

Policy Brief

January 11, 2016 - No. 3



COMPACT FOR AMERICA



Article V 2.0: The Compact for a Balanced Budget

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 junior U.S. senator from Illinois, Barack H. 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 only 12 months?

That could happen with a new approach to state-originated amendments under Article V of the United States Constitution. At the stroke of their pens on April 12 and 22, 2014, respectively, Govs. Nathan Deal⁶ and Sean Parnell⁷ formed the "Compact for a Balanced Budget" between Georgia and Alaska. Subsequently, on March 13, 2015 and April 2, 2015, respectively, Mississippi⁸ and North Dakota⁹ adopted the Compact as well. The Compact for a Balanced Budget now establishes a binding commitment to fix the national debt, spanning

the nation from the Atlantic to the Pacific,¹⁰ and that commitment means business. Congress is currently considering House Concurrent Resolution 26, which could activate the Compact upon simple majority passage.¹¹ Unlike every other effort to reform Washington using the states' Article V amendment power, the formation of the Compact for a Balanced Budget changes the political game almost immediately.

A Persistent Platform for Reform

The Compact for a Balanced Budget Commission – an interstate agency dedicated to organizing a convention for proposing a balanced budget amendment – held its first organizational meeting on January 13, 2015.¹² Previously, on June 16, 2014, Georgia Gov. Deal appointed state Rep. Paulette Braddock to the Commission.¹³ Alaska Gov. Parnell appointed former Lieutenant Governor Mead Treadwell on November 19, 2014.¹⁴

This historic Commission is now busy unifying the states and leading the charge for fiscal reform shoulder-to-shoulder with allied legislators, citizens, and public interest groups.¹⁵ It has lent instant credibility to and ignited support for the effort. And with the introduction of House Concurrent Resolution 26 on March 19, 2015, the Commission is also engaging with Congress on fulfilling its role in the amendment process. Think of the Com-

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pact for a Balanced Budget Commission as an outside-the-beltway Erskine-Bowles Commission that can do much more than ponder hypothetical fiscal reforms: It will marshal a state-based effort to propose and ratify a powerful balanced budget amendment.

The Amendment in a Nutshell

The Compact's proposed amendment constitutionally codifies a five-point plan for fixing the national debt.¹⁶

First, the amendment would ensure Washington cannot spend more than tax revenue brought in at any point in time, with the sole exception of borrowing under a fixed debt limit.¹⁷ Section 1 of the proposed amendment states, "Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article." By limiting federal spending to available cash on hand from taxes and authorized borrowing, rather than budget estimates, all known forms of fiscal gaming would be prevented.

Second, the amendment imposes a limit on the amount of federal debt.¹⁸ Section 2 of the proposed amendment states, in relevant part, "Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article." In other words, if there is \$20 trillion of outstanding debt at the time of ratification, the federal government's line of credit will be fixed initially at \$21 trillion. The additional \$1 trillion borrowing cushion would provide approximately 18 to 24 months of borrowing capacity based on current annual deficit rates (\$500 to \$650 billion per year). This cushion would give Congress a transition period during which to develop a proposal to address the national debt crisis.¹⁹

For example, this strict cash-flow-based "pay-as-you-go" spending limit will not be circumvented by inaccurate budget projections or delays in payments of amounts due ("rollovers"). Additionally, borrowing could not supply additional funds for spending beyond the constitutional limit because the definition of "debt" in Section 6 of the proposed amendment limits approved borrowing to proceeds from full faith and credit obligations.²⁰ Finally, the definition of "total receipts" in Section 6 of the proposed amendment to which "total expenditures" are limited excludes "proceeds from [the federal government's] issuance or incurrence of debt or any type of liability."²¹ This ensures expenditures cannot be increased by raiding trust funds, sale-leaseback schemes, or even direct deposits into the U.S. Treasury of freshly printed fiat money; these actions would constitute excluded "proceeds from [the federal government's] issuance or incurrence of debt or any type of liability."²²

All known forms of fiscal gaming are prevented.

Third, by compelling spending impoundments when 98 percent of the debt limit is reached, the proposed amendment would ensure Washington is forced to reduce spending long before borrowing reaches its debt limit, preventing any default on obligations.²³ Section 4 of the proposed amendment provides, in relevant part, "Whenever the outstanding debt exceeds 98 percent of the debt limit ... the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt."

Here's how it would work: Assuming the constitutional debt limit were \$21 trillion, this provision would be triggered when borrowing reached \$20.58 trillion, with about \$420 billion in available borrowing left under the debt limit. At current yearly deficits ranging between \$500 and \$650 billion, the president would be required to start designating spending delays approximately seven to ten months before reaching the constitution-

al debt limit. This provision would start a serious fiscal discussion with plenty of time in which to develop a plan to fix the national debt.

It is important to underscore that the foregoing provision does not increase presidential power. It regulates presidential power by requiring the president to use his or her existing (or defacto) impoundment power, under the threat of impeachment, when borrowing reaches 98 percent of a constitutional debt limit – as opposed to waiting until the midnight hour. It also checks and balances the president’s ability to abuse the impoundment power by empowering simple majorities of Congress to override impoundments within 30 days without having to repeal the underlying appropriations, which is currently the only way Congress can respond to abusive presidential impoundments. Specifically, once the president puts proposed impoundments on the table, Section 4 provides, “Said impoundment shall become effective thirty (30) days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective.”²⁴

With the proposed amendment in place, it would be easy to know who is responsible for any impoundment that is enforced. It will be either the president’s impoundments or Congress’s impoundments. And if neither the president nor Congress acts, spending will be limited to tax receipts as soon as the debt limit is reached, in effect resulting in an across-the-board sequester. The threat of a massive, automatic sequester resulting from inaction would give the president a strong incentive to designate and enforce the required impoundments. Congress otherwise would be all too happy to shift the blame for a disorderly across-the-board sequester to the president by invoking the provision of Section 4 that provides, “The failure of the President to designate or enforce the required impoundment is an impeach-

able misdemeanor.”²⁵ Fourth, if new revenue streams are needed to avoid borrowing beyond the debt limit, the amendment would ensure all possible spending cuts are considered first. It does this by requiring abusive tax measures (new or increased sales or income taxes) to secure super-majority approval from each house of Congress.²⁶ It reserves the current simple majority rule for new or increased taxes only for completely replacing the income tax with a non-VAT sales tax (“fair tax” reform),²⁷ repealing existing taxation loopholes (“flat tax” reform), and increasing tariffs or fees (the Constitution’s original primary source of federal revenues). Any push for new revenue through these narrow channels would generate special-interest pushback, strongly incentivizing spending cuts before taxes are raised.

