congress, and
- by a gathering of delegates of state legislatures that the Constitution calls a *convention for proposing amendments.*

Other acceptable names for a convention for proposing amendments are *amendments convention*, *convention of the states*, and *Article V convention*. (For reasons explained in section II it is inaccurate and misleading to call a convention for proposing amendments a "constitutional convention.")

The congressional-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.[1] But thus far the states have never exercised their corresponding power to correct *federal* abuses. As a result, the constitutional design has become unbalanced.

To correct for this imbalance, the American Legislative Exchange Council (ALEC) has recommended several constitutional amendments to limit some of the worst abuses of federal power—among these, a balanced budget amendment (BBA).[2] Except for repeal of Prohibition, however, Congress has not forwarded to the states any amendment limiting its own power since approving the Bill of Rights in 1789. Thus, despite recurrent hopeful talk about how Congress might adopt a BBA or other corrective amendments on its own, history suggests reformers cannot depend on that. The states must do the job, as our Founders expected them to do.

Although state lawmakers have initiated the state application and convention process many times, they never have carried it to completion. Historically, there are many reasons for this, but since the 1960s a principal reason for this neglect has been alarmism based on misinformation (a topic explained later in section V). Indeed, many of the writings published about the state application and convention process since the 1960s have been based more on guesswork than on serious historical or legal investigation. Many more writings on the subject are simply briefs promoting an agenda rather than a source of complete and accurate information. However, there have been a few solid studies of the process, and the recommendations in this Handbook are based on their research and conclusions (see Appendix D).



II. The Constitution's State Application and Convention Process: What It Is

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 we tend to think of a convention as a "constitutional convention," but during the Founding Era most of those gatherings were not "constitutional" at all. Most were simply task forces assigned to recommend solutions to pre-specified problems. Others were established to ratify the work done by others. The Constitution authorizes three kinds of limited purpose conventions: One kind to ratify the Constitution itself, another to ratify amendments, and a third to act as a task force to recommend solutions to pre-specified problems. The convention for proposing amendments is in the third category.

The historical record tells us what the Founders had in mind when they authorized a convention for proposing amendments: They envisioned an interstate or "federal" convention—that is, an assembly composed of state delegations ("committees") responsible to their respective state legislatures and operating, at least initially, according to a rule of one state/one vote. Although the fact is now widely known today, interstate conventions were commonplace during the Founding Era: There were at least eleven of them.[3] They were modeled after diplomatic conventions among separate sovereignties.

The agenda and powers of interstate conventions were fixed by the participating states, sometimes after congressional recommendation, sometimes not. Usually the agenda was fairly narrow. For instance, the interstate convention held in Yorktown, Pennsylvania in 1777 was entrusted only with issues of price inflation. The 1781 interstate convention held in Providence, Rhode Island was restricted to military supply for a single year.

The scope of a convention for proposing amendments is similarly narrow. As James Madison made clear, it is not what leading Founders called a "plenipotentiary convention." In other words, it is not an assembly with very wide authority, such as one charged with drafting or adopting a Constitution. *Thus, it is simply incorrect to refer to a convention for proposing amendments as a "constitutional convention."* They are different creatures entirely.[4]

The convention for proposing amendments was based on comparable provisions in state constitutions that predated the U.S. Constitution. One of these was Article 63 of the 1777 Georgia Constitution. It granted to a majority of counties the power to petition for an amendment,

upon which "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." In other words, 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.

In the U.S. Constitution two-thirds of state legislatures (now 34 of 50) petition instead of a majority of counties:

> 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 Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[5] (Italics added.)

As in the Georgia prototype, the U.S. Constitution grants named assemblies (legislatures, conventions) designated roles in the amendment process. The Constitution gives Congress authority to propose amendments and, for any amendment (however proposed), to choose among two modes of ratification. The Constitution also empowers state legislatures to force Congress to call an amendments convention and empowers the convention to propose. Finally, the Constitution authorizes state legislatures and state conventions to ratify.

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.*[6] 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.

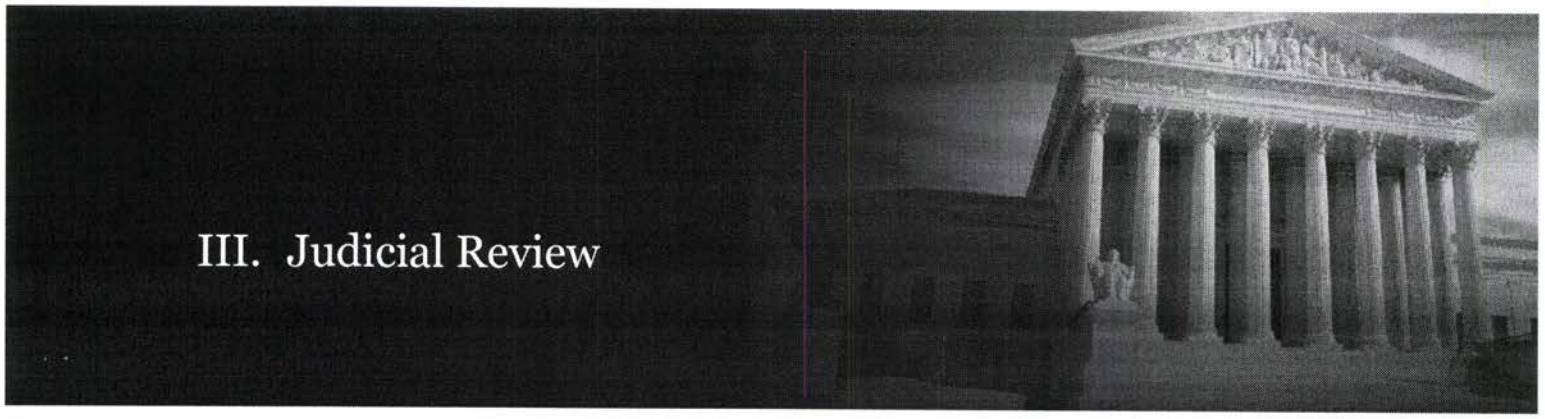
Why Not Just Leave Amendments to the Discretion of Congress Alone?

