

EXTRACT OF KEY POINTS RE: ARTICLE V  
FROM ROBERT G. NADELSON'S TREATISE  
M. Emmer, October, 2018

An Article V Convention is not a Constitutional Convention

Our original "constitutional" convention was called by two states that invited delegations from the other states. This all happened under the "sovereign" (i.e., inherent) powers of each state. Such "sovereign" powers bestowed on the delegations broad ("plenipotentiary") authority at the convention. This derived from the fact that the states, being independent sovereigns, dealt with each other as countries do, using rules of international diplomacy.

An Article V convention is different because it is called under the authority of Article V of the Constitution, not the sovereign authority of each state. Therefore, the rules of international diplomacy do not apply and the convention has only the authority allowed by Article V, i.e., to propose amendments on particular subjects.

The rich history of conventions of states was familiar to the Founders

It was common practice for the colonies and later the states (collectively, the "states" hereafter) to hold "conventions" of delegations to establish rules among themselves. The practice also was used to resolve intra-state matters.

Between 1689 and 1776 the colonies met in convention 20 times. Between 1776 and 1787 the states met in convention 11 times. The customs and practices developed by such conventions are a rich source of authority instructing us about how an Article V convention must be convened and conducted.

The practice was borrowed from the British, who had used "assemblies" or "conventions" for such purposes. This long predated either the Articles of Confederation or the Constitution. Customs and practices of such conventions were well understood by the Founders, many of whom had been delegates to some of these conventions.

There were several types of conventions. Some were for developing proposed rules for potential adoption by the states. Some were for ratifying rules proposed by other conventions or by the state legislatures. Some had broad authority; others strictly limited authority.

### Non-Article V Conventions of States Continued to be Used After the Constitution Was Adopted

States continued to hold conventions for purposes various purposes. One was held in Washington, D.C. in 1861 attempting to avoid civil war. Another was called in 1922 to create the multi-state Colorado River Compact (seven states).

### Article V Conventions Were Added In Case Congress Went Too Far

Early drafts of the Constitution permitted amendments to be both proposed and ratified ONLY at a Convention of States. This was modified to permit Congress to propose (subject to state ratification) because it was thought Congress' experience would alert it to needed changes. In final form, Article V included the additional means of proposing (not ratifying) amendments through a Convention of States because it was foreseen that Congress might exceed its authority and require restraining.

Thus, Article V is a way in which the Founders enfranchised the citizens to propose amendments through their legislatures. To deny the citizens the opportunity to propose amendments would be as serious a denial of a civil right as denying them the right to vote.

### The Demonization of Article V is Purely Political, Not Based in Fact

Use of an Article V convention was well accepted into the early 20<sup>th</sup> century. Then some political movements began to fear that such a convention might do exactly what Convention of States Action seeks to do: reduce federal power. That's when politically motivated essays began to appear quoting selectively and often inaccurately to spread unfounded fear of an Article V convention.

Such demonization efforts were difficult to rebut at first for lack of comprehensive scholarship on Article V. Though many authorities existed to interpret Article V (e.g., minutes from the Constitutional Convention, minutes from the debates of the Bill of Rights (introduced in Congress by James Madison), minutes from the ratifying debates in the states, Federalist Papers, other publications contemporaneous with the drafting and ratification, judicial decisions), no one had brought the threads together until a Justice Department lawyer began to do so in a 1979 opinion. This was followed by other comprehensive works, including the most extensive work of Professor Robert G. Natelson.

### Interpreting Article V

If two-thirds of the state legislatures apply to Congress for an Article V convention, Congress “must” call one. The convention is for proposing amendments to the Constitution; no other purpose is authorized by Article V.

Questions frequently asked in interpreting Article V are easily answered using legal authorities and standard methods of statutory interpretation.

1. Do the states have any way of proposing Constitutional amendments other than Article V? No. Article V is the exclusive means of amending the U.S. Constitution. A state could beseech Congress to consider proposing an amendment, but Congress is not required to circulate any proposed amendment for ratification outside the Article V process.
2. How would an Article V convention organize itself? Where would it derive the authority to do so? The Constitution grants Congress the power to “call” an Article V convention once enough state legislatures “apply” for one. When an Article V convention convenes, it does so under the Article V Congressional power to call it. The convention conducts its business under federal law, but is not a federal department. For that reason, Congress has no further power over the convention, as it would have if the convention were part of the federal government. The convention’s federal power includes the

express power to propose amendments, as well as implied powers, such as the power to adopt its own rules and select its own officers. Congress has no power to do those things and, thus, could not control the convention as some have alleged.

3. What powers do the state legislatures have over the convention? They have powers that they exercised in regard to conventions of states at the time the Constitution was adopted. These include: To define the scope of its application (i.e., what may be considered at the convention); to determine how to select delegates (commissioners) and how many; to provide delegates with instructions. These were typical of the powers exercised by colonial or state legislatures in regard to the numerous conventions occurring between 1689 and 1787.
4. If a state divides its legislative power between a "legislature" and the citizens (i.e., if it permits the right of ballot initiative), can the citizens call for an Article V convention or ratify a proposed amendment? No. Article V is explicit that action must be taken by the "legislature," which has been interpreted to mean the elected representative body of the state.
5. Is a legislature's resolution calling for an Article V convention covering only specific matters effectively so limited? Despite arguments to the contrary, the overwhelming evidence is that such resolutions are effective to limit the scope of an Article V convention. Historical practice confirms the use of subject-limited applications for conventions of states. Further, all conventions of states have remained within their stated subjects. More fundamentally, Congress could not apply the terms of Article V that require it to determine whether two-thirds of the legislatures had "applied" for a particular convention unless it could determine that they all had applied to cover the same subject matter.
6. How long does a legislative house's resolution remain in effect? A resolution adopted in one house of the Colorado general assembly dies at the end of the legislative session unless also adopted by the other house in the same session. Once adopted in the same session in both houses, the resolution is valid unless and until it is rescinded.

7. Could Congress determine the rules of conduct and limits of authority of an Article V convention? No. No such authority is granted to Congress in any part of the Constitution. Grants of authority in articles other than Article V do not apply to an Article V convention. If they did, it would make a dead letter of Article V. This would thwart the drafters' intent and would not withstand challenge. Moreover, constitutional language granting Congress powers in other articles does not extend to Article V.