

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: SCR 7066
INTRODUCER: Fiscal Policy Committee
SUBJECT: Equal Application of the Law
DATE: February 20, 2024 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Nobles</u>	<u>Yeatman</u>	<u>RC</u>	FP Submitted as Comm. Bill/Fav.
	<u>Nobles</u>	<u>Twogood</u>		Favorable

I. Summary:

Congress has exempted itself from certain laws that are applicable to the other branches of government or the citizenry at large, such as the Federal Freedom of Information Act and certain provisions of the Whistleblower Act of 1989. In 1995, Congress passed the Congressional Accountability Act to apply certain laws to Congress to which they had previously exempted themselves. However, there remain federal laws from which Congress has exempted the federal legislative branch, either through not applying the laws to itself or not fully complying with their requirements.

Article V of the United States Constitution provides the specific process for amending the document. Congress may directly propose amendments to the Constitution, which is the method that has been used for each of the 27 amendments ratified since the Constitution went into effect. Alternatively, upon application by the legislatures of two-thirds of the states, Congress must call a convention for the purpose of proposing amendments. A proposed amendment goes into effect once ratified by the legislatures or state conventions of three-fourths of the states; the method of ratification being solely the choice of Congress.

The concurrent resolution constitutes the state's application to Congress under Article V of the U.S. Constitution to call a convention for the sole purpose of considering and proposing a constitutional amendment prohibiting Congress from making any law applying to the citizens of the U.S. that does not also equally apply to all U.S. Representatives and U.S. Senators, and all members of the federal legislative branch.

This concurrent resolution does not have a fiscal impact on the state or local governments.

II. Present Situation:

Amending the United States Constitution

Article V of the U.S. Constitution¹ provides the exclusive process for amending the document.² Congress may directly propose amendments to the Constitution, the method used for each of the 27 amendments ratified since the Constitution went into effect. Alternatively, upon application by the legislatures of two-thirds of the states,³ Congress must call a convention for the purpose of proposing amendments. A proposed amendment goes into effect once ratified by the legislatures or state conventions of three-fourths of the states;⁴ the method of ratification being solely the choice of Congress.

State Applications for an Article V Constitutional Convention

Article V requires application to be made by a state's legislature, meaning the representative body authorized to make laws and not referring generally to a state's legislative process.⁵ The specific text does not refer to the authority of the President or a Governor to approve or veto legislation⁶ and the Governor's approval is not required.

Under Article V, Congress has the exclusive authority to review state applications and determine whether they count toward the two-thirds requirement. While Congress has not specified the form, structure, or content of a valid state application,⁷ the accumulation of pending applications from the various states shows Congress groups applications according to the issues expressly stated by the petitioning state rather than simply counting the total number of applications. For example, the current 27 applications seeking a convention on a balanced federal budget amendment are not combined with the four applications requesting a convention for an amendment barring discrimination in public schools to satisfy the necessary two-thirds requirement and call a convention.⁸

¹ "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall be in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Art. V, U.S. CONST.

² "The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method in which the Constitution has fixed." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 127 (1996); Arthur Earl Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 Notre Dame L. Rev. 659 (1964).

³ Currently, 34 states.

⁴ Currently, 38 states.

⁵ *Hawke*, *supra* note 2 at 227.

⁶ Sen. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 888-889 (1968); See also art. I, s. 7, cl. 2, U.S. CONST.; art. III, s. 8(a), FLA. CONST.

⁷ Legislation previously was proposed but never enacted. See Kenneth F. Ripple, *Article V and the Proposed Federal Constitutional Convention Procedures Bills*, 3 Cardozo L. Rev. 529, 530-533 (1981-1982); Ervin, *supra* note 6 at 885. See also Mary M. Penrose, *Conventional Wisdom: Acknowledging Uncertainty in the Unknown*, 78 Tenn. L. Rev. 789, 796 (2011), citing separate prior legislation filed by Senator Sam Ervin and Senator Jesse Helms.

⁸ See Selected Memorials, Office of the Clerk of the United States House of Representatives, available at <https://clerk.house.gov/SelectedMemorial> (last visited Jan. 30, 2024).

Article V requires neither a state application nor the congressional call for a convention to include the specific text of a proposed amendment. Article V authorizes applications to Congress to call a convention “for proposing [a]mendments,” apparently requiring the convention to study, debate, and compose the terms of a proposed amendment within the scope of issues authorized in the call.⁹ As Article V does not restrict the scope of a state’s application, states may request a general convention for any purpose or a convention limited only to certain issues.¹⁰

There is no court decision on whether a time limit applies to state applications. However, the U.S. Supreme Court determined Congress has sole authority to set a time limit for states to ratify proposed amendments.¹¹ Federalist Papers 43 and 85¹² imply that applications for a convention should be reasonably contemporaneous, addressing a particular problem or issue recognized by at least two-thirds of the states as requiring consideration of constitutional amendment.