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

This bothered George Mason of Virginia, who 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 essentially the work of James Madison.

In summary, please note:

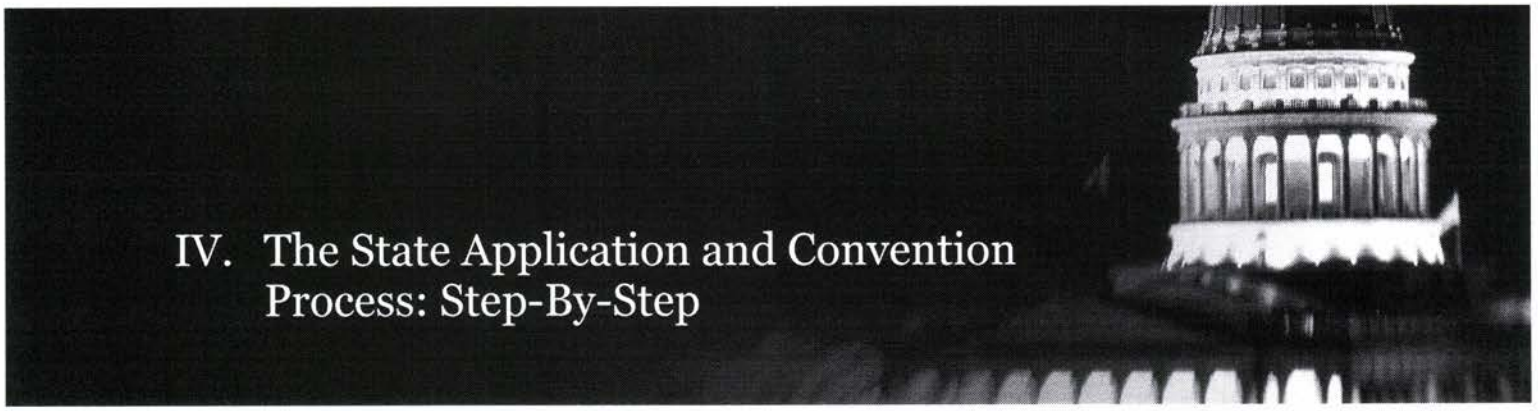
- The principal reason for the state application and convention process is to enable the states to check an oppressive or runaway Congress—although the Constitution does not actually limit the process to that purpose.
- The Framers explicitly designed the process to enable the states to substantially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



III. Judicial Review

Despite some language to the contrary from an old Supreme Court decision,[7] it is now clear that *the courts can and will resolve Article V disputes*. A court might have to decide whether a legislative resolution qualifies as an "application," applications are sufficient to require Congress to call a convention, or 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 better that the courts, rather than Congress, define and enforce the state application and amendment process. 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 state application and convention process to enable state legislatures to bypass Congress in proposing amendments. Courts routinely construe legal provisions to further their central purpose.



IV. The State Application and 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 to Congress for a convention pursuant to Article V. The resolution should not merely request that Congress propose a particular amendment, nor should it 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 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, are interested in an open convention or in 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*].[8]

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 may the application attempt to coerce Congress or other state legis-

latures. As the courts have ruled repeatedly, assemblies (Congress, state legislatures, and conventions) are entitled to some deliberative freedom when involved in Article V procedures. An application may *suggest* particular language or rules for the convention, but to avoid confusion, suggestions should be placed 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 invalidate 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 rules governs legislatures applying under Article V: (1) They 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 as what it really is: A committee or task force charged with solving designated problems. When charging a task force in business or government, you inform its members of the problems you want them to address. You don't tell them to investigate anything they wish. Additionally, once you have given the task force an assignment, you don't dictate a solution. To serve its purpose the task force has to be free to consider different solutions. Otherwise there would be no good reason for the task force.

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?*

An application probably lasts until it is duly rescinded. Some have argued that older applications grow "stale" after an unspecified time and lose their validity. However, this argument probably does not have merit. The power to rescind continues until the two-thirds threshold is reached, or perhaps shortly thereafter.[9]

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, 2015." Also valid would be this language: "This application, if not earlier rescinded, shall be null and void if Congress shall propose a balanced budget amendment to the U.S. Constitution." On the other hand, courts may deem some kinds of automatic terminations to be coercive, 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. It is important to note, however, that congressional receipt of 34 applications is not sufficient; those applications must relate to the same subject matter.

Historically some members of Congress have tried to find excuses for avoiding any duty to call a convention.[10] One possibility is that 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. Thus, if 17 states have applied for a clean balanced budget amendment and another 17 have applied for a balanced budget amendment with a requirement of a two-thirds vote to raise taxes, Congress may refuse to treat both groups as addressing the same subject. The more differences exhibited by the applications, the more justification Congress will have in refusing to aggregate them.

One way to forestall such obstruction 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 a balanced budget amendment, 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 that properly are for the state legislatures or for the convention to resolve. If adopted, these bills would have dictated how delegates are selected, how many delegates each state may have at the convention, and what voting and other rules the convention must follow.