Fifth and finally, if borrowing beyond the debt limit proved truly necessary, the proposed amendment would end the absurdity of allowing a bankrupt debtor (Washington) to increase its credit unilaterally. Instead, the amendment would give the states and the people the power to impose outside oversight by requiring a majority of state legislatures to approve any increase in the federal debt limit within 60 days of a congressional proposal of a single-subject measure to that effect.²⁸

Specifically, Section 3 provides, “From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered or

The Compact’s Balanced Budget Amendment advances a five point plan for fixing the national debt.

accepted as a quid pro quo for such approval.” Further, “If such approval is not obtained within sixty (60) calendar days after referral then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.”²⁹

Using the time-tested idea of dividing power between the states and the federal government, and balancing ambition against ambition, requiring a referendum of the states on any increase in a fixed constitutional debt limit would minimize the abusive use of debt compared to the status quo. It would become substantially more difficult to increase debt if both Congress and simple majorities of the states were necessary to do so. Two hurdles are better than one. The fact that states rely on federal funding does not mean debt spending would increase relative

to the status quo, because states are far less dependent on federal borrowing than the feder-

al government itself is. Moreover, any quid pro quo trade of debt approval for appropriations would prevent any increase in the debt limit from having legal effect³⁰ and would render void any debt thereby incurred.³¹

By requiring a nationwide debate in 50 state capitols over any increase in the constitutional debt limit it establishes, the proposed amendment would shine more light on national debt policy and give the American people a greater chance to stop needless increases in the debt limit. And by requiring state approval within 60 days, the proposed amendment establishes a strong default position disfavoring any increase in the federal debt limit.

It is important to underscore that the proposed amendment does not include any emergency spending or borrowing loopholes because of the

flexibility made possible through this state referendum process. Congress is a debt addict and cannot be trusted with the sole power to decide whether an emergency or war justifies taking on additional debt. Once the Compact’s balanced budget amendment is in place, all Congress would need to do is pay down its debt during good times, and it would enjoy a huge line of credit that could cover any war or emergency. If additional borrowing beyond the initial debt limit were somehow truly necessary, there would be plenty of time for Congress to ask the states to approve an increase in the debt limit. Current tax cash flow is adequate to allow for dramatic increases in discrete spending priorities; by redirecting available funds, Congress could double or even triple current military expenditures without additional borrowing.

A sudden demand for emergency expenditures thus could be handled through the temporary reallocation of existing cash flows

while a longer-term borrowing proposal is submitted for consideration by a majority of state legislatures. If Congress ultimately could not persuade 26 state legislatures to approve such additional borrowing, that should be reason enough to stop the proposed spending. A simple majority of state legislatures can be trusted to approve any truly necessary increase in the balanced budget amendment’s debt limit to handle legitimate war or emergency requests.

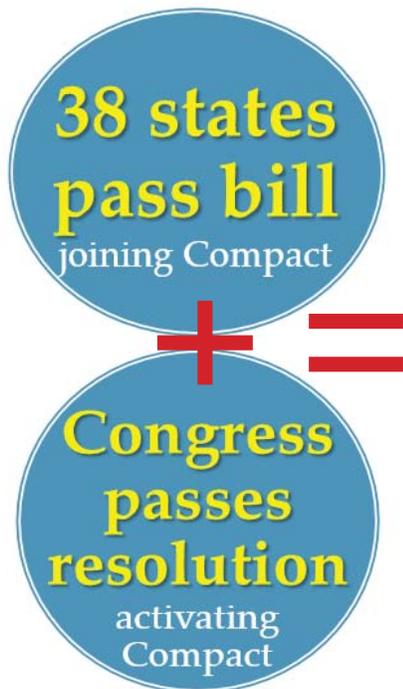
This powerful reform proposal, advanced by an interstate agency – the Compact Commission – is jump-starting fiscal discussions in Washington. It has been championed by conservative columnist George Will,³² but the amendment should have bipartisan appeal. Democrats and Republicans alike should recognize that if we want to preserve the federal spending that is truly necessary, the first thing we need to do is start treating

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is essentially self-enforcing.***

debt as a limited resource.

Imposing scarcity on debt conforms fiscal policy to the reality of limited resources, which is necessary to ensure that meaningful fiscal planning and prioritization take place such that the necessary borrowing capacity will exist when the states and the people actually need it. No state or person who hopes to receive any federal benefit will be in a better position if the government spends the nation over the fiscal cliff. If unsustainable borrowing crashes the system, there will be no more borrowing to fund desired programs.

With the formation of the Compact for a Balanced Budget and continued growth in membership among the states, April 2014 could go down in history as the month the states finally took charge of federal fiscal reform.



ing 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).

**Convention proposes
Balanced Budget
Amendment**

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.³³ Everything Congress does is consolidated in a single concurrent resolution passed just once with simple majorities and no presidential presentment.

Article V: The Next-Generation

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 instruct-

The Compact includes everything in the Article V amendment process from the application to the ultimate legislative ratification.³⁴ The counterpart congressional resolution includes both the call for the convention and the selection of legislative ratification for the contemplated amendment.³⁵

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 the "secret sauce" of 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 applica-

tion because the Compact is designed to start and complete the entire amendment process).³⁶ The Compact also includes a nested legislative ratification of the contemplated balanced budget amendment, which goes live only if Congress selects ratification by state legislature rather than in-state convention.³⁷

Correspondingly, using conditional enactments, the nested call in the congressional counterpart resolution goes live only after three-fourths of the states join the Compact.³⁸ 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.³⁹ 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 necessary 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).

