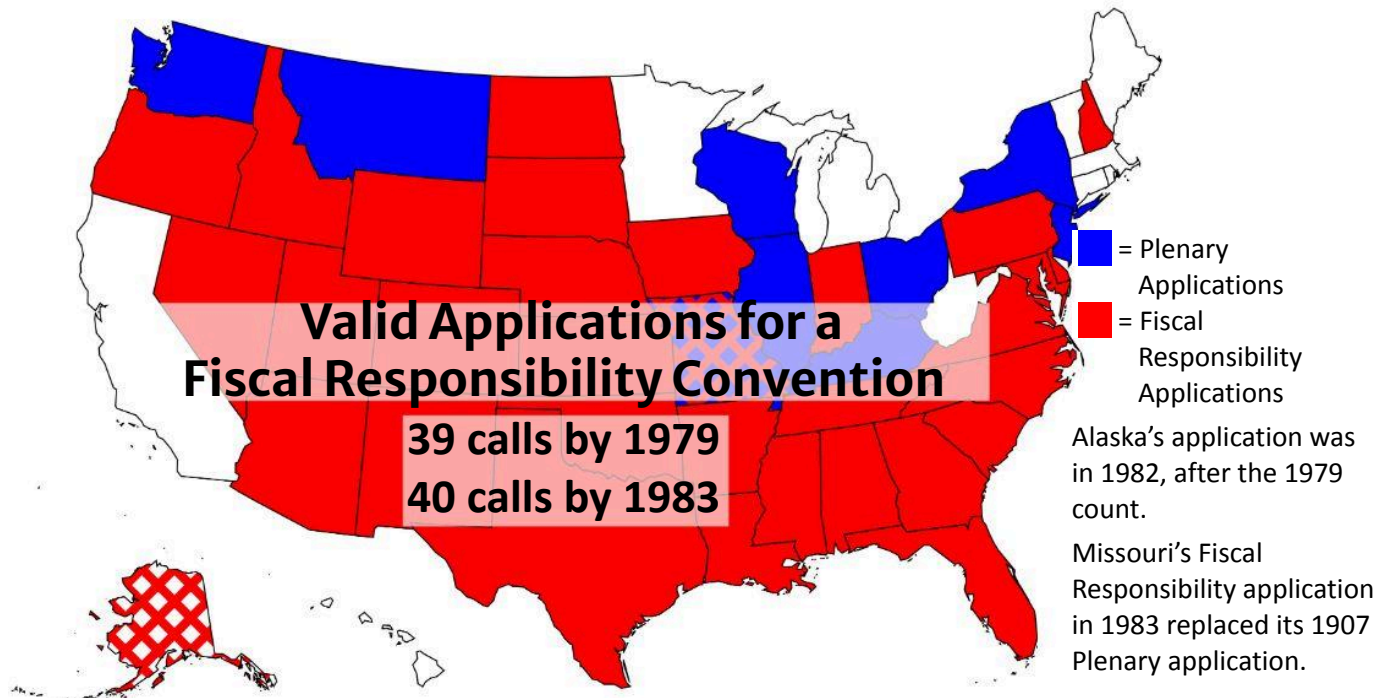


States v. Congress

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I. A Fiscal Responsibility Amendment

The United States faces a growing crisis of fiscal irresponsibility, with the federal deficit and debt reaching unsustainable levels due to Congress's short-term focus driven by election cycles. Regular legislation has proven ineffective at solving this problem because one Congress cannot bind the next. A constitutional amendment is the only solution to enforce fiscal discipline, as it would provide a long-term fix beyond the reach of shifting political priorities. The Constitution empowers the states to call a convention to propose such an amendment, and enough states have already applied to require Congress to do so. If Congress does not do its duty, it is up to the States to enforce their rights. Citizens also play a crucial role by urging their congressional representatives and state officials to act and uphold their constitutional responsibilities.

A. State Attorneys General

Congress has failed to do its duty for decades. It would be great if that were to suddenly change, but being realistic, the States will have to enforce their rights. Fortunately, all 50 States have standing to sue to enforce their right to meet in convention under Article V because they suffered a direct and concrete injury when Congress failed to fulfill its constitutional duty. Once two-thirds of the states apply for a convention for proposing amendments, Congress is obligated to call it. By refusing to do so, Congress nullifies the states' applications and denies them their constitutional right to propose amendments, infringing on their sovereignty. As the entities directly empowered by Article V to initiate the amendment process, states are uniquely positioned to challenge this inaction and seek judicial enforcement of their rights.

