

# STATE LEGISLATORS ARTICLE V CAUCUS

## An Article V Primer

Vickie Deppe

Editor, *State Legislators Article V Caucus Newsletter*

### What is an Article V Convention?

The Article V Convention is a valuable tool in the checks-and-balances structure of our government. When most people hear the phrase “checks and balances,” they think of the three branches of the federal government. What many **don’t** realize is that the interplay between the states and the federal government is a component of our checks-and-balances system, too. Using Article V, the states can **unite** to impose reforms on Washington that we cannot expect Congress to take up any time soon.

*“You can’t change  
Washington from the inside.”*

*President Barack Obama*

The state legislatures have the same power to propose amendments to the United States Constitution that Congress does. This authority is provided for in Article V of the Constitution. Because all 50 states don’t meet together on a regular basis like Congress does, they need to hold a special meeting in order to be able to discuss and vote on proposals. To **schedule** this meeting, legislatures need to pass a resolution—called an *application*—through both chambers then transmit it to Congress. Each state may then send delegates to a convention where amendments may be proposed, debated, and voted on by the delegates on a one-state one-vote basis. Once a proposal has been approved at the convention, it must undergo the same ratification process as congressionally-proposed amendments:  $\frac{3}{4}$  of the states must ratify the amendment for it to become part of our Constitution...the highest bar for any political action to be taken in the United States.

The founders unanimously supported the states having the same power as Congress to propose amendments if, as George Mason anticipated, “the Government should become oppressive.” Gallup has been measuring Americans’ opinion of our government for years, and it’s big news when the congressional approval figure exceeds 30%. Most of the time, the number of Americans who disapprove of the job Congress is doing outnumber those who approve by more than 2-to-1. Yet incumbent reelection rates are consistently at or near 90%. Washington is broken, but the states can fix it.

## Why haven't the states used Article V before now?

*“Power concedes nothing without a demand.”*

*Frederick Douglass*

Throughout American history, the states have, in fact, passed and submitted to Congress over 400 applications for an Article V Convention. The first Article V application was passed by Virginia in 1788, and applications have continued to be passed at a steady pace right up to this day. Hawaii is the only state in the Union that has never passed an Article V application.

As Frederick Douglass sagely observed, “Power concedes nothing without a demand. It never did and it never will.” Historically, once applications have begun to reach critical mass, Congress has either ignored them or moved to propose an amendment of its own. Congressionally-proposed amendments followed the accumulation of Article V applications for the Bill of Rights, the abolition of slavery, direct election of senators, the repeal of Prohibition, and term limits for the president. Some argue that the 1985 Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act was a legislative attempt by Congress to sidestep its duty to call a convention for a balanced budget amendment, for which there were 40 Article V applications in force at the time.

Until very recently, neither Congress nor any of the states has had a mechanism to count and catalog Article V applications. Even Article V advocates seem to have been unaware that for 40 years (1979-2019) there were enough applications in force to call a convention. Frederick Douglass was right: the states will need to stop asking and start demanding.

## What is Congress' Role in an Article V Convention?

Congress plays an extremely limited role in an Article V Convention. It is merely the body to which the states submit their applications. When 2/3 of the states have submitted an application, Congress has a *perfunctory* (i.e., obligatory) duty to *call* (name the place and time of) the convention. Once an amendment is passed at the convention, Congress sends it to all the states for ratification, and may decide whether this will be accomplished by the legislatures or state conventions.

*“Nothing...is left to the discretion of [Congress].”*

*Alexander Hamilton*

Though the Congressional Research Service has posited a role for Congress at an Article V Convention, the Constitution gives Congress no authority to involve itself once the convention has been called. In *Federalist 85*, Alexander Hamilton clearly states that “nothing...is left to the discretion of [Congress].” Congress cannot choose delegates, dictate delegate selection criteria, impose rules, or modify the one-state-one-vote principle. The whole point of giving the states the authority to propose amendments was to provide them with a means to check the power of the federal government. To argue for a Congressional role in a process specifically meant to sidestep Congress is nonsensical.