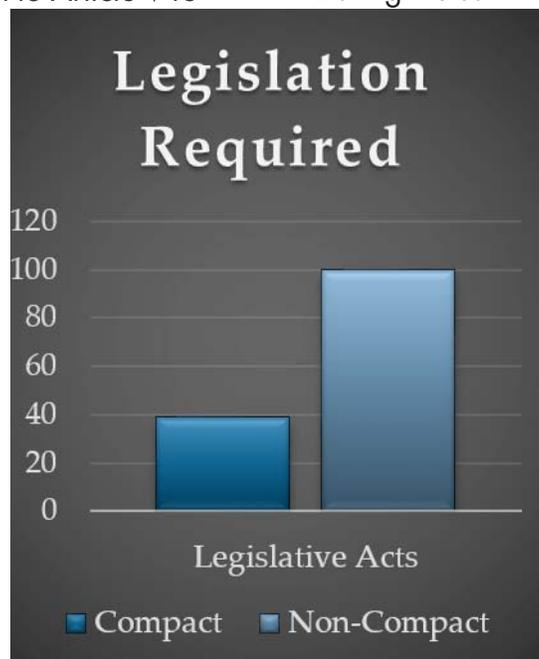
In addition, like any well-drafted contract, the Compact approach eliminates all reasonable uncertainty about the process. It identifies and specifies the authority of the delegates from its member states.⁴⁰ It specifies in advance all Article V convention ground rules, limiting the duration of the convention to 24 hours.⁴¹ 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.⁴² It disqualifies from participation

any member state – and the vote of any member state or delegate – that deviates from that rule.⁴³ It further bars all member states from ratifying any other amendment that might be generated by the convention.⁴⁴

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 – with one significant caveat. The requirement of such detailed and upfront agreement will probably work only for well-formed reform ideas that likely already command supermajority support among the states and the people. The list of such reform ideas is short, but sustained polling data across four decades undoubtedly put the Compact’s balanced budget amendment on that short list.

During the summer of 2012, Compact for America, Inc. commissioned a nationwide poll from one of the leading pollsters in the country, McLaughlin & Associates, to assess what policy reforms could command supermajority support from the American people and whether the Compact’s balanced budget amendment in particular was politically viable. McLaughlin concluded, “Six in ten voters favor a balanced budget amendment and at least 70% favor Compact for America’s specific and common sense proposals to rein in the federal

deficit. Subsequent polling in Texas and Alabama by West-Third Group during the spring of 2015, further confirmed supermajority support for the specific policy components of the Compact for a Balanced Budget at between 60% to 68% of registered voters. These survey results demonstrate that the Compact has the potential to obtain broad support.”⁴⁵



Article V: Not Meant to Be an Insurmountable Obstacle

One would expect all supporters of Article V – “Fivers,” they call themselves – to be rejoicing at this point. Indeed, many are, but some have criticized the Compact effort.

One argument is that the Compact for a Balanced Budget violates the text of Article V by avoiding a difficult, multi-staged, multigenerational amendment quest. This criticism generally focuses on the fact that the Compact includes pre-ratification of the amendment it contemplates. But this criticism is meritless.

Through the operation of conditional enactments, the Compact conforms strictly to the text of Article V. Furthermore, the “spirit” of Article V in no way requires states to originate amendments in an uncoordinated, multi-staged amendment process.

There is no textual conflict between Article V and the use of a conditional enactment to pre-ratify a desired amendment. The Compact’s pre-ratification is entirely contingent on Congress first effectively selecting legislative ratification of the contemplated amendment, which, in turn, presumes the prior proposal of the amendment. In other words, the pre-ratification will go live only in the precise sequence required by the text of Article V.

There is perhaps no more universally accepted legislative provision than the conditional enactment. Conditional enactments are common components of congressional legislation, including legislation approving interstate compacts,⁴⁶ as well as within many existing interstate and federal-territorial compacts.⁴⁷ The U.S. Supreme Court and courts in 45 states and territories have recognized the appropriateness of conditional

enactments for a wide range of state and federal legislation,⁴⁸ including state laws enacted contingent on the passage of new federal laws.⁴⁹ As explained in one typical court decision, “[I] legislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld.”⁵⁰ Courts defer to “broad legislative discretion”⁵¹ when conditional enactments are used. Because a state’s authority over whether to apply for an Article V convention or whether to legislatively ratify an amendment is as plenary as any other form of legislation, case law sustains the use of a conditional enactment in connection with Article V applications and ratifications.

Moreover, 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

The Founders expected the States to direct, control and coordinate their use of Article V from beginning to end.

convention that it was too difficult for the states to use Article V, George Nicholas responded, “It is natural to con-

clude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments” (emphasis added).⁵² Nicholas clearly anticipated that states would coordinate their use of Article V from beginning to end. The Founders never said the states had to apply for a convention without having any specific amendments in mind and without coordinating the ratification of those amendments. They 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.

It is well-established that the amendment process under Article V was supposed to be neither extraordinarily difficult nor extraordinarily easy. It was meant to strike a balance between these two extremes. In Federalist No. 43, James Madison wrote that Article V “guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”⁵³ If anything, the balance struck by Article V between facility and difficulty was meant to allow for amendments to be accomplished more easily than was the Founders’ experience in attempting to revise the Articles of Confederation.

During the New Jersey ratification debates, for example, the New Jersey Journal wrote that the Constitution included “an easy mode for re-
dress and amendment
in case the theory
should disappoint
when reduced to practice.”⁵⁴ Similarly, at the time of the Connecticut ratification debates, Roger Sherman wrote, “If, upon experience, it should be found deficient, [the Constitution] provides an easy and peaceable mode of making amendments.”⁵⁵ Likewise, in Federalist No. 85, Alexander Hamilton stated there was “no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.”⁵⁶

These representations formed the basis of the public understanding of the Constitution as it was ratified. If anything, the targeted, streamlined, coordinated Compact approach to Article V is more consistent with the actual spirit of Article V as described by advocates of ratification than the multi-staged legislative obstacle course necessitated by a non-compact approach to Article V.

Consent of Congress

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.⁵⁷ 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.⁵⁸

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.⁵⁹ 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 and ratification refer-

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Although it is true that the Compact Commission will operate immediately upon the membership of two states, that changes nothing in this regard. The Compact Commission serves as a unified platform for securing congressional cooperation in originating constitutional amendments by way of an Article V convention. A compact does not infringe on federal power necessitating prior congressional consent merely because it provides “strength in numbers” among the states for a more effective federal educational or lobbying campaign.⁶⁰

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 there is no evidence that anyone during the Founding era or immediately thereafter – whether Federalist or Anti-Federalist – thought the Article V convention process was meant to be controlled exclusively by Congress in these crucial respects.

