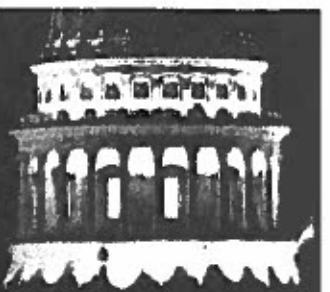

IV. The State Application and Convention Process: Step-By-Step

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.