That kind of legislation is probably unconstitutional for several reasons. First, congressional efforts to control the convention would handicap its fundamental purpose as a mechanism for the *states* to amend the Constitution without interference from Congress. Also, the historical record shows that such provisions exceed the scope of what the Constitution means by "calling" an interstate convention. The power to "call" an interstate convention authorizes Congress only to count and categorize the applications by subject matter, announce on what subjects the two-thirds threshold has been reached, and set the time and place of the convention. Arguably, Congress may also designate a presiding officer to serve until the convention elects its own. Any further prescriptions by Congress exceed the scope of powers reasonably incidental to the constitutional power to "call."[11]

D. *Delegate selection.*

As noted above, the Founders modeled the interstate convention on international diplomatic practice. As in diplomatic meetings, each sovereignty decides how to select its own delegation or "committee" and how many to send. The records of the Founding-Era interstate conventions tell us that states selected delegates in any of several ways:

(1) Election by one house of the state legislature, subject to concurrence by the other, with a joint committee negotiating any differences;

(2) Election by joint session of both houses of the state legislature;

(3) Designation by the executive;

(4) Selection by a designated committee.

Moreover, when selecting delegates to the Confederation Congress (which, strictly speaking, was a legislative body rather than a convention), Rhode Island provided for direct election by the people.

Of the foregoing methods, the most popular way for choosing convention delegates probably was legislative joint ballot.

Election by legislative joint ballot has several advantages in addition to the weight of precedent. First, it makes sense for the legislature to select delegates who 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 applications and legislative instructions will define the policy behind the amendment, the delegates' role at the convention is primarily to serve as a legal drafting committee, calling for technical abilities and diplomatic skills.

E. *The Convention.*

All states, not merely the applying states, are entitled to send delegations to a convention for proposing amendments. Moreover, an amendments convention is, as James Madison once asserted, "subject to the forms of the Constitution." In other words, it is not "plenipotentiary" (or "constitutional") in nature. Accordingly, a convention for proposing amendments has no authority to violate Article V or any other part of the Constitution. According to the rules in Article V, the convention may not propose a change in the rule that each state has "equal Suffrage in the Senate,"[12] nor may it alter the ratification procedure.[13]

Prior rules and practice governing interstate conventions show that conventions must honor the terms of their call and limit themselves to the scope of the subject matter they are charged with addressing. The scope of the subject matter is set by the scope of the 34 or more successful applications, and ideally Congress should reproduce that scope in its call.

Delegates to American conventions generally have had power to elect their own officers and adopt their own rules, and this has been universally true of interstate conventions. These rules include the standards of debate, daily times of convening and adjourning, whether the proceedings are open or secret, and other matters of internal procedure. Interstate conventions always have determined issues according to a "one state/one vote," although a convention is free to change the rule of suffrage. The convention also may limit how many delegates from each state can occupy the floor at a time.

Like other diplomatic personnel, convention delegates are subject to instruction from home—in this case from the legislature or the legislature's designee. The designee could be a committee, the executive, or another person or body. Although state applications cannot specify particular wording for an amendment, a state could instruct its delegates to not agree to any amendment that did not include particular language. In accordance with Founding Era practice and the convention's purpose, each state should pay its own delegates.

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.

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

Once amendments are proposed or the delegates decide not to propose any, the purpose of the convention has been served, and it must adjourn.

In summary, please note:

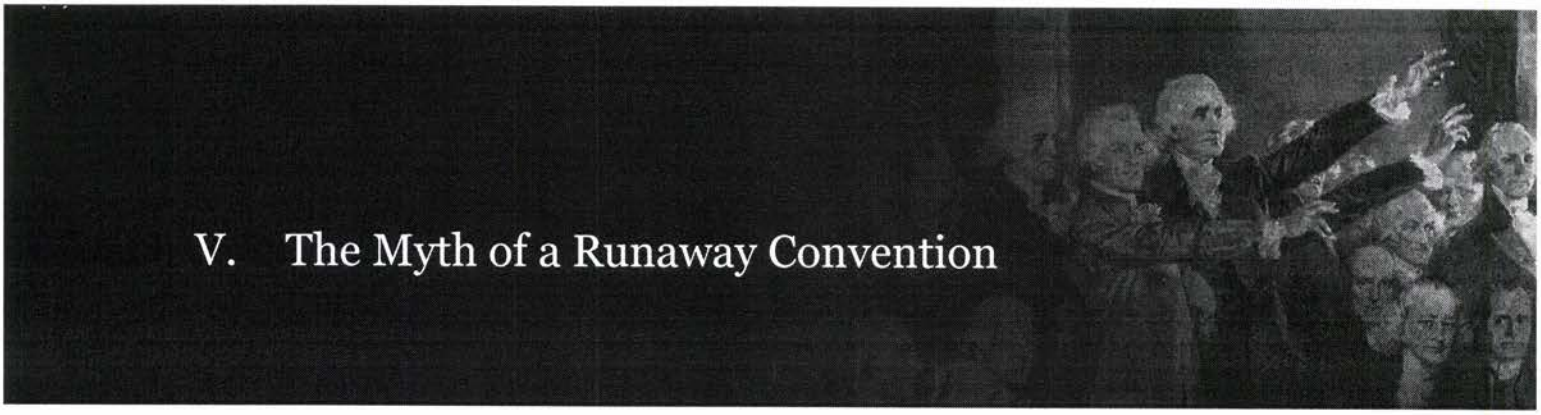
- All states send "committees" to the convention in accordance with state law.
- The convention elects its own officers and sets its own rules.
- Initial suffrage is one state/one vote with decisions made by a majority of states, but the convention may change both rules.
- The convention must follow the rules of the Constitution, including those in Article V. The convention cannot change the ratification procedure.
- The delegates 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 delegates may propose one or more amendments, or may propose none at all.
- Once that decision is made, the convention must adjourn.

