

AMERICAN CONSTITUTION FOUNDATION

Strategic Initiative for Restoration of the Constitution as the Governing Document for America

White Paper on an Article V General Convention of States

June 15, 2018

The American Constitution Foundation (ACF) is focused on a strategy to trigger a Congressional call for an Article V convention of states for proposing amendments. The strategy (a) promotes a general convention and disrupts the current paradigm that believes a convention can only be called based on applications for a “limited subject of set of subjects” convention and (b) provides the framework for a convention being held prior to the November 2020 national elections. Following a comprehensive analysis (described herein) of published scholarship and the historical record, ACF contends Congress can only call a *general* convention for proposing amendments, *irrespective of the subject or set of subjects* specified in applications. This would be a plenary convention by nature (i.e., commissioned delegates have full constitutional authority to set the agenda and rules for considering and recommending amendments) and is commonly referred to as a general convention or a constitutional convention¹ (only for proposing amendments to the Constitution). This paper addresses key concepts and definitions, naysayers to an Article V convention, application aggregation history, and closes with findings, implications, and recommendations.

Concepts and Definitions

Article V provides two methods for proposing amendments to the Constitution: one by Congress and one by a convention of states. The actual text for the second method reads, “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments.” It is important to understand concepts and definitions.

Application. The nature and meaning of the word application is critical to understanding the amending process. An application is simply a notice to Congress, and other State legislatures, of a State legislature’s perceived need or value for a convention for proposing amendments. One State might see a particular need for issue X, another for issue Y, another for issue Z, and so forth. If two thirds of the State legislatures convey such a need, without exclusionary language (e.g., “for the sole purpose of,” “null and void, if,” etc.) via an application, then Congress “shall call a convention for proposing amendments.” This appears to be the understanding of the post-Constitutional era, as reflected in the actual record of applications, especially between 1789 and 1899. During this period, 12 applications were filed.² Ten were for general conventions (Virginia, 1789; New York, 1789; Georgia, 1833; South Carolina, 1833; Indiana, 1833; Kentucky, 1861; Ohio, 1861; New Jersey, 1861, Illinois, 1861; and Texas, 1899). One application was for direct election of senators (Nebraska, 1893). One application was for tariffs and other issues (Alabama, 1833). The latter could arguably qualify as a general convention application because it did not have exclusionary language.

Convention. A convention called under Article V authority is an assembly of commissioned

¹ Unfortunately, special interest groups have invented a “con-con” slur to generate fear of a runaway convention.

² Data are from the Article V Library, available at <http://article5library.org/>

delegates representing the several States for the function of proposing amendments. Numerous adjectives are commonly used to qualify the meaning of a convention, such as constitutional, general, plenary, and limited.

Constitutional convention. By “constitutional convention,” ACF understands this to mean an equivalent expression for a convention for proposing amendments under the authority of Article V. This meaning was clearly understood in the post-Constitutional era because the record reveals State legislatures used this expression when making application for a convention under Article V. For example, the record reveals some Article V applications actually used the expression, “constitutional convention” in its language (Indiana, 1907; Missouri, 1913; Louisiana, 1920; Nevada, 1925; etc.).

General convention. By “general” convention, ACF means an Article V convention for proposing one or more amendments to be determined by the commissioned delegates during the convention. The first mention of a general convention was by the State of New York in 1789. Their Article V application stated, “. . . in the fullest confidence of obtaining a revision of the said Constitution by a General Convention; . . .” The application further stated, “we, the Legislature of the State of New York, do, in behalf of our constituents, in the most earnest and solemn manner, make this application to the Congress, that a Convention of Deputies from the several States be called as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind” (H.R. Jour., 1st Cong., 1st Sess. 29-30 [May 6, 1789]).³ This application has never been repealed. It is the first such application filed by a State after the Constitution’s ratification in 1789.