Calling an Article V Convention on Application by the States

Article V states that “Congress...on the Application of the Legislatures of two thirds of the several states, shall call a Convention...” (emphasis supplied). As the U.S. Supreme Court has interpreted the text as “plain” and its interpretation “admits of no doubt,”¹³ the general consensus appears to be that once two-thirds of the states apply for a convention on a common topic, Congress has no discretion and must call for the requested convention.¹⁴

Article V is silent on such matters as the selection of delegates by the states, voting requirements at the convention, and the procedural rules of the convention. Under the Supremacy Clause,¹⁵ because Congress would be exercising its national power provided in Article V, congressional action on these issues would be controlling, particularly on national matters such as the date, time, place, and financing of the convention. Congress also could determine the number of votes allocated to each state and establish uniform requirements for the selection, guidance, removal, and replacement of state delegates. Absent congressional action, each state may be able to decide such matters for itself.

Florida Control of Delegates to an Article V Constitutional Convention

The Article V Constitutional Convention Act¹⁶ provides guidelines for Florida to qualify, appoint, remove, and recall delegates to an Article V constitutional convention. These statutes

⁹ Michael A. Almond, *Amendment by Convention: Our Next Constitutional Crisis*, 53 N.C. L. Rev. 491, 513 (1975); Robert M. Rhodes, *A Limited Federal Constitutional Convention*, 26 Fla. L. Rev. 1 (1973).

¹⁰ William W. Van Alstyne, *A Response to Justice Thomas Brennan’s Remarks at the Thomas M. Cooley Law School Article V Symposium*, 28:1 *Thomas M. Cooley L. Rev.* 51, 54 (2011); Ripple, *supra* note 7 at 548; William W. Van Alstyne, *The Limited Constitutional Convention – The Recurring Answer*, 1979 *Duke Law Journal* 985; Rhodes, *supra* note 9 at 18.

¹¹ *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *Dillon v. Gloss*, 256 U.S. 368, 375-376 (1921).

¹² See James Madison, *The Federalist No. 43* (January 23, 1788); Alexander Hamilton, *The Federalist No. 85* (May 28, 1788).

¹³ *Hawke*, *supra* note 2 at 227.

¹⁴ Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 *Constitutional Commentary* 53, 80 (2012); Gerald Gunther, *Constitutional Brinkmanship: Stumbling toward a Convention*, 65 *A.B.A. J.* 1046, 1048 (1979); Almond, *supra* at 498; Ervin, *supra* note 6 at 885; Bonfield, *supra* note 2 at 675. See also Alexander Hamilton, *The Federalist No. 85* (May 28, 1788).

¹⁵ Art. VI, cl. 2, U.S. CONST.

¹⁶ Ss. 11.93-11.9352, F.S.

would control absent express directions by Congress on the same issues, whether in the convention call itself or established in separate federal legislation.¹⁷

Due Process in the U.S. Constitution

The statement that no person is to be deprived of life, liberty, or property without due process of law is contained in substantially similar form in both the Fifth and Fourteenth Amendments to the U.S. Constitution.¹⁸ The 5th Amendment, which includes the primary Due Process Clause, applies to the federal government; upon the passage of the 14th Amendment, the states must also comply with the requirements of due process.¹⁹ Both amendments work together to ensure that no governmental entity acts arbitrarily in creating or enforcing laws, and to ensure that every person is entitled to fair procedures.²⁰ There are two categories of due process (substantive and procedural), but both protect citizens from unfair or undue governmental deprivation.

Equal Protection in the U.S. Constitution

The Fourteenth Amendment to the U.S. Constitution was passed by Congress in 1866 and ratified in 1868.²¹ Section 1 of the Fourteenth Amendment states, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While the Fourteenth Amendment applied explicitly to the states, the U.S. Supreme Court has interpreted the Fifth Amendment's Due Process Clause, which binds the Federal government, as also guaranteeing a right to equal protection of the laws.²² Taken together, the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the federal and state governments from enforcing laws that are discriminately applied to individuals or groups of citizens.²³ This is the notion of equal protection, which, in other words, ensures that laws apply equally to all citizens and that the government does "not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective."²⁴

¹⁷ See art. VI, cl. 2, U.S. CONST., the "Supremacy Clause."