F. *Ratification.*

In general, ratification of convention-proposed amendments is the same as 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 (the mode selected for all other amendments). The obligation of Congress to select a mode should be enforceable judicially, but it is completely up to Congress which of the two modes it chooses. Neither the applying state legislatures nor the convention may dictate which mode Congress selects.

Of course, the obligation of Congress to choose a mode depends on the measure qualifying as 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.



V. The Myth of a Runaway Convention

The *runaway convention scenario* was conjured up in the 19th century to dissuade state lawmakers from bypassing Congress through the state application and convention process. The scenario became famous during the 1960s, when liberal activists, legislators, and academics raised it to defeat an application campaign for amendments that would have overturned some Supreme Court decisions. Various groups have employed the same tactic to defeat balanced budget amendment proposals over the years.[14] In one of the ironies of history, some deeply *conservative* groups now promote the scenario as well. One can expect both liberal and conservative opponents to promote it again if another application campaign begins to gain traction.

In the "runaway convention" scenario, state legislatures attempt to limit the convention through their applications, but once the convention meets the delegates disregard the applications and their subsequent instructions. Instead, heedless of their reputations, their political futures, and all ties of honor, the delegates issue proposed amendments that are *ultra vires*—that is, beyond their legal authority.

In the more extreme versions of the runaway scenario, the convention's proposed amendments reinstate slavery, abolish the Bill of Rights, or otherwise completely alter the American form of government. To prevent the states from blocking their proposals, the convention also changes the method of ratifying to a method they find more congenial. 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.

In the more moderate versions of the runaway scenario, the convention is unable to change the ratification process, but three-fourths of the states nevertheless ratify amendments they did not authorize and do not want.

> "At the very least, delegates who willfully disregarded limits on their authority would suffer severe loss of reputation and probably compromise fatally their political futures."

Of course, even the more moderate version of the runaway convention scenario shows a slender regard for political reality. At the very least, delegates who willfully disregarded limits on their authority would suffer severe loss of reputation and probably compromise fatally 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 have actually sug-

gested "going rogue." Advocates of the runaway scenario do not dispute this, but argue that the 1787 Constitutional Convention disregarded its instructions. Unfortunately for their position, the widespread claim that the 1787 Constitutional Convention disregarded its instructions is substantially false (see Appendix C). Another practical political factor is that Congress, and to some extent the President, are institutional rivals of the convention, and unlikely to remain inactive while it runs wild.

"There are far more political and legal constraints on a runaway convention than on a runaway Congress."

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

(1) Because convention delegates are subject to state legislative instruction, legislatures can correct or recall any delegates attempting to exceed their power.

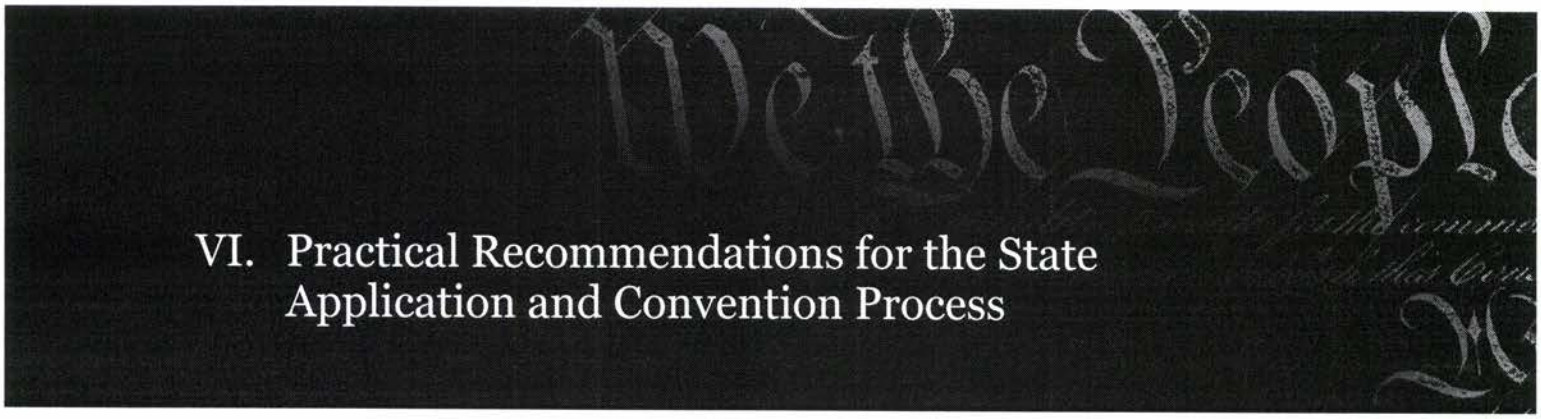
(2) If, nevertheless, legislatures failed to do this AND the convention purported to adopt an *ultra vires* amendment, it would not be a constitutionally valid "proposal." Hence Congress would not be obligated to select a "Mode of Ratification"—and, indeed, would have no right to do so.

(3) If state legislatures failed to stop delegates from acting beyond their powers, AND if the convention reported an *ultra vires* amendment, AND if Congress nevertheless selected a mode of ratification, the courts could declare Congress's decision void.

