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COMPACT FOR AMERICA

"Article V 2.0" in a Nutshell: The Balanced Budget Compact

By Nick Dranias

Introduction

The U.S. gross federal debt is approaching $20 trillion.[1] That figure is:

- more than twice what was owed ($8.6 trillion) in 2006, when the then-junior U.S. senator from Illinois, Barack Obama, opposed lifting the federal debt limit;[2]
- nearly as big a percentage of the American economy (103+ percent of Gross Domestic Product) as during the height of World War II;[3] and
- nearly $160,000 per taxpayer.[4]

And that is just the tip of the iceberg, with unfunded federal liabilities estimated at $205 trillion.[5]

The burden is daunting. But what if states could advance and ratify a powerful federal balanced budget amendment in as few as 12 months?

That could happen now that the "Compact for a Balanced Budget" exists between Alaska, Georgia, Mississippi and North Dakota. The Compact establishes a binding commitment to fix the national debt, spanning the nation from the Atlantic to the Pacific. That commitment means business: the Compact advances a uniquely powerful, yet plausible federal Balanced Budget Amendment.

The Amendment in Brief

The Compact's proposed amendment constitutionally advances a powerful Balanced Budget Amendment that would impose three critical reforms.

First, the Amendment would enforce a glide path to balanced budgets. It would limit Washington's borrowing capacity to a specific amount and otherwise restrict spending to unencumbered cash revenue at all times. By freezing the national debt, it would force Congress to live within its means.

Second, the Amendment would encourage spending reductions before tax increases to close deficits, while still keeping responsible revenue options on the table. It would do so by requiring supermajority approval for new or increased income or sales taxes, while retaining the current simple majority rule for revenue increases that are politically difficult and less harmful to our economy; such as eliminating tax loopholes.

Third, the Amendment would furnish three "release valves" that would allow emergency borrowing without easy evasion. Specifically, Washington could pay down the national debt and free up borrowing capacity under the limit. A novel idea! The President could also delay less urgent spending when a "red zone" of borrowing capacity is reached (subject to simple majority override by Congress to prevent abuse). And if all else failed, Congress could ask a majority of state legislatures to approve an increase in its borrowing capacity. These release valves would provide Washington with all the flexibility needed to deal with the uncertainties

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of the real world—but without the absurdity of giving a bankrupt debtor the power to borrow whatever it wants.

These reforms would focus the mind in Washington on priorities. They would force political players to show their cards. And once spending reductions were exhausted, they would encourage long overdue pro-growth tax reforms to close deficits. At long last, the days of kicking the fiscal can to our kids would be over.

Democrats and Republicans alike should recognize that if we want to preserve the federal spending that is truly necessary, the first thing we need to do is start treating debt as a limited resource. Imposing scarcity on debt conforms fiscal policy to the reality of limited resources. This is necessary to ensure that meaningful fiscal planning and prioritization take place. Only with planning and prioritization will the the necessary borrowing capacity exist when the states and the people actually need it. If unsustainable borrowing crashes the system, there will be no more borrowing to fund desired programs.

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The Next-Generation Article V Movement

The Compact for a Balanced Budget uses an interstate agreement to simplify the state-originated Article V convention process. Ordinarily, without an interstate compact, the Article V convention process would require at least 100 legislative enactments, six independent legislative stages, and five or more years of legislative sessions to generate a constitutional amendment.

In particular, the non-compact Article V approach first requires two-thirds of the state legislatures to pass resolutions applying for a convention (34 enactments). Second, a majority of states must pass laws appointing and instructing delegates (26 enactments). Third, Congress must pass a resolution calling the convention. Fourth, the convention must meet and propose an amendment. Fifth, Congress must pass another resolution to select the mode of ratification (either by state legislature or in-state convention). And sixth, three-fourths of the states must pass legislative resolutions or successfully convene in-state conventions that ratify the amendment (at least 38 enactments).

By contrast, the compact approach to Article V consolidates everything states do in the Article V convention process into a single agreement among the states that is enacted once by three-fourths of the states. Everything Congress does is consolidated in a single concurrent resolution passed just once with simple majorities and no presidential presentment.

The Compact includes everything in the Article V amendment process from the application to the ultimate legislative ratification. The counterpart congressional resolution includes both the call for the convention and the selection of legislative ratification for the contemplated amendment.