The Application Was Meant to Specify the Amendment

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.”⁶¹ 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.”⁶²

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.”⁶³ 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.⁶⁴ Because Congress selects the mode of ratification, we know that Hamilton was speaking of the targeting of Article V applications originated by state legislatures, not state legislative ratification, as the source of such barriers to national encroachments.

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 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.⁶⁵ The contemporaneous usage of “application” thus naturally supports the conclusion that state legislatures had the power to apply for an Article V convention with a specific agenda. Moreover, the usual and customary practice in response to specific applications was either to grant what was requested or to deny them.⁶⁶ 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 was⁶⁷ – naturally understood as adopting that agenda.

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” (emphasis added). 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.⁶⁸ After highlighting that “Legis-

latures 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, no one in the founding era thought the states were somehow preempted or otherwise disabled by Article V from setting the agenda of the convention for proposing amendments and securing desired amendments through the convention. An Article V convention obviously was not regarded as an autonomous body following an agenda and populated by delegates selected by Congress. An Article V convention was meant to bypass Congress and deliver the 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.

This basic principle further reinforces the conclusion that the Compact for a Balanced Budget does not infringe on any power delegated to the federal government by fully occupying the space of convention logistics. 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, which gives implied consent to the Compact by calling the convention and preselecting legislative ratification in accordance with its terms, would require presidential presentment, as do ordinary bills.⁶⁹ 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.⁷⁰ Although this ruling was applied specifically to the congressional proposal of amendments, there is every reason to conclude that Congress's convention call duty and ratification referral power would be treated the same way, even if exercised by way of a resolution giving implied consent to an interstate compact.

Even more so than the congressional proposal of amendments in *Hollingsworth*, Congress's call duty and ratification referral power under Article V are purely ministerial, procedural powers of the sort not ordinarily subject to presidential presentment. 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.

If anything, the convention call component of the contemplated resolution has an even more attenuated relationship to lawmaking than does the direct congressional proposal of amendments. This is because, strictly speaking, the duty to call a convention is not a legislative or quasi-legislative power at all. It is a mandate on Congress to act ministerially when a certain threshold is reached. Further, any convention call would precede both the convention's proposal of an amendment (which is not

guaranteed) and the ultimate ratification referral. Even if it were analogized to the exercise of a quasi-legislative power, the fulfillment of the call duty is far more like an exercise of the rulemaking power conferred by the Constitution exclusively upon each house of Congress,⁷¹ to which presidential presentment clearly does not apply, than it is like ordinary lawmaking.

A different conclusion is not warranted by the fact that a concurrent resolution effectuating the Compact could be construed as giving implied congressional consent to the Compact. There is no textual difference between the role of the president in regard to the Compact Clause (Article I, Section 10, of the U.S. Constitution) and the role of the president in regard to the congressional proposal of amendments under Article V. In both provisions, the text of the Constitution articulates no role for the president whatsoever. Where the Constitution is silent, as here, the Supreme Court has ruled that presidential presentment applies only to congressional actions that are equivalent to ordinary lawmaking.⁷²

In substance, the contemplated congressional resolution is no more like ordinary lawmaking than is the direct congressional proposal of amendments under Article V. Although congressional consent has been regarded as rendering an interstate compact the functional equivalent of federal law, this doctrine has been applied only in the context of such consent being furnished by federal statute.⁷³ In the absence of consent being furnished by statute, the legal effect of any such consent consists entirely of yielding to member states' own underlying sovereign power,⁷⁴ to which presidential presentment obviously does not apply. Thus, even more than the direct congressional proposal of amendments, which is meant to facilitate subsequent legislative action, the contemplated counterpart congressional resolution does not imply legislative action that is equivalent to ordinary lawmaking by fulfilling the congressional call duty and exercising ratification referral powers. Therefore, its passage does not require presidential presentment.

Status of Existing Article V Applications

The last few criticisms of the Compact for a Balanced Budget come from Lew Uhler, a key member of the Reagan-Friedman drive for a balanced budget amendment in the 1970s and '80s.

Uhler criticizes the Compact for a Balanced Budget for starting the Article V application process from scratch and failing to aggregate 23 (or 27) existing Article V applications that seek a balanced budget amendment convention.⁷⁵ But the claim that 23 or 27 applications exist that can be aggregated to trigger a convention call cannot be sustained if one takes the Founders at their word that the Article V convention process was meant to allow the states to obtain the amendments they desired.

Only a handful of the supposed 23 or 27 Article V applications actually call for the same convention agenda. The remaining applications are a grab-bag of resolutions that differ in significant respects. For example, an application from Mississippi, passed in 1979, very clearly seeks a convention agenda that would consider only one specific amendment proposal – and the text of that amendment is even specified in the application.⁷⁶ If a convention were to be organized in accordance with the intent the respective states express, it is difficult to see how this application could be viewed as capable of being aggregated with applications that request the calling of a convention that could consider a broader array of balanced budget amendment proposals.

The same problem crops up with aggregating the applications that specifically call for a balanced budget amendment convention with a wide variety of emergency spending exceptions.⁷⁷ It is unlikely those states intended for their applications to be aggregated with others that have no such exceptions and thereby risk Congress calling

a convention with an agenda that would include the possible proposal of a balanced budget amendment without exceptions.⁷⁸ A similar problem arises with the applications that coyly apply for a balanced budget amendment convention “alternatively” to Congress proposing such an amendment but without imposing on Congress a deadline to act.⁷⁹ It is unclear whether those applications will ever go or stay “live” because Congress could propose a balanced budget amendment at any time and thereby render them inactive.

In view of these substantive differences, the assertion that Congress must aggregate the 23 or 27 current Article V applications essentially proclaims for Congress the power to mix and match applications that neither activate on the same terms nor seek the same convention agenda. Uhler appears to be arguing that the aggregation of applications would be based on Congress’s sole and discretionary judgment that they are “close enough.” But ascribing such discretion to Congress is contrary to the text of Article V, which references “Application” in the singular, implying that two-thirds of the state legislatures would be advancing and concurring in the same application. It is also contrary to the text and context of Article V that indicates Congress “shall call” the convention.