(4) If the state legislatures did not stop their delegates from acting beyond their powers, AND if the convention reported an *ultra vires* amendment, AND if Congress still selected a mode of ratification, AND if the courts failed to declare Congress's decision void, then the states could refuse to ratify it.

(5) In the unlikely event that the states insisted on ratifying a proposal they (1) did not apply for, and (2) was issued contrary to their instructions, then the courts—or, indeed, any government agency—could treat the "amendment" as void.

In sum, there are far more political and legal constraints on a runaway convention than on a runaway Congress.



VI. Practical Recommendations for the State Application and Convention Process

The constitutional amendment process can be messy. Indeed, people occasionally argue that one or more existing amendments never were approved properly. Nonetheless, lawmakers employing the state application and 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 procedural mistakes to block amendments they don't like.

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 state application and 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 back toward 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, a balanced budget amendment probably meets all four criteria; an amendment to abolish the income tax probably does not.

⚙ *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." Congress proposed direct election of Senators only after 31 of the then-48 states (one shy of two-thirds) had submitted closely similar applications for a convention. In the latter instance, the legislatures of several states coordinated the national effort by erecting standing legislative committees—that is, funded command centers

that prepared common forms and assisted the common effort.

Future application campaigns will succeed only if state legislatures work together. They should establish standing "committees of correspondence" to further the cause. Each applying legislature should designate a contact person for official communications to and from other states. Each applying legislature should notify all other state legislatures of its actions. Applications should follow certain standard forms. Examples of such forms appear in Appendix A.

All applications should be sent to as many recipients as possible, especially (of course) Congress. As the campaign builds, state legislatures should communicate with each other on such issues as how they will choose their delegates, what the convention rules will be, and the size of state delegations. The exchange of information will enable states to address differences in advance of the amendments convention, maintain momentum and control over the process, and protect it from congressional interference.

⚙ *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 in anything 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. Therefore, applications should specify the subject of the proposed convention. If the legislature wishes to address several subjects, those subjects should be in separate applications. 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 the legislatures) to try to dictate a solution to others (such as the convention). The courts may invalidate any applications that limit the convention to an up or down vote on specific wording.[15]

There also are some practical reasons for avoiding too much specificity. 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 will deviate enough from other applications to give Congress a reason for refusing to aggregate it with other applications. Finally, the convention probably will do a better job of drafting an amendment than dispersed state lawmakers. Consisting as it will of experienced personnel from all states, the convention may very well craft a solution more deft—and more politically palatable—than any specified 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 with any appropriate limitations on revenue and/or expenditures." If the former route is followed, not only does it become difficult to garner sufficient political support for the application, but Congress or the courts may treat it as invalid. If the latter route is followed, neither Congress nor the courts have any such excuse, but the convention still may include the desired terms in any amendment it proposes.

⚙ *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 that 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 in serious trouble; don't be sidetracked by alarmism or by hope that Congress may propose an amendment limiting its own power. History shows this is unlikely.

Older applications should be renewed from time to time. Some people have argued that applications automatically expire or "grow stale" with the passage of time. There is little constitutional basis for this argument, but some in Congress have advanced it to weaken the state application and 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 to the problem.

Also, don't put recommendations or statements of understanding in your legislature's applications. If you wish to issue a non-binding recommendation to other legislatures, Congress, or the convention, then do so in a separate resolution.

To be sure, a recommendation or statement of understanding in an application does not necessarily void it. 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 drafted, and opponents may challenge them with the claim that they really are terms or conditions that invalidate the application or prevent it from being aggregated with other applications toward the two-thirds threshold. Therefore, recommendations, declarations, and statements of understanding always 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 state application and 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 delegates. Those are the prerogatives of the state legislatures and of the convention delegates responsible to the state legislatures.

⚙ *The state legislature should choose its own delegates.*

The Founding Era record tells us that when an interstate convention is called, each state decides, under its own laws, how many representatives will make up its delegation or "committee" and how they are selected.

Although selection could be delegated to popular vote or to the executive, in the case of a convention for proposing amendments such delegation makes little sense. Since the policy agenda for the convention will be fixed by the applications and by subsequent legislative instructions to the delegates, service in the convention requires more in the way of negotiation skills and legal drafting ability than popular political appeal or passion on the issues. Ideally, convention delegates should be seasoned and tested leaders of unquestioned probity.

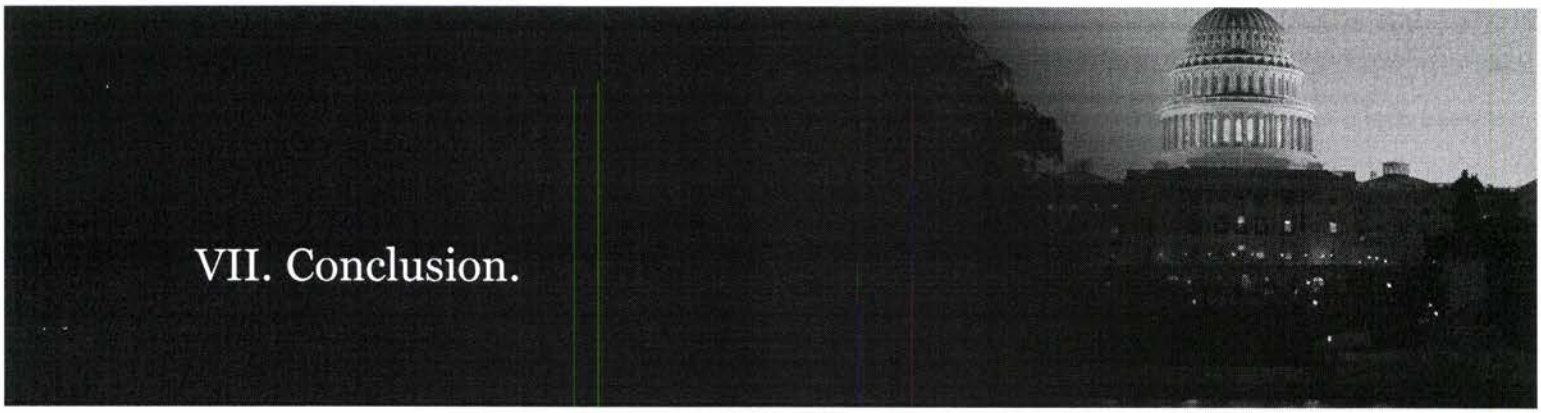
Another reason for legislative selection is that the delegates will be subject to state legislative instructions and recall.