¹⁸ "...nor shall any person...be deprived of life, liberty, or property, without due process of law..." Amend. V, U.S. CONST.; "...nor shall any State deprive any person of life, liberty, or property, without due process of law..." Amend. XIV, s. 1, U.S. CONST.

¹⁹ Bill of Rights, including Fifth Amendment, was incorporated and made applicable to the states through the Fourteenth Amendment's Due Process Clause. Legal Information Institute, *Due process*, Cornell Law School (last updated Oct. 2022), https://www.law.cornell.edu/wex/due_process (last visited Jan. 31, 2024); see also Legal Information Institute, *Incorporation doctrine*, Cornell Law School (last updated Oct. 2022), <https://www.law.cornell.edu/wex/incorporationDoctrine> (last visited Jan. 31, 2024).

²⁰ Legal Information Institute, *Due process*, Cornell Law School (last updated Oct. 2022), https://www.law.cornell.edu/wex/due_process (last visited Jan. 31, 2024).

²¹ National Archives, 14th Amendment to the U.S. Constitution: Civil Rights (1868), available at <https://www.archives.gov/milestone-documents/14thamendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws> (last visited Feb. 2, 2024).

²² See *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995).

²³ Legal Information Institute, *Equal protection*, Cornell Law School (last updated Nov. 2022), https://www.law.cornell.edu/wex/equal_protection (last visited Jan. 31, 2024).

²⁴ *Id.*

Congressional Accountability Act of 1995

In response to concerns, complaints, and a conception that Congress was unduly and unfairly exempting itself from complying with multiple laws, Congress passed the Congressional Accountability Act (CAA) in 1995.²⁵ Prior to the CAA's enactment, the federal legislative branch was exempted from several of Congress' laws specifically regarding workplace discrimination and civil rights.²⁶ The CAA in turn required Congress to comply with these labor laws that already applied to private and other governmental entities; it also established what is now the Office of Congressional Workplace Rights, which checks for compliance with and otherwise enforces the CAA within the federal legislative branch.²⁷

For example, prior to the CAA's enactment, the legislative branch was not covered by the Occupational Safety and Health Act (OSH Act) of 1970, despite reported hazardous conditions within Congress' facilities.²⁸ The OSH Act and 13 other federal laws were made applicable to Congress with the CAA.²⁹

Current Congressional Exemptions

Despite the CAA's passage in 1995, there are still laws from which Congress has exempted itself or with which Congress does not fully comply; below are some examples.

Freedom of Information Act of 1967 (FOIA)

The definitions section of FOIA explicitly excludes Congress from the meaning of "agency" as it relates to federal governmental entities who are bound by the disclosure law.³⁰ There are uncertainties about some forms of communications between applicable agencies and Congress. For example, if "Congress manifested a clear intent to control the document," items sent from Congress to agencies could be exempt from FOIA.³¹

Civil Rights Act of 1964 (CRA)

Title II of the CRA prohibits discriminatory or segregationist access to places of public accommodation, and Title III specifies that such prohibition applies to state and local governments.³² Given that much of the federal legislative branch's facilities include public

²⁵ Jay M. Zitter, *Construction and Application of Congressional Accountability Act ("CAA")*, 2 U.S.C.A. §§ 1301 to 1438, 59 A.L.R. Fed. 2d 493 (2011).

²⁶ *Id.*

²⁷ *The Congressional Accountability Act*, Office of Congressional Workplace Rights, <https://www.ocwr.gov/the-congressional-accountability-act/#:~:text=The%20CAA%20requires%20Congress%20to,%2C%20on%20January%202023%2C%201996>. (last visited Feb. 1, 2024).

²⁸ James W. Stanley, *Statement on how OSHA would apply to the legislative branch*, OSHA Archive (July 14, 1994), <https://www.osha.gov/news/testimonies/07141994> (last visited Feb. 2, 2024).

²⁹ *Legislative Branch Whistleblowing Fact Sheet*, Office of the Whistleblower Ombud, https://whistleblower.house.gov/sites/evo-subsites/whistleblower.house.gov/files/Legislative_Branch_Whistleblower_Fact_Sheet.pdf (last visited Feb. 1, 2024).

³⁰ 5 U.S.C. § 551.

³¹ Benjamin M. Barczewski & Meghan M. Stuessy, *Congress and the Freedom of Information Act (FOIA)*, Congressional Research Service (Jan. 9, 2023), <https://sgp.fas.org/crs/secrecy/IF12301.pdf> (last visited Feb. 1, 2024), citing *ACLU v. CIA*, 823 F.3d 655, 662-63 (D.C. Cir. 2016).