In view of such mandatory language, Hamilton observed in Federalist No. 85 that “whenever nine States concur” in an application, Congress’s role in calling a convention would be “peremptory” because “[n]othing in this particular is left to the discretion of that body.” Thus, according to Hamilton, Congress’s mandatory duty to call a convention would be triggered upon receiving an application that had received the concurrence of two-thirds of the states. It seems rather inconsistent with Congress’s envisioned peremptory, non-discretionary role to claim, as does Uhler, that its duty to call a convention nevertheless could be

Fivers should not aggregate mutually exclusive Article V applications.

triggered by a grab-bag of different Article V applications, not one of which actually received the concurrence of two-thirds of the states. If anything, the ministerial nature of Congress's envisioned role in the Article V process would seem to preclude exercising the kind of discretion be needed to determine whether facially different applications were "close enough" to be aggregated. Thus, Congress might rightfully balk at aggregating different Article V applications.

Even if Congress played along with the grab-bag approach to Article V, a successful aggregation of applications that do not seek the same convention agenda on the same terms would be a disaster for the wider Article V movement. It would set a precedent that Congress is entitled to cobble together applications to produce a convention agenda never actually agreed upon by the state applicants. In other words, Congress would be empowered to call a convention with an agenda largely determined by Congress. That would tend to consolidate all amendment power in Congress, rather than allowing the states to have a parallel means of obtaining the amendments they desire – hardly what Fivers or originalists should want from the process.

Getting to a convention should not be an end in itself, and any effort that relies upon aggregating distinct or mutually exclusive Article V applications is short-sighted.

Restrictions on the Convention

Uhler also contends the Compact for a Balanced Budget deviates from constitutional requirements by pre-committing member state delegates to voting up or down on the proposal of a specific balanced budget amendment.

In response, it should first be observed that the legislature of each member state has full deliberative authority to enact, amend, or refuse to enact the Compact, including the Article V application, the contemplated balanced budget

amendment, and prospective ratification contained therein. The delegates to the convention organized by the Compact also have full deliberative authority to propose or reject proposing the constitutional amendment the Compact contemplates. Legislative deliberation does not intrinsically require more than this; state legislatures, for example, have long entertained special sessions limited to considering or reconsidering specific bills or laws – essentially an up-or-down vote – without anyone questioning the existence of legislative deliberation in doing so. In addition, Article V's ratification convention process recognizes there is nothing about legislative deliberation in the context of a "convention" that requires more than an up-or-down vote on a specific amendment proposal.⁸⁰

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 suggested 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.⁸¹ 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.”⁸² 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.⁸³

Furthermore, the Founders’ expectation that the states would direct the convention to propose desired amendments is entirely consistent with the rationale given for the insertion of the convention mode of proposing amendments in Article V. As reported in *The Records of the Federal Convention of 1787*, the original language of Article V as proposed by James Madison would have required Congress to propose amendments on application of two-thirds of the legislatures of the several states.⁸⁴

To the modern eye, this original formulation would seem to be a more direct route for the states

to obtain desired amendments. Nevertheless, on September 15, 1787, George Mason objected to this formulation because it made the proposal of amendments desired by the states entirely dependent upon Congress, and he feared Congress would not propose amendments that would limit its own power.⁸⁵ To address Mason’s objection, the congressional proposal of amendments on application of two-thirds of the state legislatures was replaced with the convention mode of proposing amendments, which Congress would call upon application of two-thirds of the legislatures of the several states. Notably, nothing in this drafting history indicates that the application would cease specifying the amendments to propose, even though a convention would be doing the proposing rather than Congress.

In short, the convention mode of proposing amendments was explicitly adopted in order to better guarantee that the states could obtain the

proposal of desired amendments specified in their application. This rationale is inconsistent with the notion that an Article V convention was meant to be a freewheeling, independently deliberative body. However ironic that rationale may look to modern eyes, it makes perfect sense in light of the technological limitations of the eighteenth century. At the time, communications would take days, weeks, or months to travel from state capitol to state capitol, traveling by horse rather than by telegraph, telephone, or email. Ensuring the states all convened at a central location through their own representatives to propose desired amendments was simply a practical necessity to ensure unity and control over what was proposed.

Given the technological limitations of the eighteenth century, Mason’s preferred formulation of Article V not only ensured state control over the

Nothing in the history or text of Article V requires states to organize a “black box” amendment-drafting convention.

proposal of amendments, it streamlined the amendment process. The states would have had to first organize an informal

convention to reach consensus on their desired amendments before delivering conforming applications to Congress. Because an informal convention was a practical predicate to states making use of Madison’s originally proposed amendment process, Mason’s preferred formulation of Article V, which instead allows a formal convention of the states to propose amendments directly, side-stepped the additional hurdle imposed by Madison’s original idea of requiring the states to apply to Congress to propose amendments. There is nothing in the text or history of Article V that suggests the convention mode of proposing amendments precludes states from setting a strict agenda of voting up or down on the proposal of a specific amendment.

Uhler’s criticism of the Compact’s laser-focused approach to advancing a specific balanced budget amendment also fails to account for the mechanism by which the Compact requires an up-

or-down vote on the contemplated amendment. Although the application nested in the Compact sets the agenda, as is perfectly consistent with the meaning of “application” at the time of the founding era, it is the delegate instructions set out in the Compact that enforce the adoption of convention rules that limit the agenda to an up-or-down vote on the contemplated balanced budget amendment. As the first order of business, delegates are strictly instructed to adopt the Compact’s contemplated convention rules, which require an up-or-down vote on the contemplated amendment, or else they forfeit their authority in a variety of ways.⁸⁶

This means the scope limitations of the Compact are enforced based on the agency principle that the delegates are the agents of the states that sent them. Thus, the extent of targeting in the Compact differs only in degree, not kind, from the custom and practice of more than a dozen interstate and inter-colonial conventions organized prior to ratification of the U.S. Constitution.