B. State Legislatures

State legislatures have the right to apply for a Convention for Proposing Amendments under Article V of the Constitution. By refusing to call the convention upon the completion of the application by the State Legislatures, Congress has nullified and usurped the Constitutional rights of the State Legislatures. Not every State Legislature has the standing to sue, but 40 of them do. Those are the 40 States that had active calls by 1983 that were either limited to fiscal responsibility (32 states) or open to any subject (8 states). In most States, the legislature needs a separate resolution authorizing such a lawsuit. A handful of State Legislatures, though, have rules in place that grant blanket authority to the House Speaker and Senate President to bring the suit on their behalf.

II. The States Equal Power to Propose Amendments

"The Congress... on the Application of the Legislatures of two-thirds of the several States, ***shall call*** a Convention for proposing Amendments, which... shall be valid... as part of this Constitution, when ratified by... three-fourths of the several States." The founders and contemporary scholars are essentially unanimous about this aspect of Article V: once valid applications from two-thirds (34) of the states exist, Congress has no discretion in its ministerial duty to call the convention. The States have, in fact, already called for a convention which they have limited to the subject of fiscal responsibility. The States now have the power to enforce their right to meet in Convention.

A. More than 34 States Have Valid Applications

Starting in 1979, there were more than 34 calls for a convention limited to fiscal responsibility. Specifically, 39 states have active applications in 1979 of which 30 were unambiguously limited to the subject matter of fiscal responsibility. That number peaked when, in 1983, 40 states had active applications of which 32 states had similarly worded applications unambiguously limited to the

subject matter of fiscal responsibility. Of these, 3 included specific amendment language as an example and specified that they should be counted together with "substantially similar" applications. The Congressional Research Service (citing a Congressional Report) explains why this is sufficient.

There are an additional 8 states with applications valid during the relevant time period that can be counted toward any subject. seven of these are clear on their face that they were intended by the legislature at the time to apply to any subject. The New Jersey application is less clear, but the New Jersey Legislature recently made clear, when rescinding their call, that they believe it could be counted toward any subject. A court may give weight to that opinion. That brings the highest possible count to 40, 36 of which are uncontroversial in the scholarly writing on the subject.

B. Limited Subject Matter

The set of applications is subject to the restrictions imposed by 32 of those states: limiting the convention to the subject matter of fiscal responsibility. Those limits are enforceable through a variety of means. Once called by Congress, a Convention for proposing Amendments has the power only to propose an amendment, which then must be "ratified by the Legislatures of three-fourths [38] of the several States, or by Conventions in three-fourths thereof" exactly as if Congress had proposed it. Ratification is by one-state, one-vote, meaning that any proposed amendment must be written to reach that very high bar and can be vetoed by merely 13 states. Additionally, delegates to the convention are sent by each of the 50 states for the singular purpose of drafting a fiscal responsibility amendment and subject to ongoing control by their state's legislature. Further, fiscal responsibility is an overwhelmingly popular bipartisan issue, one of very few subjects that, with a well-written amendment, can meet the high bar of ratification by 38 states.

C. Congress' Continuing Duty to Call

The Convention for Proposing Amendments under Article V is an agreement among the States. Once the two-thirds (34 state) threshold has been reached, the agreement is complete. Just like any other contract, "once the bell is rung, the obligations triggered cannot be unringed." Once the right to meet in convention has vested, any future rescission is irrelevant. The right to meet in convention remains and is enforceable. Congress does not absolve itself of its constitutional duty to call the Convention just because it has continued to fail to do that duty for decades on end.

D. Enforceable Right

Under the Declaratory Judgment Act, the court can declare the existence of a right. This Act has been used successfully to declare that plaintiffs have a right to Congressional action and to allow them to proceed as if Congress had performed its ministerial duties, even without ordering Congress to actually perform an action directly. The Supreme Court has acknowledged that actions assigned to a legislative body under Article V are not necessarily legislative in nature and that our founders were very clear that Congress has no discretion here. The typical bars against suing Congress, such as the Political Question Doctrine and the Speech and Debate Clause, do not apply in these circumstances.

III. An Objective Reading of an Application

As scholar Robert Natelson explained in his paper [Counting to Two-Thirds](#), "[T]here is no Founding-Era practice suggesting that the text should be read otherwise than in the most straightforward manner[.]" "Because a primary purpose of the convention procedure is to check Congress, when it aggregates applications it does so in a conflict of interest situation. Fiduciary

principles argue against allowing Congress to avoid a convention by interpretive logic chopping.” Scholar William Van Alstyne agreed in his paper [Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague](#), arguing that “Congress is under a constitutional obligation to call a convention responsive in good faith [to applications on] a given subject of sufficient common description.”