Plenary convention. By “plenary” convention, ACF means that the commissioned delegates would have “full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.”⁴ On the other hand, a “plenipotentiary” convention would exercise full and independent power to amend the Constitution, to include ratification. The Compact for America initiative advocates plenipotentiary power and is contrary to the intent of Article V that separates authority for proposing and ratifying. The result of such a convention would have no force of law because it would be considered *ultra vires* in relation to Article V authority. None of the other Article V organizations presume this level of power. They understand that a convention can only propose amendments. Amendments must still be ratified by three-fourths of the States.

Limited convention. By “limited” convention, ACF believes this means that a convention called under Article V is limited to the “function” of proposing amendments. One scholar asserts that a limited convention is limited by subject: “In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two-thirds need for convention, but to group them according to

³ Article V application by the State of New York, H.R. Jour., 1st Cong., 1st Sess. 29-30 (May 6, 1789)

⁴ The notion of a plenary convention is explicit in the language of the Article V application by the State of New York, H.R. Jour., 1st Cong., 1st Sess. 29-30 (May 6, 1789).

subject matter.”⁵ After surveying the literature and historical record, another scholar claimed: “The illimitability theory currently holds the edge among constitutional scholars.”⁶ Yet, another scholar is even more explicit:

If the legislatures of thirty-four states request Congress to call a general constitutional convention, Congress has a constitutional duty to summon such a convention. If those thirty-four states recommend in their applications that the convention consider only a particular subject, Congress must still call a convention and leave to the convention the ultimate determination of the agenda and the nature of the amendments it may choose to propose. If, however, a state’s application is based on the erroneous assumption that Congress is empowered to impose subject-matter limits on the convention, such an application must be considered invalid. Many of the state applications calling for a convention on a balanced budget amendment are invalid under this test. Congress has no authority to call a convention in the absence of valid applications from two-thirds of the states. Therefore, even if the total number of applications reaches thirty-four, Congress must decline to call a constitutional convention.⁷

Even if all Article V organizations agreed to the notion that Congress can only call a general convention limited only to the function of proposing amendments not by subject, the effort faces formidable opposition by naysayers.

Naysayers

There are two types of naysayers: special interest groups and judicial activists. The special interest groups represent political agendas on both ends of the political spectrum and use FUD (i.e., a deliberate attempt to inject **f**ear, **u**ncertainty, and **d**oubt) tactics and are generally united in opposing attempts to use Article V to restore a balance of power and federalism as a Constitutional Republic. These special interest groups represent the factions that Madison warned about in *Federalist 10*: “The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular Governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations.” The lack of unity among the various Article V organizations is no defense against the unified set of special interest groups.

The other type of naysayers represents judicial activism. Reflecting the progressive vision of

⁵ Natelson, Robert G., (2010, December), Amending the Constitution by convention: A more complete view of the founders’ plan,” The Independence Institute, IP-7-2010, p. 16. Retrieved on May 6, 2018 from <http://robnatelson.com/wp-content/uploads/2016/11/II-Paper-I-Founders-Plan-II-webversion.pdf>

⁶ Caplan, Russell L., (1988), *Constitutional Brinkmanship: Amending the Constitution by national convention*, (New York, NY: Oxford University Press), p. 138.

⁷ Dellinger, Walter E. (1979), The recurring question of the “limited” constitutional convention, *Yale Law Journal*, 88, 1623-1640, p. 1640. Note: Dellinger’s understanding of the Framers’ intent is that Congress can only call a general convention. Applications that attempt to limit an Article V convention to a specific subject is in violation of the constitutional plenary authority granted to assembled convention delegates.

Herbert Croly,⁸ judicial activists believe it is far more expedient and efficient for highly educated elite to softly amend the Constitution through judicial rulings. The major manifestation of the progressive vision in modern America is a living constitution⁹ that reflects tradition and legal precedent (similar to Great Britain’s approach, which has no written constitution). The “progressive” tradition is a created tradition based on ideas of a more perfect union, not the inherited “traditional” tradition that is based on tried and tested wisdom. This shift in thinking has now been institutionalized in “the *Constitution of the United States of America: Analysis and Interpretation* (popularly known as the *Constitution Annotated*), which contains legal analysis and interpretation of the United States Constitution, based primarily on Supreme Court case law.”¹⁰

Having examined key concepts and definitions in defense of ACF’s position that Congress can only call a general convention for proposing amendments, are there a sufficient number of valid applications that can be aggregated to reach the two-thirds (or 34 State legislatures) threshold for the call?