At the time, it was usual and customary for states to set the agenda for any such convention and to instruct their delegates specifically on what to advance and address at the convention.⁸⁷ Although Federalists and Anti-Federalists famously disputed whether the delegates to the Philadelphia Convention had stayed within the scope of their state-specified legal authority, nobody at the time argued that the delegates were legitimately free to exceed their authority and ignore their states’ instructions.⁸⁸

In other words, the debate over the legitimacy of the scope of proceedings at the Philadelphia Convention proves only that it was generally understood at the time of the founding that delegates to a convention had no lawful authority to do anything other than what they were told to do by their state principals. It was simply taken for granted during the founding era that delegates were “servants” of the states that sent them. Even if (for the sake of argument) the delegates

violated their lawful authority in the course of the Philadelphia Convention, that would not in any way legitimize their conduct or define the authority of delegates to an Article V convention. It is a complete non sequitur to argue that because the delegates violated their authority at the Philadelphia Convention, all future delegates at all future conventions under Article V have the right and authority to disregard their state authority.⁸⁹

Under ordinary principles of agency law, states, as the “masters,” naturally would have every right and power to circumscribe the authority of their delegates, as their “servants,” as tightly as they wish. Consequently, the Compact’s strict delegate instructions and limitations on delegate authority are entirely consistent with relevant law, custom, and practice.

Accordingly, the limited agenda contemplated by the Compact should win the day if for no other reason than that a supermajority of delegates from member states will form a quorum at the convention and do exactly what they are authorized and instructed to do – namely, vote to establish rules that restrict the convention to an up-or-down vote on the contemplated balanced budget amendment within 24 hours. If they do not, the Compact ensures they immediately lose all legal authority to act for their respective states and are automatically recalled.

This last point underscores the superiority of the Compact approach for advancing and ratifying a powerful balanced budget amendment. Without an agreement in advance among the states structuring the procedure and substance of an Article V convention, you have no idea what you are going to get, if anything, from the incredibly difficult process of organizing such a convention. With a compact, you have as much certainty in the process as politics can afford. But even more importantly, a compact provides a plausible vehicle for co-opting Congress before it can use its powerful political leverage to disrupt the movement, which is discussed below.

Countering Congressional Leverage

As the Congressional Research Service recently noted, Congress has never regarded its role in Article V as purely ministerial.⁹⁰ Analyst Thomas Neale has observed that Congress “has traditionally asserted broad and substantive authority over the full range of the Article V Convention’s procedural and institutional aspects from start to finish.”⁹¹ Congress repeatedly has introduced bills that purport to give it a substantial role in delegate selection, convention rules, and even setting or enforcing the convention agenda.⁹² All of these efforts are unconstitutional in view of the public understanding of the purpose of Article V discussed above, but they nevertheless pose a real and substantial political and litigation risk that Congress could assume control over any Article V convention.

The hurdle of requiring ratification from three-fourths of the states is not a perfect defense against such an ultra vires “congressional convention,” because just over 10 percent of constitutional amendments (for example, the 16th Amendment (income tax), 17th Amendment (popular election of senators), and 18th Amendment (Prohibition)) have been contrary to limited-government principles, and they were still ratified. Furthermore, even if Congress called a convention with no federal strings attached on the front end, there is no guarantee Congress would not set an impossibly short ratification sunset date for any proposal it disliked on the back end. In short, whether Fivers like it or not, Congress has significant leverage in the Article V amendment process. It is irresponsible to ignore this fact. Only a compact ensures that the states lead and Congress follows. By fully occupying all logistical spaces and then deliberately seeking to co-opt Congress at the states’ time of choosing – using the platform of a compact commission to unite the states and enable them to parley institution-to-in-

stitution – the compact approach minimizes the risk that Congress will abuse its leverage. This, in turn, enables the compact effort to neutralize the principal political and litigation risk to the Article V movement: the erroneous view that Congress, not the states, controls convention logistics in significant ways.⁹³

It is irresponsible to ignore Congress’ significant leverage to derail or seize control over an Article V convention.

Conclusion: The Most Secure Process

Even if Congress took an uncharacteristic hand-off approach to the Article V convention process, a compact-organized Article V convention remains the superior approach for a balanced budget amendment.

The organization of a convention of indefinite duration populated by as-yet unidentified delegates governed by as-yet unidentified rules is as likely to produce deadlock or to generate something worthless as to engender something worthwhile. Even if an effective balanced budget amendment were proposed, the drafting-convention approach would require the subsequent step of ratification. And there is no guarantee that any amendment proposed by the convention would secure ratification from the requisite 38 states.

With the Compact for a Balanced Budget, by contrast, you know what you are going to get. 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 approved 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.)

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.

Before this crucial reform can become a reality, 34 more states (at print) must join the Compact (to reach the ratification threshold of three-fourths of the states) and simple majorities of Congress must approve it. This can be done in as few as 12 months, because 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 or Milton Friedman, has ever successfully navigated to its conclusion despite decades of trying.

Not only is the Compact's payload worth the effort, the Compact approach is clearly a superior Article V vehicle for advancing and ratifying a balanced budget amendment.

It is time for Fivers to upgrade.