A. Applications for Fiscal Responsibility

As the [Department of Justice noted in 1979](#), it is the "general problem or issue" as determined by the states that matters, not the specific articulation of that issue. Most applications in the set here specify that "in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year." Others call for a "balanced federal budget." These are among the articulations of the general problem of fiscal responsibility. As long as it is clear to a reasonable person (an objective standard courts apply routinely) that the legislatures intend to meet in a convention which will discuss solutions to that problem, the way the problem was explained is immaterial.

B. Specifically Worded Amendments

A House Report led by then-Representative [Chuck Schumer](#) concluded that "applications which attempt to limit the Convention to consideration of amendments 'substantially similar' to the ones contained in the application... can only be counted with other applications proposing 'substantially similar' amendments." (1985). The [Congressional Research Service](#) cited this argument favorably, noting that if the text were limited to just the exact wording, it would be invalid as it would deprive the Convention from any ability to deliberate. Legislation should never be interpreted to be invalid if there is a reasonable reading of it that makes it valid. For this reason, when an application is silent or ambiguous on whether amendment text included is intended as an articulation of one way to address the problem or a limitation expressing the only allowable solution, a court should interpret it to be a mere articulation of the issue. However, even if a court goes the other way, there are still enough calls without the ambiguous ones.

C. Date of Resolutions

Any debate about the age of the Convention calls in question died with the 27th Amendment. Before then, scholars debated about whether or not ratification of amendments as well as calls for a convention, both under Article V, needed to be contemporaneous. But the 27th Amendment was first proposed as part of the Bill of Rights in 1789 and a handful of States ratified it at the time. The bulk of ratifications occurred as part of a concerted political effort with 33 ratifications within 9 years. Another ratification was 14 years old. Still another was over 100 years old. And finally, there were 6 ratifications over 200 years old. Four of the ratifications that were over 100 years old were needed to reach 38.

This set of applications include 31 within 10 years of the peak of 1983 as part of a concerted and coordinated political effort. This complemented one application that was about 20 years old at the time, another that was about 70 years old, 6 more over 100 years old, and finally one that was close to 200 years old. Of the 8 older plenary applications, at least 2 are needed with up to 5 being used if the court were to ignore the more complex arguments around specifically worded amendment language in resolutions. This is a very similar profile to the 27th Amendment ratification.

IV. 40 Applications by 1983 (and 39 by 1979)

In sum, by the early 1980s, 32 States had submitted applications for a limited Convention related to a balanced budget amendment or differently worded but substantively similar call to address the problem of fiscal responsibility. Those include: (1) Alabama HJR 227 (1976); (2) Alaska HJR 17 am S (1982); (3) Arizona SJR 1002 (1979); (4) Arkansas HJR 1 (1979); (5) Colorado SJM 1 (1978); (6) Delaware HCR 36 (1975); (7) Florida SM 234 (1976); (8) Georgia HR 469-1267 (1976); (9) Idaho HCR 7 (1979); (10) Indiana SJR 8 (1979); (11) Iowa SJR 1 (1979); (12) Kansas SCR 1661 (1978); (13) Louisiana SCR 4 (1979); (14) Maryland SJR 4 (1975); (15) Mississippi HCR 51 (1975); (16) Missouri SCR 3 (1983); (17) Nebraska LR 106 (1976); (18) Nevada SJR 8 (1979); (19) New Hampshire HCR 8 (1979); (20) New Mexico SJR 1 (1979); (21) North Carolina SJR 1 (1979); (22) North Dakota SCR 4018 (1979); (23) Oklahoma HJR 1049 (1976); (24) Oregon SJM 2 (1977); (25) Pennsylvania HR 236 (1976); (26) South Carolina S 1024 (1978); (27) South Dakota SJR 1 (1979); (28) Tennessee HJR 22 (1977); (29) Texas HCR 31 (1977); (30) Utah HJR 12 (1979); (31) Virginia SJR 36 (1977); (32) Wyoming HJR 7 (1961).

Eight additional States had submitted applications for a plenary Convention, open to proposing amendments on any subject, including restricting federal deficit spending. Those include: (33) Illinois (1861); (34) Kentucky R.1 (1861); (35) Montana (1911); (36) New Jersey (1861); (37) New York (1789); (38) Ohio (1861); (39) Washington HB 90 (1901); (40) Wisconsin JR 65 S (1929). Of these 40 applications, only Alaska (1982) and Missouri (1983) passed after 1979. However, Missouri SJ & CR (1907) was plenary, which makes the count as of 1979 as high as 39 states.