Aggregation History

To our knowledge, there have been six attempts at aggregation: two by Professor Michael Stokes Paulsen, one by attorney Robert Biggerstaff, one by Professor Robert Natelson, one by attorney John Cogswell of Campaign Constitution,¹¹ and one by ACF. A table summarizing the various studies is attached.

Paulsen aggregations. Paulsen first conducted two aggregation analyses, in 1993¹² and 2011.¹³ Of 399 active applications in 1993, Paulsen identified 45 valid applications to justify a Congressional call for a convention. His criteria were that an application was valid if (a) it had not been repealed and (b) it was for a general convention or recommended a subject with no exclusionary language. He used the convention of the light is “on” for valid applications or “off” for no valid applications. After the study, he notified Congress but was ignored. His second study, in 2011, revealed that many of the 399 applications had been repealed, resulting in only 33 applications that were valid—one short of the necessary 34 threshold.

Biggerstaff aggregation. Robert Biggerstaff, Curator of the Article V Library dataset, updated Paulsen’s 2011 analysis, discovering three applications had since been repealed. Since the Convention

⁸ For an excellent analysis of Herbert Croly’s vision, advanced through his book, *The Promise of American Life*, see Pearson, Sidney, (2013, March 14), Herbert D. Croly: Apostle of progressivism, *Political Process Report*, The Heritage Foundation. Retrieved on May 20, 2018 from <https://www.heritage.org/political-process/report/herbert-d-croly-apostle-progressivism>

⁹ See, for example, Strauss, David A., (2010), *The living constitution*, (New York, NY: Oxford University Press).

¹⁰ The legal requirement for this document was enacted by a Joint Resolution of Congress and as of today consists of 2,880 pages. This document is available at <https://www.congress.gov/constitution-annotated/>

¹¹ For more information on Campaign Constitution, see <http://www.campaignconstitution.com/>

¹² Paulsen, Michael Stokes, (1993), A general theory of Article V: The constitutional lessons of the Twenty-Seventh Amendment, *Yale Law Journal*, 103, 677-789.

¹³ Paulsen, Michael Stokes, (2011), How to count to thirty-four: the constitutional case for a constitutional convention, *Harvard Journal of Law & Public Policy*, 34, 837-872.

of States Project (COSP) organization claims its application is a “limited subject” application, we infer that Biggerstaff has not considered these applications eligible for aggregation. ACF disagrees because the actual language calls for a convention for the “sole purpose of proposing amendments” or “limited to proposing amendments,” which ACF argues is the limited “function” of the convention. The application then includes broad “topics” for consideration. The second topic, “power and jurisdiction,” is what the Constitution is all about: the delegation of enumerated powers.

Natelson aggregation. Natelson conducted an aggregation study using the set of 28 Balanced Budget Amendment (BBA) applications as the baseline and then added active general applications. His scheme produced 33, which included 27 BBA applications (he eliminated one from Mississippi) and added six general applications. The major flaw in this scheme is that 26 of the 28 BBA applications have “null and void, if” language that prevents aggregation with any other application.

ACF aggregation. Not aware of any aggregation attempts (to include Paulsen’s and Natelson’s), ACF conducted an aggregation scheme starting with active general applications, followed by COSP applications and others that use nonexclusionary language. ACF’s study produced 35 valid applications for aggregation purposes. ACF then sought peer reviews from nearly 40 constitutional scholars, with no rebuttals and a recommendation by Yale’s Jack Balkin to consult with Michael Stokes Paulsen. It was at this time that ACF discovered Paulsen’s work and the similarity in aggregation schemes. Since then, ACF has identified two additional applications for a total of 37 States.

