

# LWVUS AMENDING THE CONSTITUTION STUDY

## INTRODUCTION:

Article V of the U.S. Constitution provides two ways of amending the Constitution. Congress, by a two-thirds vote of both houses, may propose amendments to the states for ratification, a procedure used for all 27 current amendments. Alternatively, if the legislatures of two-thirds of the states apply, 34 at present, Congress “shall call a Convention for proposing Amendments...” This alternative, known as an Article V Convention, has yet to be implemented.

This study looks at the second option for amending the Constitution, the “Article V Convention” option. Since, this option has never been used, the League is looking at forming a Position on issues in three areas:

- I. Congress’s Constitutional Duties in the Article V Convention Progress
- II. The Role of the States in the Article V Convention Progress
- III. When resorting to a Constitutional amendment is appropriate

## PURPOSE:

In this summary paper, I have gleaned the readings to isolate issues in these three areas.

I. Taken from “The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress” by Thomas H. Neale

### **Congress’s Constitutional Duties in the Article V Convention Progress**

1. Is Congress obligated to call an Article V Convention on the receipt of sufficient state applications?

Most scholars agree that the Constitution is clear that Congress is obliged but there are factors concerning state applications that might be used to rule state applications invalid

- Applications that propose specifically worded amendments
  - The scope of the convention – general or limited
  - Application has expired and no longer has any force
  - Congress responds to the applications of the states by proposing its own relevant amendment
2. What Sort of Convention Does Article V Authorize?
    - The General Convention- Proponents contend that the Founders included ample checks on the work of a general or unlimited convention.
    - The Limited Convention – Proponents contend that the Founders did not contemplate a wholesale or large-scale revision of the Constitution when they drafted Article V.
    - The Runaway Convention –Opponents suggest that a runaway convention driven by

an extreme political group might attempt to change a wide range of constitutional provisions.

### 3. Is Congress Required to Propose Ratification of Amendments Approved by a Convention?

- Those who answer “no,” contend that were the Convention to deviate from the subject that brought it into being and propose amendments on other subject, Congress could use its power given to it in the ratification process to refuse to submit the amendments to the states.
- Those who answer “yes,” contend that unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the Article V process.

Note: This is not an exhaustive list of issues that Congress has to consider but they address the most fundamental of them. Some others are: The Role of the President, Congressional Authority to Propose Ratification by Convention or Legislature, Time Limit for Ratification, Details of the Article V Convention Process and Procedures, State Applications Procedures, Defined Term for the Convention, and Judicial Review.

**II.** Taken from “The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress” by Thomas H. Neale

#### **The Role of the States in the Article V Convention**

There is a general agreement that a state application, in order to be valid, must be approved by the joint or concurrent action of both of its state legislative chambers. (The exception being Nebraska, whose legislature is unicameral.) Further questions remain

##### 1. Legislative Procedure

- What margin is necessary for an application to be valid? Would a plurality vote be sufficient, or would a simple majority, or super majority be required?
- Beyond margin requirements, would approval of an application petition require a majority of the whole membership, or approval by members present and voting?
- Could the upper and lower chambers of the same state legislature adopt different quorum or vote margin standards?

##### 2. Must Applications Share Identical Language or Is Issue Congruency Sufficient?

##### 3. Are Conditional Applications Allowed?

##### 4. For What Period of Time should an Application be Considered Valid?

##### 5. May a State Amend or Rescind Its Application for an Article V Convention?

##### 6. May a State Application Contain a Self-Canceling Provision?

##### 7. Who, in the National Government, Should Receive States Applications for an Article V Convention?

### III. Taken from “GREAT AND EXTRAORDINARY OCCASIONS” The Constitution Project

**The Constitution Project identified eight guidelines in the form of questions that will provoke discussion of when resorting to the proposing a Constitutional amendment is appropriate and that ensure all relevant concerns are fully debated.**

**1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?**

- The Constitution should not be amended solely on the basis of short-term political considerations
- Constitutional amendments should usually be cast, like the Constitution itself, in general terms

**2. Does the proposed amendment make our system more politically responsive or protect individual rights?**

- Of the twenty-seven amendments to the Constitution, seventeen either protect the rights of vulnerable individuals or extend the franchise to new groups.
- The Constitution’s main thrust should be to ensure that our political system is more, rather than less, democratic

**3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?**

- The Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments
- The more the Constitution is filled with specific directives, the more it resembles ordinary legislation and less like a fundamental charter of government
- This Guideline does not caution against resort to constitutional change when there are significant legal or practical obstacles to ordinary legislation.

**4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?**

- This problem does not arise when whole areas of constitutional law are reformulated.
- This problem arises most often when framers of amendments focus narrowly on specific outcomes without also thinking more broadly about general legal principles.
- The campaign finance amendment presents at least two sets of anomalies in First Amendment jurisprudence – **A.** It would allow Congress and the states to set limits on the amount a candidate could spend on elections, but would not alter the law regarding governmental attempts to control the amounts spent on other types of speech and **B.** If the amendment were broadly construed, it would have the anomalous effect of placing a greater limit on speech in the context of elections than in the context of commercial products or cultural matters, a result that is difficult to square with the core notion of what the First Amendment is intended to protect.

**5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?**

- Most existing constitutional amendments are also silent regarding the means of enforcement. Since *Marbury v. Madison*, however, there has been a presumption that judicial enforcement will generally be available.

**6. Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?**

- Consider how their proposals might shift the balance of shared and separated powers among the branches of the federal government or affect the distribution of responsibilities between the federal and state governments
- **FYI Even though this speaks to an individual amendment, I included it for interest.** The campaign finance proposal would authorize Congress and the states to place limits on political campaign spending. While purportedly aimed at limiting the influence of wealthy donors, the amendment might establish as constitutional law that the government could ration core political speech. Moreover, even though its sponsors do not intend to impose financial limits on the press, the proposed amendment itself contains no such restriction. Certainly, the value of a newspaper endorsement, at least equivalent to the cost of a similarly sized and placed advertisement, could easily violate an expenditures limit.

**7. Has there been full and fair debate on the merits of the proposed amendment?**

- Congress should consider the policy questions, which include whether the basic idea is sound and whether the amendment is the type of change that belongs in the Constitution,
- Congress should also consider the operational questions, including whether there are problems in the way that the amendment will work in practice.
- To ensure that floor votes are taken only on language that has been previously scrutinized, each House should adopt rules requiring that only changes to a proposed constitutional amendment that have been specifically considered in committee be eligible for adoption on the floor, with one exception: votes on clarifying language

**8. Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?**

- There should be a nonextendable time limit for ratification of all amendments.
- If extensions are permitted at all, they should be adopted by the same two-thirds vote that approved the amendment originally.
- States that ratified the amendment during the initial time period should be allowed to rescind their approvals, thereby assuring a continuing consensus.