In some states there will be pressure for popular election. If a legislature does opt for popular election, it still must clarify that a delegate's failure to follow legislative instructions could lead to his or her removal. This is required to serve the core purpose of the state application and convention process: To enable state legislatures to advance amendments targeted at problems those legislatures have identified. Unless a state legislature can control its own delegation, that core purpose is defeated.

Some have suggested that states adopt statutes providing that delegates who exceed the scope of the convention or disregard legislative instructions are deemed immediately recalled. It is uncertain whether such a law would be enforceable against a state legislature acting within Article V, but at least such a law would serve an educational function.[16]

Respond to the "minority rule" argument.

If history is any guide, opponents will claim the state application and convention process is a license for "minority rule" because, in theory, states with a minority of the American population could trigger a convention. Advocates should respond by pointing out that this is improbable as a practical matter because political realities will place some larger states on the same side as smaller states. 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 Massachusetts. Further, the application stage is only an initial step in a three-step process. Once the convention meets, a majority of state delegations will have to approve any amendment, and in the glare of publicity the delegates are unlikely to propose measures most Americans find distasteful. After the convention issues the proposal, that proposal will have to be ratified by 38 states—including, in all probability, some states that failed to apply. The ratifying states will almost certainly represent a supermajority of the American people.



VII. Conclusion.

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

If we could address one or more of the leading Founders today, we might tell them what has happened to American federalism—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 a convention of the states 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."

Thus, the responsibility for reclaiming constitutional government is very much ours.

Article. V.

ngress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendme
of two thirds of the several States, shall call a Convention for proposing Amendments, whic
rt of this Constitution, when ratified by the Legislatures of three fourths of the several States, or
Ratification may be proposed by the Congress; Provided that no Amendment which may be m
shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first
ed of its equal Suffrage in the Senate.

Appendix A: Annotated Forms

This Appendix offers forms for state legislative resolutions for the state application and convention process. Among the forms are applications for a convention, separate resolutions for legislative declarations and recommendations, and delegate 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 "Clean" Balanced Budget Amendment 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 the legislature wishes to make recommendations or issue declarations or statements of understanding, those items should appear only in an accompanying resolution. Credentialing of and any instructions to delegates also should be placed in separate resolutions.

The starting point for the following form was one of two forms commonly employed by state legislatures during their highly successful application campaign for direct election of U.S. Senators.[17] 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

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

Section 1. 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 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.

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 _____ and _____; 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.*

***

Notes to Clean BBA Form:

- Observe how simple this application is. For one thing, it does not include a lengthy preamble ("whereas" clauses), which might be construed as creating limitations or qualifications on the application.

- Further, 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.[18]

- 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 form, on the other hand, is designed to be aggregated easily with several relatively simple applications adopted in the late 1970s and early 1980s.

- 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" 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 delegates, 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. Of course, the application always can be rescinded.

- The *italicized* wording is optional language for lawmakers desiring to "clear the deck" of previous BBA applications from their state.

Sample Form:
BBA with Option for Further Fiscal Restraint

If the legislature wishes to add additional terms to a basic BBA, the legislatures should describe those terms in general words. In this example, Sections 2, 3, and 4 remain the same, but Section 1 is re-written to read as follows:

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

Section 1. 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 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.

***

Notes to BBA with Option for Further Fiscal Restraint:

- This calls for a broader convention agenda than the "clean" BBA form. 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 could forestall future challenges to the validity of programs otherwise outside federal authority.

Sample Form: Resolution of Declarations, Statements of Understanding, and Recommendations

Sometimes legislatures submitting Article V applications decide to insert declarations or understandings of how they expect the state application and convention process to work. For example, the application might assert that the applying legislature expects the convention to apply the rule of "one state/one vote." Similarly, the legislature might include in the application 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) delegates are 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) delegates 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 delegates to the convention;
(b) The convention retain the suffrage rule of "one state/one vote" throughout its proceedings;
(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.

Section 4. The secretary of state is hereby directed to accompany all transmissions of the aforesaid application for a convention with copies of this declaratory and recommendatory resolution as well.

* * *

Notes to Declaratory and Recommendatory Resolution:

- The "Whereas" clauses form a preamble setting forth the reasons for the application. Lengthy preambles are best kept out the applications.

- Section 1 sets forth the legislature's general understanding of the nature of the convention.

- Section 2 includes items inappropriate to be mandated in an application, but recommendations for the convention to consider.

- 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 Delegates

(with "Trap Door")

As noted earlier, the mode of delegate 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 delegates will be. Hence the following form:

Resolution Electing Delegates 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 delegates 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 (delegate 1), (delegate 2), (delegate 3), (delegate 4), and (delegate 5) are hereby elected delegates from this state to such convention, with power to confer with delegates 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 such delegates, 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 delegates shall expire at the earlier of (1) December 31, 2014 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.