Cogswell aggregation. ACF asked John Cogswell of Campaign Constitution for a legal opinion of ACF’s aggregation study. Cogswell defaulted to Paulsen’s 2011 aggregation study to update it with any changes between 2011 and 2018. His analysis is currently pending. His analysis is considering changes that include (a) three previous valid applications had since been repealed (Delaware, Nevada, and New Mexico), (b) one valid application from South Dakota (a 1909 anti-polygamy application), and (c) five COSP applications that were issued since 2011 (Alaska, Arizona, Georgia, North Dakota, and Tennessee). While the COSP resolution language uses “for the sole purpose of proposing amendments” and then lists three broad topics, it is inferred that the topics attempt to provide some specificity in terms of the nature of constitutional issues and are the closest to a general application. For example, the topic of “power and jurisdiction” is essentially what the Constitution is all about in combination with the concept of federalism. Cogswell’s pending analysis may range from 30 to 37 valid applications.

Findings, Implications, and Recommendations

ACF’s assessment of the Article V movement and its grounding in published scholarship and the historical record can best be summarized in Table 1.

Table 1. Summary of Findings, Implications, and Recommendations

Findings	Implications	Recommendations
1. Concepts and definitions matter	<ul style="list-style-type: none"> • Concepts and definitions matter because they add the clarity needed for a problem that is abstract and complex 	<ul style="list-style-type: none"> • Promote a disciplined and consistent presentation of concepts and definitions

2. Article V organizations operate from a flawed proposition that an Article V convention must be limited by subject	<ul style="list-style-type: none"> • The position that an Article V convention must be limited by subject makes the Article V movement vulnerable to opposition • The position weakens an otherwise unified effort that could benefit from the innovative potential of an actual Article V convention 	<ul style="list-style-type: none"> • Encourage a disciplined and consistent understanding of a general convention as the only constitutional approach • Rally Article V organizations around this notion 	
3. More evidence exists to support a general convention, limited only to the “function” of proposing amendments	<ul style="list-style-type: none"> • The Article V group has a greater chance of their subjects being addressed at a general convention • Concerns about a runaway convention can be assuaged in the commissioning and instruction process. Commissioned delegates remain, throughout a convention, agents of the States they represent 	<ul style="list-style-type: none"> • Encourage Article V organizations to avoid or to change exclusionary language in recommended resolutions • In the commissioning process, consideration of the extent of any prohibitions should be balanced with the benefit of having a voice/vote on unanticipated topics/issues 	
4. The Article V movement is obstructed by	a. Internal confusion based on concepts and definitions	<ul style="list-style-type: none"> • Confusion in concepts and definitions weakens the Article V effort and promotes a lack of confidence among State legislators 	<ul style="list-style-type: none"> • Instill confidence in Article V organizations in advancing terminology such as constitutional convention as a general convention for the sole purpose (function) of proposing amendments. Terminology such as the “con-con” slur reflects the ignorance of the person using it.
b. A flawed proposition about a general convention that is plenary by nature	<ul style="list-style-type: none"> • A united Article V community regarding the safety of a general convention would instill confidence in State legislators, especially with the power to regulate delegate behavior through commissions and instructions 	<ul style="list-style-type: none"> • Emphasize the critical role of our State legislators in taking ownership for the Article V convention 	
c. Unified opposition	<ul style="list-style-type: none"> • A unified Article V effort is stronger against a unified opposition 	<ul style="list-style-type: none"> • Working with State legislators, focus on the innovative opportunity of an Article V convention to address constitutional issues and the critical role State legislators play in the commissioning process 	
5. Aggregation of applications is supported by scholars (Paulsen, Natelson), Biggerstaff, Cogswell, and the ACF	a. Paulsen’s (1993/2011) scheme based on defensible logic	<ul style="list-style-type: none"> • Once the Article V community recognizes the futility of a convention limited by subject, a more concerted effort can unfold to advance an actual convention where specific issues/subjects have a venue for consideration 	<ul style="list-style-type: none"> • Promote a general convention and the opportunity to aggregate applications for this purpose • States without applications are opportunities to approach State legislators to advance either a general application or a nonexclusionary recommended subject application