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Endnotes

1. Treasury Direct, The Debt to the Penny and Who Holds It, www.treasurydirect.gov/NP/debt/current.
2. Whet Moser, "Remember When Barack Obama Voted Against Raising the Debt Limit?" *Chicago Magazine*, July 14, 2011, www.chicagomag.com/Chicago-Magazine/The-312/July-2011/Remember-When-Barack-Obama-Voted-Against-Raising-the-Debt-Limit/.
3. U.S. National Debt and Deficit History, Chart 4.02, www.usgovernmentdebt.us/debt_deficit_history.
4. U.S. Debt Clock, www.usdebtclock.org/.
5. Laurence J. Kotlikoff, *Assessing Fiscal Sustainability*, Mercatus Institute, George Mason University, December 12, 2013, p. 4, mercatus.org/sites/default/files/Kotlikoff_FiscalSustainability_v2.pdf.
6. Enactment History of HB794, www.legis.ga.gov/legislation/en-US/Display/20132014/HB/794.
7. Enactment History of HB284, www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20284&session=28.
8. Mississippi State Senate Bill 2389, available at <https://legiscan.com/MS/bill/SB2389/2015>.
9. North Dakota State House Bill 1138, available at <https://legiscan.com/ND/text/1138/2015>.
10. Although the effective date of Alaska's HB284 is July 21, 2014, the contractually binding nature of Alaska's adoption of the compact proposed by HB794 is not tethered to that effective date. Georgia's HB794 has been effective since it was signed on April 12, 2014. By its terms, HB794 becomes contractually binding on Georgia immediately upon enactment of counterpart legislation by another state and Georgia's receipt of seasonable notice. The relevant language of the compact (Article III, section 2) provides, "in addition to having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when: (a) at least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and (b) notice of such State's Member State status is or has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State." HB794, www.legis.ga.gov/legislation/20132014/144709.pdf. In essence, Georgia invited acceptance of its offer to compact through performance without specifying a deadline for acceptance. As a result, under ordinary contractual principles, upon Alaska's part performance of the terms of acceptance (enactment of HB284), Georgia became contractually obligated thereafter to keep its offer open for a reasonable period of time – and certainly that time will not expire before the effective date of Alaska's legislation. RESTATEMENT (SECOND) OF CONTRACTS, §§ 41, 45 (1981). Therefore, by enacting the counterpart compact legislation HB284 and giving seasonable notice, the State of Alaska has performed the terms of acceptance proposed by HB794 and the Compact has been formed, although its various provisions will not have the force of law in Alaska until July 21, 2014. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 (1991) (holding contractual principles, as well as statutory interpretive principles, govern the interpretation of a compact).
11. House Concurrent Resolution 26, available at http://media.wix.com/ugd/e48202_271be6dfd84b4a8ea3beb144fb9f844e.pdf.
12. Minutes from Compact for a Balanced Budget Commission organizational meeting, available at http://media.wix.com/ugd/e48202_b04db59f0b6a4ebc8b9139027de14d4e.pdf.
13. Executive Order of Governor Nathan Deal, available at http://media.wix.com/ugd/e48202_1c07f88163a1447b93c314f3fb-b7631e.pdf.
14. Letter of Appointment from Governor Sean Parnell, available at http://media.wix.com/ugd/e48202_f3a4bfee0e514bb09e0b9f003ae0974c.pdf.
15. See Official Website of the Compact for a Balanced Budget Commission, <http://www.balancedbudgetcompact.org>.
16. See Compact for America Educational Foundation, Frequently Asked Questions, <http://www.compactforamerica.org/#!faq/xv6u2> (question 2).
17. Model Balanced Budget Amendment, http://media.wix.com/ugd/e48202_0468889115a94eed-a2b0a9104f8989e6.pdf (section 1).
18. *Ibid.* (section 2).
19. It is important to underscore that there is no constitutional debt ceiling right now. The Constitution, as-is, provides for unlimited borrowing

- power. On what otherwise would be totally unlimited borrowing authority for the federal government, the balanced budget amendment would impose a limit of 105 percent of outstanding debt on ratification. This would be a constitutional debt limit, not an increase in debt authority. The definition of debt utilized in the proposed balanced budget amendment is deliberately narrow. It is designed to encompass only full faith and credit borrowing so that spending ("total outlays") is restricted to proceeds from taxes, fees and full faith and credit borrowing ("total receipts" + authorized debt).
20. Supra note 17 (section 6).
 21. Ibid.
 22. It is important to emphasize the mechanics of the spending limit. The limit on total expenditures would be fixed at all points in time based on available cash from taxes (or the equivalent) and approved borrowing. If fiscal gaming tactics – such as no-recourse borrowing, trust-fund raiding, salelease-back schemes, and money-printing – were attempted, the resulting proceeds would not count as receipts affecting the expenditure limits, and thus would not serve to increase the spending limit. This would neutralize any incentive to engage in such gaming tactics.
 23. Supra note 17 (section 4).
 24. Ibid.
 25. Ibid.
 26. Ibid. (section 5).
 27. Without the proposed amendment, Congress could levy both end-user sales taxes and value-added taxes (VATs) as a type of excise tax or impost, with only simple majorities in both houses, perhaps even as an additional tax on top of the current income tax. The proposed amendment would prevent this, providing a restriction on congressional taxing power that does not currently exist. The amendment would require any new national sales tax to "completely replace all existing income taxes" if it were to be approved with simple majorities of Congress. This would be a one-time occurrence, because once all existing income taxes were completely replaced by a new end-user sales tax, the provision could not be invoked again. Instead, any new or increased sales tax would thereafter have to secure two-thirds approval of the whole number of each house of Congress.
 28. Supra note 17 (section 3).
 29. Ibid.
 30. Ibid.
 31. Ibid. (section 4).
 32. George Will, "Amend the Constitution to Control Federal Spending," Washington Post, April 9, 2014, www.washingtonpost.com/opinions/george-will-amend-the-constitution-to-control-federal-spending/2014/04/09/00fa7df6-bf3c-11e3-bceb71ee10e9bc3_story.html.
 33. Model Compact Legislation, http://media.wix.com/ugd/e48202_fba42b6664504c-488cebb2513632a510.docx?dn=Compact%20for%20a%20Balanced%20Budget%20-%20leg%20counsel%20drafting%20version.docx.
 34. Compact Legislation of the State of Georgia, www.legis.ga.gov/Legislation/20132014/144709.pdf.
 35. Model Congressional Resolution, <http://goldwaterinstitute.org/sites/default/files/CFA%20-%20Text%20-%20Cong%20Omnibus%20Resolution%20Final%282%29.pdf>.
 36. Supra note 33 (Article V, section 3).
 37. Supra note 33 (Article IX, section 2).
 38. Model Congressional Resolution, supra note 35, Title I, section 103.
 39. Ibid., Title II, section 202.
 40. Supra note 33 (Article VI).
 41. Ibid., Article VII.
 42. Ibid., Article VI, section 9.
 43. Ibid., Article VI, section 10.
 44. Ibid., Article VIII, section 3.
 45. McLaughlin & Associates, National Survey – Executive Summary, January 14, 2013, http://media.wix.com/ugd/e48202_d2d89036b8934669b8dc6d37578b2719.pdf.
 46. See, e.g., Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, Title II, 99 Stat. 1842, 1859 (1986), available at www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1842.pdf; Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (1996).
 47. See, e.g., Compact of Free Association Act of 1985, Pub. L. 99-239, Title II, 99 Stat. 1770, 1800, available at www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1770.pdf; Jennings Randolph Lake Project Compact authorized, W. Va. Code, § 29-1J-1 (1994); Interstate Compact on Licensure of Participants in Live Racing with Parimutuel Wagering, Ky. Rev. Stat. § 230.3751 (2001); Interstate Compact on Juveniles, Wyo. Stat. § 14-6102 (1977).
 48. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Opinion of the Justices*, 287 Ala. 326 (1971); *Thalheimer v. Board of Super-*