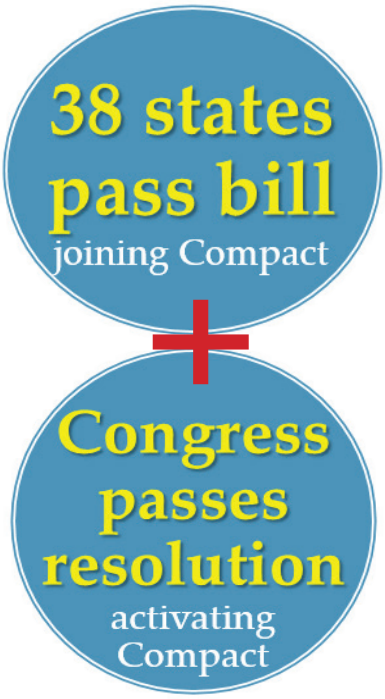
The Compact is able to pack both the front and back ends of the Article V convention process into just two overarching legislative vehicles by using conditional enactments. For example, using a conditional enactment, the "nested" Article V application contained in the Compact goes "live" only after three-fourths of the states join the compact (three-fourths, rather than two-thirds, is the threshold for activating the Article V application because the Compact is designed to start and complete the entire amendment process).

Correspondingly, using conditional enactments, the nested call in the congressional counterpart resolution goes live only after three-fourths of the states join the Compact. Likewise, the nested selection of legislative ratification in the congressional resolution becomes effective only if, in fact, the contemplated amendment is proposed by the Article V convention organized by the Compact.

By using an interstate agreement and conditional enactments to coordinate and simplify the state-originated Article V amendment process, the Compact approach to Article V reduces the number of nec-

essary legislative enactments, stages, and sessions from 100+ enactments to 39 (38 states joining the compact, one congressional resolution), from six legislative stages to three (passage of compact, convention proposal of amendment, congressional passage of resolution), and from five or more session years to as few as one (the current target is three years).

In addition, like any well-drafted contract, the Compact approach eliminates all reasonable uncertainty about the Article V Amendment process. It identifies and specifies the authority of the delegates from its member states. It specifies in advance all Article V convention ground rules, limiting the duration of the convention to 24 hours. It requires all member state delegates to vote to establish rules that limit the agenda to an up-or-down vote on a specific, pre-drafted balanced budget amendment. It disqualifies from participation any member state – and the vote of any member state or delegate – that deviates from that rule. It further bars all member states from ratifying any other amendment that might be generated by the convention.



Thus, from the vantage points of efficiency, public policy, and certainty, the Compact for a Balanced Budget is an upgrade from the non-compact approach to Article V.

Article V: Not Meant to Be Insurmountable

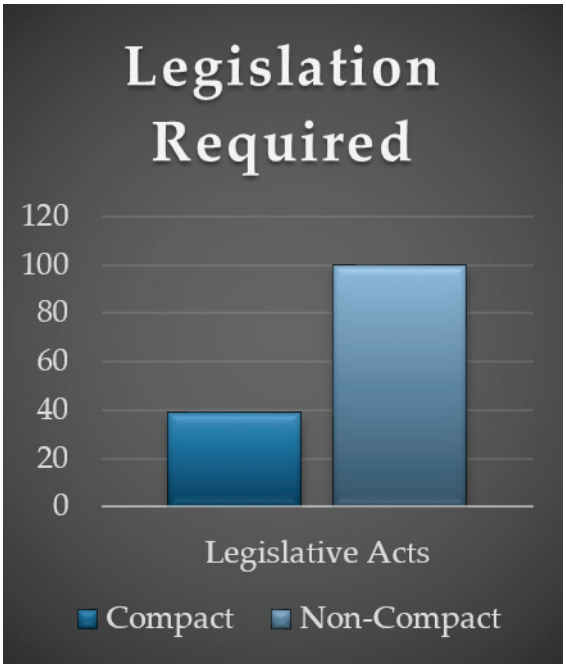
The "spirit" of Article V is not somehow violated by coordinating and consolidating the amendment process in such a way that the states applying for a convention also agree to ratify a desired amendment. To the contrary, there is strong evidence that the Founders expected the states would do just that. In rebuttal of Patrick Henry's lengthy oration at the Virginia ratification convention that it was too difficult for the states to use Article V, George Nicholas responded, "It is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments" (emphasis added).[6] Nicholas clearly anticipated that states would coordinate their use of Article V from beginning to end.