b. Biggerstaff	<ul style="list-style-type: none"> • COS applications not used because of the “sole purpose” or “limited” language 	<ul style="list-style-type: none"> • Convince Biggerstaff that (a) the sole purpose or limitation is for proposing amendments using broad topics, not subjects, and (b) the topic of “federal power and jurisdiction” is what the Constitution is about
c. Natelson’s (2018) scheme is compromised by undefendable logic and exclusionary language	<ul style="list-style-type: none"> • Although approached differently, application aggregation is plausible 	<ul style="list-style-type: none"> • Given the evidence, convince advocates of the current flawed reasoning that Congress can call a convention limited by subject
d. Cogswell’s (2018) updates Paulsen’s 2011 study	<ul style="list-style-type: none"> • A solid legal opinion supporting 37 valid applications for aggregation purposes 	<ul style="list-style-type: none"> • Use this legal opinion in conjunction with ACF’s analysis for justifying a Congressional call when the time is right (sufficient confirmation by the leadership of State legislatures that they support a Congressional call)
e. ACF’s study is consistent with Paulsen (1993/2011) and Cogswell (2018)	<ul style="list-style-type: none"> • An independent analysis identified 37 valid applications that is consistent with schemes advanced by Paulsen and supported by Cogswell 	<ul style="list-style-type: none"> • Since ACF independently arrived at 37 valid applications, use this study as the basis for a Congressional call and for preparing the several States for a convention

Conclusion

There is a growing body of literature on the subject of an Article V convention of states for proposing amendments. While there remains some debate regarding what kind of Article V convention Congress can call, the existing evidence favors a general convention. Current efforts to trigger a convention limited by subject are not supported by the evidence, have contributed to a failure to achieve the necessary number of applications for a subject-limited convention, and have empowered opposition groups to further damage the Article V movement. ACF is focused on disrupting this dynamic to better position the Article V movement for success.

Additionally, attempts to aggregate applications have demonstrated the plausibility of counting applications to trigger a call. Although ACF believes their study indicates the condition has been met to trigger a call, they also understand Congress is likely to seek affirmation from the States in affirming their intent for a convention. State legislators will be the key in this affirmation. It is imperative that ACF and other Article V organizations work in concert with State legislators (and State Attorneys General, if needed) to promote a general convention and to be prepared to properly commission convention delegates for effective conduct/proceedings at a convention. Failure to do this will perpetuate the status quo, or, even worse, enable expanding institutional corruption, to continue into the future.