³² Erika Lovley, *Congress exempt from Civil Rights Act*, Politico (July 17, 2010), <https://www.politico.com/story/2010/07/congress-exempt-from-civil-rights-act-039831> (last visited Feb. 2, 2024); Civil Rights Act of 1964.

accommodations, the Office of Congressional Workplace Rights (OCWR) and others have opined that Congress should also be required to comply with these two titles of the CRA.³³

Americans with Disabilities Act of 1990 (ADA)

Although Congress is currently not exempt from the ADA,³⁴ Congress has not always complied with the law and still does not have full accessibility for members of the public and of the legislative body and staff.³⁵

Whistleblower Protection Act of 1989

Outside of the CAA, there are some protections not guaranteed to federal legislative branch employees for reporting misconduct, such as whistleblower protections.³⁶ Compared to the U.S. Department of Labor's ability to look into reports and bring suit against an employer, the legislative OCWR has no such authority on behalf of reporting employees and these employees must take care of any lawsuits themselves.³⁷

III. Effect of Proposed Changes:

The concurrent resolution is the state's application to Congress under Article V of the U.S. Constitution to call a convention for the sole purpose of considering and proposing a constitutional amendment to prohibit Congress from making any law applying to the citizens of the U.S. that does not also equally apply to all U.S. Representatives and U.S. Senators, and all members of the federal legislative branch.

The concurrent resolution states it is a continuing application until the required two-thirds of the states' legislatures have made similar applications on the same subject, and proposes that other state legislatures similarly apply to Congress to call for a convention regarding such an amendment. The concurrent resolution also provides that the application is revoked and withdrawn, nullified, and superseded as if never passed, retroactive to the date of passage, if the application is used to support calling a convention on any other subject.

The concurrent resolution requires copies of the application to be dispatched to the U.S. President, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives,

³³ *Id.*

³⁴ *Guide to Disability Rights Laws*, U.S. Department of Justice ADA.gov (last updated Feb. 28, 2020), [https://www.ada.gov/resources/disability-rights-guide/#:~:text=about%20this%20topic,-,Americans%20with%20Disabilities%20Act%20\(ADA\),to%20the%20United%20States%20Congress](https://www.ada.gov/resources/disability-rights-guide/#:~:text=about%20this%20topic,-,Americans%20with%20Disabilities%20Act%20(ADA),to%20the%20United%20States%20Congress). (last visited Feb. 1, 2024).

³⁵ Katherine Tully-McManus, *Congress still playing catch-up on accessibility, despite progress, 30 years after ADA*, Roll Call (July 29, 2020), <https://rollcall.com/2020/07/29/congress-still-playing-catch-up-on-accessibility-despite-progress-30-years-after-ada/> (last visited Feb. 1, 2024).

³⁶ *Legislative Branch Whistleblowing Fact Sheet*, Office of the Whistleblower Ombud, https://whistleblower.house.gov/sites/evo-subsites/whistleblower.house.gov/files/Legislative_Branch_Whistleblower_Fact_Sheet.pdf (last visited Feb. 1, 2024); *see also* Office of Compliance, Recommendations for Improvements to the Congressional Accountability Act, https://www.ocwr.gov/wp-content/uploads/2011/01/report_section_102_b_112_congress.pdf (last visited Feb. 2, 2024).

³⁷ Theodor Meyer, *Do As We Say, Congress Says, Then Does What It Wants*, ProPublica (Jan. 31, 2013), <https://www.propublica.org/article/do-as-we-say-congress-says-then-does-what-it-wants> (last visited Feb. 1, 2024); *Legislative Branch Whistleblowing Fact Sheet*, Office of the Whistleblower Ombud, https://whistleblower.house.gov/sites/evo-subsites/whistleblower-evo.house.gov/files/Whistleblower_Protection_Act_Fact_Sheet.pdf (last visited Feb. 1, 2024).

each member of the Florida delegation to the U.S. Congress, and the presiding officer of each house of the legislature of each state.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

If an Article V amendments convention is called, the state might be responsible for the costs of sending delegates to the convention. Whether Congress or the state would be responsible for related expenses for the convention is not a settled issue at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Senate Rules require that concurrent resolutions be read by title on two separate days before a voice vote is taken on adoption unless the matter is decided otherwise by a two-thirds vote of those Senators present.³⁸

VIII. Statutes Affected:

None.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³⁸ Florida Senate Rule 4.13 (adopted Nov. 22, 2022).