Moreover, nothing in the history or text of Article V requires states to organize a "black box" amendment-drafting convention. No Founder ever expressed the distinctly modern view that the states must first organize an Article V convention to find out what constitutional amendments it might propose. To the contrary, as discussed above, George Washington, James Madison, and Alexander Hamilton all promised the states' power to obtain desired amendments through the Article V convention process would be equal to that of Congress to propose desired amendments. These representations, if taken as true, imply the Article V convention was meant to be an instrument of the states that could be directed by the states to proposing specific amendments, not an independent agency with a mysterious constitutional reform agenda of its own. Hamilton expressly distinguished the Article V amendment process from the sort of secretive, wide-ranging legislative deliberation that characterized the Philadelphia Convention.

In Federalist No. 85, Hamilton wrote, "But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point[:] no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue." Significantly, Hamilton made the foregoing

representation with regard to "every amendment," logically including those brought forward by the states through an Article V convention, which implies that an Article V convention could be limited to an up-or-down vote on proposing a single amendment.

As illustrated by Hamilton's closing arguments in the Federalist Papers, the Founders never "sold" ratification of the Constitution on the basis that the Article V convention was a mysterious, autonomous body that no one – not even the states – controlled outside of the convention. The Founders never would have succeeded with such absurdly unpersuasive arguments against opponents of ratification, such as Patrick Henry, who railed against the usefulness of the Article V convention as a means of limiting federal power from the states.



Consent of Congress Requirements

Another common objection is that the Compact approach is defective because Article I, Section 10, of the U.S. Constitution provides that states may not enter into compacts without the "consent" of Congress. There is no question the Compact approach requires some form of congressional consent for the convention to be called and for legislative ratification to be selected, but such consent need not be express and it need not come in advance of the formation of an interstate compact.

The Supreme Court has held for nearly 200 years that congressional consent to interstate compacts can be given expressly or implicitly, either before or after the underlying agreement is reached.[7] Moreover, under equally longstanding precedent, a binding interstate compact can be constitutionally formed without congressional consent so long as the compact does not infringe on the federal government's delegated powers.[8]

Nothing in the Compact for a Balanced Budget infringes on any federally delegated power, because conditional enactments and express provisions ensure all requisite congressional action in the Article V amendment process would be secured before any compact provision predicated on such action became operative. For example, no member state or delegate appointed by the Compact can participate in the convention it seeks to organize before Congress calls the convention in accordance with the Compact. Similarly, as discussed above, the pre-ratification of the contemplated balanced budget amendment goes live only if Congress effectively selects legislative ratification. Thus no provision of the Compact in any way invokes or implicates any power textually conferred on Congress by Article V unless implied consent is first received from Congress exercising its call duty and ratification referral power in conformity with the Compact.

To claim the Compact infringes on powers delegated to the federal government, one would have to demonstrate that the federal government has the exclusive power to direct and control an Article V convention by way of setting the convention agenda and delegate instructions. But all of the available founding-era evidence shows it was the understanding of the framers and ratifiers that the states would target the Article V convention process to desired amendments, which implies state control over the convention agenda and delegates.

For example, on January 23, 1788, Federalist No. 43 was published with James Madison's attributed observation that Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." Similarly, George Washington wrote on April 25, 1788, "it should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States."[9] On June 6, 1788, as discussed above, George Nicholas reiterated the same points at the Virginia ratification convention, observing that state legislatures may apply for an Article V convention confined to a "few points."[10]

This understanding of Article V was further confirmed by the last of the Federalist Papers, Federalist No. 85, in which Alexander Hamilton concluded, "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority" by using their amendment power under Article V.

At the time of the Constitution's framing, the word "application" was a legal term of art that described a written means of petitioning a court for specific relief. The historical record of "applications" to the Continental and Confederation Congress confirms this meaning extended to legislative bodies as well, with applications being addressed to Congress by various states with very specific requests on a regular basis.[11] Given Congress's obligation to call a convention for proposing amendments in response to the requisite number of applications, any convention called in response to applications of state legislatures seeking a convention with a specific agenda is – and was – naturally understood as adopting that agenda.

An Article V convention was meant to bypass Congress and deliver the amendments desired by the states, as specified in their application.

Consistent with this understanding of the specific agenda-setting power of an Article V application, Hamilton wrote in Federalist No. 85, "If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States." The reference to alterations being "effected by nine States" was in regard to what would be put into effect by the application of two-thirds of the states for an Article V convention; nine states being two-thirds of the original 13.