* * *

Notes to election-of-delegates form:

- No legislature can bind a later legislature in this way; therefore this resolution can be rescinded later.
- The selection in this resolution is by a joint vote of both houses—probably the most common way of selecting delegates in the Founding Era.
- The resolution limits the length of the delegates' 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 given to the gathering 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 convention - a common synonym for *convention for proposing amendments*, which is the official name the Constitution gives to that gathering.

Constitutional convention - a convention charged with writing an entirely 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 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.

Interstate convention - a generic term referring to any convention of delegates representing three or more states or state legislatures. There were at least eleven interstate conventions held between 1776 and 1787, which in turn were preceded by several inter-colonial conventions and "congresses."

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

Propose - In Article V of the Constitution, *propose* can mean either (1) the power of Congress or of a convention for proposing amendments to validly tender a suggested amendment to the states for ratification or rejection, and (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 of the Constitution, *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 of the states (38 of 50) is necessary for ratification.

Appendix C:
Answers to Criticisms

A tactic employed by promoters of the "runaway convention scenario"[19] is to challenge lawmakers with a list of supposedly unanswerable questions.[20] Several lists are used and they vary somewhat, but all appear to be based on questions published over three decades ago by Professor Lawrence Tribe of Harvard Law School, a liberal opponent of conventions for proposing amendments.[21]

Although it is claimed the questions are unanswerable, most do, in fact, 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, together with their sometimes-odd phrasing and punctuation. An answer immediately follows each question.

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 if 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 many 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 14 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. Nearly all scholars have concluded that 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. Article V specifies that the question is up to Congress—as is true of any amendment, whether proposed by Congress or by a convention. Incidentally, the convention that ratifies an amendment is called a "state ratifying convention," not a "state constitutional convention."

Questions Pertaining to Delegates and Delegate Selection

Q7. 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 are representatives of their respective state legislatures and are chosen as the state legislature directs.

Q8. 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.

Q9. Would delegates be selected based on population, number of registered voters, or along party lines?

A. See the answer to Question #8.

Q10. Would delegates be selected based on race, ethnicity or gender?

A. The Equal Protection Clause of the Fourteenth Amendment and the Supreme Court cases interpreting it forbid election on these grounds.

Questions Pertaining to Convention Organization and Procedure

Q11. 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.

Q12. How is a convention to be financed, and where does it meet? (Related versions of 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 delegates. 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.

Q13. 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.

Q14. Is there a time limit on the proceedings, or can the convention act as a continuing body?
A. There is no fixed time limit—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 delegates at any time.

Q15. 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.

Q16. How would the number of delegates serving on any committee be selected and limited?
A. See answer to Question 15.

Q17. 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 15.

Q18. 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. Inside the convention hall, convention rules control. The outside environment is subject to the same rules governing the space outside any public body, convention, or legislature.

Q19. 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. Nothing requires the convention to follow a two-thirds adoption or quorum rule for proposing an amendment. Adoption and quorum rules are set by each convention in accordance with universal practice. However, the *ratification* procedure is set forth in the Constitution, and the convention cannot change that. See also the preceding answers.

Q20. 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 delegates. 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 the amendment language that is crafted during the convention, it has the opportunity to vote against it during the ratification process.

A Question Pertaining to the Courts

Q21. Can controversies between Congress and the convention over its powers be decided by the courts?

A. Controversies over the scope of the convention's powers may be decided by the courts. However, the states, not Congress, fix the scope of such powers. 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 "Facts"—Madison and the 1787 Convention

Q22. 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 drafted what became nearly the final wording for Article V and 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 agreed to draft the language. 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.

Q23. 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 delegates had full authority to recommend a new Constitution.[22]

Appendix D:
Where Does This Handbook Get Its Information?

As observed in Part I (Introduction), most writing on the state application and convention process has been poorly-researched, agenda-driven, or both. However, not everything published on the subject has been biased or shallow.

Serious scholarship on the topic 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. 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 it presented an excellent and thorough summary of applications and history up to that time.[23]

More recent scholarship falls chronologically into two groups. The first group of studies was published during the 1970s and 1980s. 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.[24] Although the findings of these studies differed in detail, they all agreed on some important conclusions—including the conclusion that state legislative applications could limit the scope of the convention.

The second group of recent studies consists of four published in 2010 and 2011 by the author of this Handbook, a retired constitutional law professor and constitutional historian. These include three papers for Arizona's Goldwater Institute and a lengthy academic article for *Tennessee Law Review.* These studies take into account not only the material used by Pullen, the ABA, Harmon, and Caplan, but also: (1) later court decisions, (2) formerly-untapped records from the Constitution's ratification debates, (3) the re-discovered journals of ten interstate ("federal") conventions held during the Founding Era, and (4) other formerly-neglected information.[25] The 2010-11 studies largely corroborate the conclusions of those dating from the 1970s and 1980s, but they also make some corrections to earlier work.

(Endnotes)

1 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.

2 ALEC has also recommended, among others, (1) a general BBA application (2011), (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), and (7) a States' Initiative Amendment (1996) (permitting three quarters of the states to propose amendments without a convention, subject to congressional veto). To see model legislation on any of these bills, contact Jonathan Williams at 202-466-3800 or jwilliams@alec.org.

3 The First Continental Congress (1774) was also considered a "convention," but because it was held before Independence, it was an inter-colonial rather than an interstate convention. Adding it raises the count to a dozen.

4 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 Complete View of the Founders' Plan*, at http://www.goldwaterinstitute.org/article/5005.