## **How are delegates to an Article V Convention selected?**

Because each state is regarded as a sovereign entity at an Article V Convention, each is free to determine the size of its delegation as well as the process and criteria for selecting its members. But in the end, each state has one vote, regardless of the number of delegates they choose to send to the convention. Historically, states have utilized a variety of methods to select delegates, including executive designation with legislative approval; selection by committee; or election by the state legislature, either by chamber or in joint session. The delegates (also called *commissioners*) receive instructions from and are answerable to their legislature for their actions at the convention. As of this writing, there are 14 states with delegate selection statutes in place. All provide for the state delegates who violate the specific instructions from their legislatures to be recalled and replaced, and many impose criminal penalties, as well.

## **Are our rights secure?**

Thoughtful people on both the left and the right have raised concerns that an Article V Convention could be used to abridge existing rights enjoyed by Americans. On the right, there is concern about the loss of our First and Second Amendment rights; on the left, fear that civil rights secured for women and minorities over the last century could be walked back. Such scenarios are implausible.

The founders wisely set the bar for ratification at an extremely high  $\frac{3}{4}$  of the states—38 at this point in our nation's history. Neither party controls enough state legislatures to independently push through an amendment without securing a significant level of support from legislatures controlled by the other party.

This concern also overlooks the historic role of the states as advocates for their citizens' rights when the federal government has lost its way. Virginia and Kentucky stood against what may be the greatest irony in American history: the Sedition Act of 1798, which criminalized criticism of the government and was supported by some of the very men who drafted and advocated for the ratification of our Constitution just a decade before. The states also began outlawing slavery and providing sanctuary for enslaved persons who had escaped captivity, even as measures like the Fugitive Slave Act and the *Dred Scott* decision were emanating from Washington. The 19<sup>th</sup> Amendment languished in Congress for decades even as states granted women suffrage in state and local elections. Because the disgraceful Jim Crow era is still a part of our collective memory, many Americans think that when it comes to civil rights, feds=good, states=bad. But the truth is, the rights we enjoy are *not* the result of federal supremacy; they are the product of the states and the federal government checking and challenging each other.

## **Can the convention “run away?”**

Those who oppose an Article V convention argue that such a convention could become a “runaway,” scrapping our entire Constitution and replacing it with a new, radical one. They attempt to scare people by dubbing it a “con-con” and claim, “this has never been done before...we can't possibly know what could happen.”

First, let's dispense with the “con-con” scare tactic: it doesn't matter what you call the meeting; if it's convened under the authority of Article V, the only thing it can do is propose amendments. Period.

Next, let's examine the assertion that we can't know what will happen because it's never been done before. In fact, we can predict with a high degree of confidence what will happen. The states have met in convention nearly three dozen times throughout American history. Every one of them has operated according to its mandate, including the Constitutional Convention of 1787. At each of these conventions, the delegates never started from scratch or made up rules as they went along. They relied upon established precedent such as English Common Law, international diplomatic protocols, Thomas Jefferson's rules for the Senate, and Mason's *Manual of Legislative Procedure*. Every governing body in America, from local school and library boards, all the way up to the United States Senate, has rules that prescribe its activities. No one avoids forming a new committee out of fear that its members will run amok. No one worries that one morning our legislators will report for work and suddenly pandemonium will ensue. No one agrees with every piece of legislation that gets passed, but we all take for granted that the business of government will be conducted according to established procedures. There is no reason to think a convention for proposing amendments will do otherwise.

What the naysayers hope you won't notice about their narrative is the implication that the only people they deem responsible and trustworthy enough to propose amendments are those who occupy the halls of power in Washington...that the people who struggle to earn a 30% approval rating are somehow more noble or intelligent than the members of our state legislatures. Members of Congress can propose a constitutional amendment any time Congress is in session. They have done so over 11,000 times; yet no one is raising the alarm. Why not? Because they are governed by the Constitution and the rules of their chamber. The same constitutional strictures that governed those proposals govern an Article V Convention, too.

Whether it's pork, corruption, or injustice, Article V provides state legislatures with the power to impose reforms on Washington when Congress can't—or won't—act. If not us, who? If not now, when?