That Hamilton intended to convey that the application itself would specify the desired "alteration" is evident in the immediately following sentence: "Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system." Significantly, Hamilton footnoted the number "nine," explaining: "It may rather be said TEN, for though two thirds may set on foot the measure, three fourths must ratify." The colorful phrase that "two thirds may set on foot the measure" clearly indicates the ultimately ratified amendment ("the measure") would be specified initially by the application of "two thirds" of the state legislatures. This understanding is further established later in Federalist No. 85, where Hamilton observes, "Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people." Again, in referring to both the two-thirds threshold for an Article V application and the three-fourths threshold for ratification, Hamilton clearly contemplated that the states would "unite" on the same "amendments," further illustrating his expectation that the prompting application would advance the very amendments that would be ultimately ratified.

Hamilton was not alone in his understanding of how applications would unite the states in advancing one or more particular amendments. Ten years later, during 1799, James Madison's Report on the Virginia Resolutions observed the states could organize an Article V convention for the "object" of declaring the Alien and Sedition Acts unconstitutional.[12] After highlighting that "Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose," Madison wrote the states could ask their senators not only to propose an "explanatory amendment" clarifying that the Alien and Sedition Acts were unconstitutional, but also that two-thirds of the legislatures of the states "might, by an application to Congress, have obtained a Convention for the same object."

As illustrated by Madison's Report on the Virginia Resolutions, an Article V convention was meant to bypass Congress and deliver the amendment or amendments desired by the states, as specified in their application. It is only logical to conclude the states have the authority to determine who will represent them at the convention, how they will represent them, how they will run the convention, what they will propose, and how the states will respond to those proposals. Hence there is no need for congressional consent for the Compact to be validly formed, although such consent is unavoidably necessary

before the Compact's contemplated convention call and ratification referral can be effective.

Presidential Presentment Not Necessary

Another concern occasionally expressed about the Compact is that the counterpart congressional concurrent resolution would require presidential presentment, as do ordinary bills.[13] However, the U.S. Supreme Court has ruled in Hollingsworth v. Virginia that Congress's role in the Article V amendment process does not implicate presidential presentment.[14] The contemplated concurrent resolution's exercise of Congress's Article V call duty and ratification referral power is similar in legal effect to the direct proposal of constitutional amendments. In both cases, Congress is merely channeling a legislative proposal for further action by other bodies – it is not, itself, making federal law. Therefore, its passage does not require presidential presentment.

Conclusion: The Most Secure Process

A compact-organized Article V convention is clearly the optimal means of securing a ratified balanced budget amendment. With the Compact for a Balanced Budget, you know what you are going to get from an Article V proposing convention. The text of the contemplated balanced budget amendment is known in advance. The identities of convention delegates are known in advance. The convention agenda and rules are known in advance. The convention itself would be limited to 24 hours, ensuring the fiscal impact of the convention itself is minimal.

The amendment would be ratified if proposed by the convention, because the Compact pre-commits each member state to ratifying the contemplated amendment. Congress's willingness to call the convention in accordance with the Compact would be known in advance, because the introduction of the requisite congressional resolution could be sought whenever the political stars align. (The conditional enactments utilized in the resolution would allow the resolution to lie dormant if sought early, and later activate.)

In short, the Compact for a Balanced Budget consolidates everything states do in the constitutional amendment process into a single agreement among the states that is enacted once by each state, and everything Congress does in a single resolution passed once. This greatly simplifies the cumbersome amendment process outlined in Article V of the Constitution, which would otherwise take more than a hundred legislative actions – a process that no one, not even Ronald Reagan and Milton Friedman, has ever successfully navigated to its conclusion despite decades of trying.

The Compact's amendment payload would be worth the effort. Imposing a fixed constitutional debt limit, which requires a referendum of the states on any debt limit increase, would increase transparency and be far more likely to generate a balanced budget than the status quo of limitless debt spending.

With the Compact's balanced budget amendment in place, Washington would no longer have the ability to set its own credit limit and write itself a blank check. The states would become an active board of directors charged with keeping an eye on our wayward federal CEO and staff. Debt would become scarce. Priorities would have to be set. Sustainable federal programs would have to become the norm. A broad national consensus – not midnight-hour panic – would have to support any further increases in the national debt.

It is time for Fivers to upgrade.

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Endnotes

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