A. Fiscal Responsibility Calls without Amendment Text

Seventeen States articulate the problem of fiscal responsibility with a phrase nearly identical to “the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.” These include: (1) Alabama HJR 227 (1976); (2) Alaska HJR 17 am S (1982); (3) Arizona SJR 1002 (1979); (4) Arkansas HJR 1 (1979); (5) Idaho HCR 7 (1979); (6) Indiana SJR 8 (1979); (7) Kansas SCR 1661 (1978); (8) Nebraska LR 106 (1976); (9) Nevada SJR 8 (1980); (10) New Mexico SJR 1 (1976); (11) Oklahoma HJR 1049 (1976); (12) Pennsylvania HR 236 (1976); (13) South Dakota SJR 1 (1979); (14) Texas HCR 31 (1977); (15) Utah HJR 12 (1979); (16) Virginia SJR 36 (1976); and Wyoming HJR 7 (1961). However, there are some slight variations, the biggest being Wyoming referring to “receipts” rather than “revenue.”

Eight States articulate the problem of fiscal responsibility with a phrase nearly identical to “require a balanced federal budget and to make certain exceptions with respect thereto.” These include (1) Florida SM 234 (1976); (2) Georgia HR 469-1267 (1976); (3) Iowa SJR 1 (1979); (4) Louisiana SCR 4 (1979); (5) Missouri SCR 3 (1983); (6) New Hampshire HCR 8 (1979); (7) North Carolina SJR 1 (1979); and (8) Oregon SJM 2 (1977). However, there are slight variations among this language, most notably North Carolina which replaces “and to make certain exceptions with respect thereto” with “in the absence of a national emergency.”

Colorado SJM 1 (1978) states the same problem as “prohibiting deficit spending except under conditions specified.” All of these statements get at the same fundamental problem of fiscal responsibility.

B. Fiscal Responsibility Calls with Amendment Text

Of the 6 states with specifically worded amendments included in their resolutions, 3 are very similar to each other. These are (1) Maryland SJR 4 (1975); (2) South Carolina S 1024 (1978); and (3)

Tennessee HJR 22 (1977). Like the large set of 17 calls that did not contain specific text, these three all include a sentence nearly identical to “The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year” followed by some method of making an exception, such as for national emergencies. Maryland, South Carolina, and Tennessee all also say that the amendment should read “substantially” as their example shows, not “exactly” showing that the specific text is not intended to be a strict restriction, but counted together with other applications that articulate the same problem, as confirmed by a Congressional Report and the Congressional Research Service.

The other three states with specifically worded amendment text are not necessary to reach the threshold of 34. However, the best count would still include them. North Dakota’s preamble reads: “That we respectfully propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such purpose as provided by Article V of the Constitution, the proposed Article providing as follows:” This can be read as a statement that North Dakota intends their specific text to be used, however most (though not all) scholars believe a convention is invalid if it has no power to deliberate at all. Hence, an alternate reasonable reading of the intent should be favored where it exists. Here, it is reasonable to conclude that North Dakota, knowing that it cannot propose an amendment in the formal Constitutional sense, is using the term in its ordinary meaning, “to put forward for consideration or discussion by others.” The explicit text is merely the text of their proposal, not a requirement that the formal proposal made by the Convention be worded the same way. In terms of a statement of the problem, the title of this resolution is “A concurrent resolution of the North Dakota Legislature calling for an amendment to the U.S. Constitution proposing to the several states the requirements of a balanced U.S. cash budget for each session of Congress except in time of war or national emergency.” And the text of the proposal includes that “Expenditures for each two-year period shall not exceed the estimated revenue except in time of war or a national emergency declared by the Congress.” These phrases are similar to those used by other States.

Mississippi HCR 51 (1975) contains several statements that indicate it may be intended to insist upon its specific text, but there is also a fair reading that says otherwise and any reading that makes the resolution passed by the legislature a nullity should be disfavored. On the one hand, they introduce their specific text with the phrase “make application to the Congress of the United States to call a convention of the several states for the proposing of the following amendment to the Constitution of the United States:” Further, their call only automatically rescinds if Congress proposes an amendment “identical with that contained in this resolution.” However, there is also some indication that Mississippi was aware that they can only control their own delegates and that the final wording would be determined by all 50 States working together at a Convention. They specified that their application would continue “until at least two-thirds (2/3) of the legislatures of the several states have made similar applications” not “identical” applications. Mississippi stated the problem of fiscal responsibility in several ways in their preamble and in the amendment text, including that Congress should “spend only the revenues that are estimated will be collected in a given fiscal year, except for certain specified emergencies.”