5 U.S. Const., Art. V.

6 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.

7 Coleman v. Miller, 307 U.S. 433 (1939). That language actually was not part of the ruling, but only *dicta* (non-authoritative side comments) by four justices.

8 Appendix A contains model legislation that can be used to apply for a convention to discuss a balanced budget amendment.

9 Exactly when the power to rescind ends has not been determined judicially, but presumably it ends 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.

10 The late Senator Sam Ervin (D.-N.C.) 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).

11 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).

12 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.

13 *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").

14 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.-N.Y); and individuals within the "Kennedy circle," such as Goldberg and speechwriter Theodore Sorensen.

15 Among the cases emphasizing that assemblies (legislatures and conventions) meeting under Article V must have a certain amount of deliberative freedom are 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).

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

17 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 31 states (one short of the needed 32 of the then 48) had approved similar

applications, the U.S. Senate, which had resisted the change, finally consented to congressional proposal of what became the 17th Amendment.

18 In proposing other amendments, it is equally important to avoid trying to mandate particular wording. For example, the proposed National Debt Relief Amendment (which ALEC has endorsed), 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."

19 See Part V: "The Myth of a Runaway Convention."

20 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?"

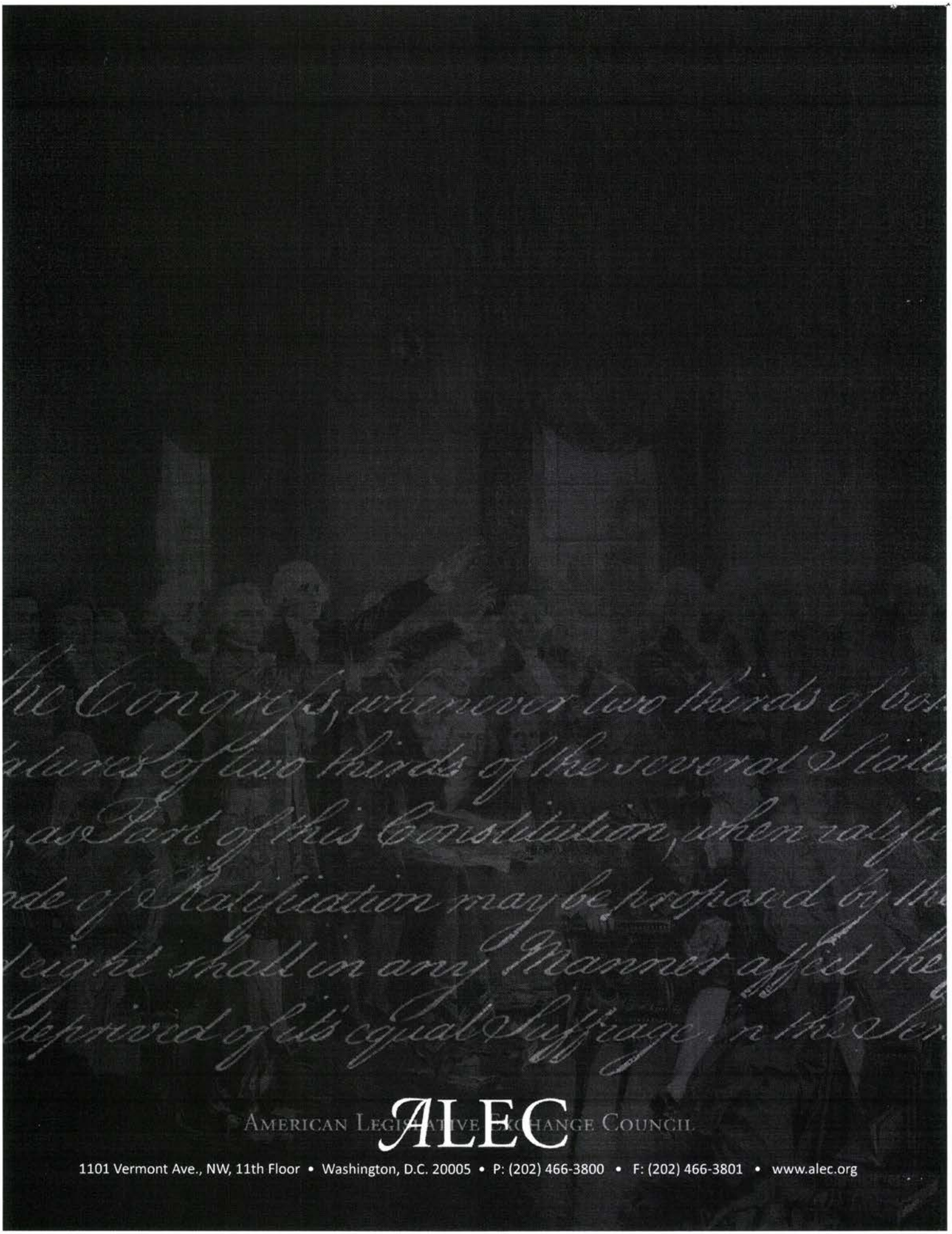
21 Lawrence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional [sic] Convention to Propose a Balanced Budget Amendment*, 10 Pac. L.J. 627 (1979) (republishing earlier legislative testimony). This article offers virtually no supporting evidence from the historical record or case law.

22 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.

23 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. Pullen later became a distinguished academic librarian.

24 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).

25 The Goldwater studies are available at http://www.goldwaterinstitute.org/ArticleV. The Tennessee Law Review study is Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693 (2011), available at http://constitution.i2i.org/files/2011/08/Rules_for_Art_V_Conventions.pdf.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