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State	Paulsen 1993 (399 Applications)	Paulsen 2011	Biggerstaff	ACF 2018 (275 Applications)	Cogswell 2018	Natelson 2018
Alabama	Revenue Sharing--1967	Revenue Sharing--1967	On	COSP--2015	Revenue Sharing--1967	BBA--2015
Alaska	Off	Off	Off	COSP--2014	Pending	BBA--1982
Arizona	Coercive Fed Funds-1980	Off	Off	COSP--2017	Pending	BBA--2017
Arkansas	Federal Debt Limit-1975	Federal Debt Limit-1975	On	Apportionment--1963	Federal Debt Limit-1975	BBA--1979
California	Proceeds of Fed. Taxes on Fuels-1952	Proceeds of Fed. Taxes on Fuels-1952	On	Federal Labor Regulation--1935	Proceeds of Fed. Taxes on Fuels-1952	None
Colorado	Apportionment--1967	Apportionment--1967	On	General--1910	Apportionment--1967	BBA--1978
Connecticut	State Taxing Power--1958	State Taxing Power--1958	On	State Taxing Power--1958	State Taxing Power--1958	None
Delaware	Right to Life--1978	Right to Life--1978	Repealed	None	None	None
Florida	Revenue Sharing-1969	Revenue Sharing--1969	On	COSP--2014	Revenue Sharing-1969	BBA--2014
Georgia	State Control of Public Educ--1965	Off	Off	COSP--2014	Pending	BBA--2014
Hawaii	Off	Off	Off	None	None	None
Iaho	Apportionment--1965	Off	Off	None	None	None
Illinois	Apportionment--1965	Apportionment--1965	On	General--1861	Apportionment--1965	Plenary
Indiana	Right to Life--1977	Right to Life--1977	On	General--1861	Right to Life--1977	BBA--1979
Iowa	General--1909	General--1909	On	General--1909	General--1909	BBA--1979
Kansas	Federal Taxing Power--1951	Federal Taxing Power--1951	On	General--1910	Federal Taxing Power--1951	BBA--1979
Kentucky	School Assignment--1975	School Assignment--1975	On	General--1861	School Assignment--1975	Plenary
Louisiana	Off	Off	Off	COSP--2016	COSP--2016	BBA--2016
Maine	Direct Election of Senators--1911	Direct Election of Senators--1911	On	Direct Election of Senators--1911	Direct Election of Senators--1911	BBA--2016
Maryland	Apportionment--1965	Apportionment--1965	On	None	None	None
Massachusetts	Right to Life--1977	Right to Life--1977	On	Right to Life--1977	Right to Life--1977	None
Michigan	Federal Taxing Power--1941	Federal Taxing Power--1941	On	Anti-Polygamy--1913	Federal Taxing Power--1941	BBA--2014
Minnesota	Direct Election of Senators--1901	Direct Election of Senators--1901	On	Anti-Polygamy--1909	Direct Election of Senators--1901	None
Mississippi	Balanced Budget--1979	Balanced Budget--1979	On	BBA--1979	Balanced Budget--1979	BBA--1979 (excluded)
Missouri	Right to Life--1975	Right to Life--1975	On	General--1910	Right to Life--1975	BBA--1983
Montana	Apportionment--1965	Off	Off	None	None	None
Nebraska	Apportionment--1965	Apportionment--1965	On	General--1907	Apportionment--1965	BBA--1979
Nevada	Coercive Fed Funds-1975	Coercive Fed Funds-1975	Repealed	None	None	None
New Hampshire	Federal Revenue Sharing--1969	Off	Off	None	None	BBA--2012
New Jersey	School Prayer--1973	School Prayer--1973	On	General--1861	School Prayer--1973	Plenary
New Mexico	Apportionment--1966	Apportionment--1966	Repealed	None	None	None
New York	Anti-Polygamy--1906	Anti-Polygamy--1906	On	General--1789	Anti-Polygamy--1906	Plenary
North Carolina	General--1910	General--1910	On	General--1910	General--1910	BBA--1979
North Dakota	Apportionment--1967	Off	Off	COSP--2017	Pending	BBA--2015
Ohio	Revenue Sharing--1965	Revenue Sharing--1965	On	General--1861	Revenue Sharing--1965	BBA--2014
Oklahoma	School Assignment--1973	Off	Off	COSP--2016	Pending	BBA--2016
Oregon	Townsend Plan--1939	Townsend Plan--1939	On	General--1901	Townsend Plan--1939	Plenary
Pennsylvania	Coercive Federal Funding--1943	Coercive Federal Funding--1943	On	Coercive Federal Funding--1943	Coercive Federal Funding--1943	BBA--1979
Rhode Island	Off	Off	Off	None	None	None
South Carolina	Apportionment--1965	Off	Off	None	None	None
South Dakota	Apportionment--1965	Off	Off	Anti-Polygamy--1909	Anti-Polygamy--1909	BBA--2015
Tennessee	Coercive Federal Funding--1976	Off	Off	COSP--2016	Pending	BBA--2016
Texas	Revenue Sharing-1967	Revenue Sharing-1967	On	COSP--2017	Pending	BBA--2017
Utah	Off	Off	Off	None	None	BBA--2015
Vermont	Anti-Polygamy--1913	Off	Off	Anti-Polygamy--1913	Anti-Polygamy--1913	None
Virginia	Apportionment/Revision to Article V--1965	Off	Off	None	None	None
Washington	Apportionment--1965	Apportionment--1965	On	General--1910	Apportionment--1965	Plenary
West Virginia	Anti-Polygamy--1907	Anti-Polygamy--1907	On	Anti-Polygamy--1907	Anti-Polygamy--1907	BBA--2016
Wisconsin	Presidential Electors--1963	Presidential Electors--1963	On	General--1911	Presidential Electors--1963	None
Wyoming	Revision to Article V--1963	Off	Off	None	None	BBA--2017
Total	45	33	30	37	30 to 37	33