Delaware HCR 36 (1975) includes very simple amendment language whose entirety is also a statement of the problem: “The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared war.” Delaware then includes a long explanation of their intent that can be dense and easy to parse incorrectly. Delaware says that it believes that if 2/3 of the states propose identically worded amendments, then the Convention

would be restricted to text only. This is a minority view among scholars, most of whom believe that states have the power to set the agenda of a convention, but not to remove all deliberative process. However, Delaware does not say that they intend their application to only be counted in the event that 2/3 of the states propose the same text, only that they believe that if it happened to be true that 2/3 of the states did that, it would bind the convention to that text. As it happens, no other state included the same text as Delaware and so their resolution does not say the convention should be bound to the text they provided. It is therefore a fair reading that they intended their resolution to count with others for a similar purpose. It should be noted that North Dakota, Mississippi and Delaware are not necessary to reach 34, but there is a good argument for counting each of them.

C. Plenary Convention Calls

Only two to five plenary calls are needed among the eight that exist. But all have a good argument that it was intended by their legislatures that they be included in an application for fiscal responsibility. Only a handful of states have passed convention calls that do not even mention any particular hopes for what the Convention would achieve. Of these, three are part of this count, Ohio (1861); Washington HB 90 (1901) and Wisconsin JR 65 S (1929). The Ohio call was likely motivated by the need to prevent the civil war. The Washington call was likely motivated by the need for direct election of Senators. And the Wisconsin call was likely motivated by a desire to repeal prohibition. However, all three are entirely open on their faces.

In 1789 New York issued the second ever call for a convention for proposing amendments. It passed on the unanimous recommendation of the Convention that ratified the US Constitution in Poughkeepsie, NY in 1788. The [recommendation letter was written by John Jay](#), first Chief Justice of the US Supreme Court with help from Alexander Hamilton. The resolution states that the Convention would have “full power to take into their consideration the defects of this Constitution that have been suggested by the State Conventions... ” This can be read as plenary or it can be read as broad, but not unlimited. However, all 9 states that proposed amendments called for any of 7 proposals related to fiscal responsibility including that 2/3 of each house of Congress would be required to borrow money. The New York resolution (together with a similar one from Virginia) was a major factor leading to the passage of the Bill of Rights. However, while the Bill of Rights addressed many of the [demands of the States](#), it did not address fiscal responsibility at all, leaving the need specified in the resolution unaddressed and still in effect.

An additional three states have applications that were motivated by a particular need, but clearly and unambiguously expressed that their intent is to be counted together with calls from other states that address other needs. These include: Illinois (1861); Kentucky R.1 (1861); and Montana SJR 1 (1911). The three from 1861 were all motivated by the need to prevent the civil war. The 1911 call was motivated by the need for direct election of Senators. Illinois specified that it did not desire any change itself, but because other States do see such a need, Illinois “does hereby concur in making such application.”

Kentucky, similarly, said their call was motivated by the fact that “some of the States feel themselves deeply aggrieved.” Kentucky further made itself clear by saying the “Legislature of the Commonwealth of Kentucky suggest[s] for the consideration of that convention, as a basis for settling existing difficulties, the adoption, by way of amendments to the Constitution, the resolutions offered in the Senate of the United States by the Hon. John J. Crittenden.” This is a clear statement that Kentucky does not intend to restrict the scope of the Convention themselves. Further, the State does not desire any particular policy that it believes must be up for consideration.

But rather, it believes that the Crittenden Amendment would be a suggestion for resolving some difficulties.

Montana's call explicitly stated their support for Direct Election of Senators. However, like Kentucky, they also said that "at the said convention, the State of Montana, will propose, among other amendments, that Section 3 of Article I, of the Constitution of the United States should be amended, so that the Senators from each state shall be chosen by the electors thereof, as the Governor is now chosen." They clearly indicate that this issue, which is now moot, is not the only issue which Montana believes to be important for consideration and that they intend to allow their application to be counted together with those from other states regardless of the issue.

The New Jersey (1861) call is less clear on its face, but additional factors favor an interpretation of it as plenary. This call states repeatedly that it is passed because of the impending Civil War. However, the resolution appears to consider several different solutions to the problem, including not only a Convention pursuant to Article V, but also the Crittenden Amendment then under consideration in the Senate, repeal of "obnoxious laws," and an interstate commission to address the issues. There is no indication that New Jersey believed or expected the Convention to be limited only to the issue. The Convention call does not say it should be so restricted. There is no language in the text indicating the intent one way or the other and so, to aid in interpretation, a court may turn to the New Jersey State Legislature in 2021 who, when rescinding this Convention call, passed a resolution that said "that past petitions could become part of the basis for calling a convention which addresses issues never contemplated by the legislators voting for such petitions."

V. Declaratory Judgment Act

The Declaratory Judgment Act allows federal courts to clarify the legal rights and obligations of parties without requiring additional relief, which is crucial for resolving disputes over Congress's constitutional duty to call a convention for proposing amendments under Article V. In [Powell v. McCormack](#), the court declared that Adam Clayton Powell had the right to be seated in Congress after being elected. The Court was able to interpret the text of the Constitution on its own without regard to any interpretation Congress stated for their obligations and ruled that Congress had failed to fulfill its ministerial duty to seat a duly elected representative. The simple textual analysis was not subject to the political question doctrine. The speech and debate clause did not bar adjudication of the actions of the legislature. The court did not rule on whether or not it could directly order Congress to act and seat Powell, as the question was moot. It did, however, declare the right of Powell to his seat dating back to his first election and ordered the Clerk to act as if Congress had done its duty and pay his salary accordingly.

Similarly, here, the court can declare the right of the States to meet in Convention because Congress has failed to perform its ministerial duty based on a plain and straightforward originalist interpretation of Article V. It can order that the States have the right to meet in Convention as if Congress had done its duty, whether or not the Court has the power to directly order Congress to comply with its Constitutional duty.

A. Political Question Doctrine

The political question doctrine does not prevent courts from deciding whether Congress must call a convention under Article V of the Constitution. This doctrine applies only to issues that the Constitution commits to another branch of government or those that lack judicially manageable standards. However, determining whether Congress has a constitutional duty to call a convention once two-thirds of the states have applied is a matter of interpreting clear constitutional text, not

making a political decision. Courts routinely interpret the Constitution to ensure that government bodies perform their required duties. Here, the judiciary's role is to enforce an express, enumerated, ministerial, and mandatory requirement outlined in the Constitution, making this a legal question appropriate for judicial review, not a political question one.

B. Sovereign Immunity

The doctrine of sovereign immunity typically protects the federal government from being sued without its consent. However, this protection does not apply in cases where the structure of the Constitution itself implies a waiver of immunity. Article V of the Constitution provides states with a specific, enforceable right to call for a convention to propose amendments when two-thirds of state legislatures have applied. This state-controlled process was designed to bypass potential congressional obstruction, ensuring that states can propose amendments even when Congress is unwilling. If Congress can ignore its duty to call a convention without any judicial recourse for the states, the alternative amendment process provided by Article V becomes meaningless. Thus, by the very structure of the Constitution and the intentions of the Founders, the federal government has implicitly waived sovereign immunity against suits by the states under Article V, allowing states to enforce their rights in court.

C. Speech and Debate Clause

The Speech and Debate Clause of the Constitution protects members of Congress from being sued for their legislative activities, ensuring they can perform their duties without interference from the courts. However, this protection is not absolute and does not extend to actions that fall outside the scope of legitimate legislative activities, nor does it apply to the institution of Congress itself. In the context of a lawsuit to compel Congress to call a convention under Article V, the duty to call the convention is a specific, mandatory constitutional obligation rather than a discretionary legislative act. The Speech and Debate Clause would not shield Congress from judicial review in this case because the obligation to call a convention, once the requisite number of state applications is reached, is not a matter of legislative debate or policymaking but a ministerial duty required by the Constitution.

VI. Conclusion

There have been attempts by individual voters to bring this kind of lawsuit before. Everyone is harmed by the failure of Congress to call for the Convention for which the States applied to restore fiscal sanity and sustainability. Unfortunately, the Judicial System does not allow a lawsuit based on that kind of general harm. When voters have attempted such a lawsuit, the cases were dismissed for lack of standing. We all rely on our elected officials to stand up and fight for the rights of all Americans. Congress can pass an amendment themselves. They can also do their duty under the Constitution. But they will not. Therefore, we must rely on our State Attorneys General and State Legislators to protect the rights of all Americans.