- visors of Maricopa County, 11 Ariz. 430, 94 P. 1129 (Ariz. Terr. 1908); *Thomas v. Trice*, 145 Ark. 143 (1920); *Busch v. Turner*, 26 Cal. 2d 817 (1945); *People ex rel. Moore v. Perkins*, 56 Colo. 17 (1913); *Pratt v. Allen*, 13 Conn. 119 (1839); *Rice v. Foster*, 4 Harr. 479 (De. 1847); *Opinion to the Governor*, 239 So. 2d 1 (Fla. 1970); *Henson v. Georgia Industrial Realty Co.*, 220 Ga. 857 (1965); *Gillesby v. Board of Commissioners of Canyon County*, 17 Idaho 586 (1910); *Wirtz v. Quinn*, 953 N.E.2d 899 (Ill. 2011); *Lafayette, M&BR Co. v. Geiger*, 34 Ind. 185 (1870); *Colton v. Branstad*, 372 N.W. 2d 184 (Iowa 1985); *Phoenix Ins. Co. of N.Y. v. Welch*, 29 Kan. 672 (1883); *Walton v. Carter*, 337 S.W. 2d 674 (Ky. 1960); *City of Alexandria v. Alexandria Fire Fighters Ass’n, Local No. 540*, 220 La. 754 (1954); *Smigiel v. Franchot*, 410 Md. 302 (2009); *Howes Bros. Co. v. Mass. Unemployment Compensation Commission*, 296 Mass. 275 (1936); *Council of Orgs. & Ors. For Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557 (1997); *State v. Cooley*, 65 Minn. 406 (1896); *Schuller v. Bordeaux*, 64 Miss. 59 (1886); *In re O’Brien*, 29 Mont. 530 (1904); *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. 1996); *State v. Second Judicial Dist. Ct. in & for Churchill County*, 30 Nev. 225 (1908); *State v. Liedtke*, 9 Neb. 490 (1880); *State ex rel. Pearson*, 61 N.H. 264 (1881); *In re Thaxton*, 78 N.M. 668 (1968); *People v. Fire Ass’n of Philadelphia*, 92 N.Y. 311 (1883); *Fullam v. Brock*, 271 N.C. 145 (1967); *Enderson v. Hildenbrand*, 52 N.D. 533 (1925); *Gordon v. State*, 23 N.E. 63 (Ohio 1889); *State ex rel. Murray v. Carter*, 167 Okla. 473 (1934); *Hazell v. Brown*, 242 P.3d 743 (Or. App. 2010); *Appeal of Locke*, 72 Pa. 491 (1873); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634 (1999); *Clark v. State ex rel. Bobo*, 113 S.W.2d 374 (Tenn. 1938); *State Highway Dept. v. Gorham*, 139 Tex. 361 (1942); *Bull v. Reed*, 54 Va. 78 (1855); *State v. Baldwin*, 140 Vt. 501 (1981); *State ex rel. Zilisch v. Auer*, 197 Wis. 284 (1928); *Brower v. State*, 137 Wash. 2d 44 (1998); *Le Page v. Bailey*, 114 W. Va. 25 (1933).
49. See, e.g., *State v. Dumler*, 559 P.2d 798 (Kan. 1977); *Bracey Advertising Co. v. North Carolina Dept. of Transportation*, 241 S.E.2d 146 (N.C. Ct. App. 1978).
 50. *Helmsley v. Borough of Ft. Lee*, 394 A.2d 65, 82 (N.J. 1978). Of course, this robust general rule is not without exception. In a case of first impression, the Missouri Supreme Court recently rejected the use of contingent effective dates where a legislative act was made contingent on the passage of another act on a “completely different matter” because doing so violated a state constitutional single-subject rule. *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013). The Compact’s contingent effective dates, however, do not pose a single-subject rule violation. The contingencies are subject to the passage of legislation that obviously relates to the same purpose as the Compact; specifically, the passage of substantially identical compact language in other states and the congressional components of the Article V process the Compact invokes. Thus, the contingent effective dates in the Compact are exactly like the contingency upheld in *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996), in which the Missouri Supreme Court ruled the “legislature may constitutionally condition a law to take effect upon the happening of a future event.”
 51. *Helmsley*, 394 A.2d at 83.
 52. Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3, pp. 101–2 (Virginia) (1827), available at files.libertyfund.org/files/1907/1314.03_Bk.pdf.
 53. Federalist No. 43 in *The Federalist* (The Gideon Edition), edited with an Introduction, Reader’s Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), available at oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27.
 54. “Reply to George Mason’s Objections to the Constitution,” *New Jersey Journal*, December 19, 26, 1788, in *The Documentary History of the Ratification of the Constitution*, Digital Edition, edited by John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, and Margaret A. Hogan (Charlottesville: University of Virginia Press, 2009), available at history.wisc.edu/csac/documentary_resources/ratification/attachments/nj%20a%20reply%20to%20george%20mason.pdf.
 55. “Letters of a Citizen of New Haven,” in *Friends of the Constitution: Writings of the “Other” Federalists, 1787–1788*, edited by Colleen A. Sheehan and Gary L. McDowell (Indianapolis: Liberty Fund, 1998), p. 271, available at files.libertyfund.org/files/2069/Sheehan_0118_Bk.pdf.
 56. Federalist No. 85 in *The Federalist*, supra note

- 47.
57. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *Wharton v. Wise*, 153 U.S. 155 (1894); *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893); *Green v. Biddle*, 21 U.S. 1, 39-40 (1823).
 58. *Cuyler*, 449 U.S. at 440; *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 459 (1978); the decision stated congressional consent is required only for an interstate compact that would enhance “states power quoad [relative to] the federal government”.
 59. *Supra* note 9, Article VI, section 4, Article VIII, section 1.
 60. *U.S. Steel*, 434 U.S. at 479 n. 33.
 61. Federalist No. 43 in *The Federalist*, *supra* note 47.
 62. *The Writings of George Washington*, collected and edited by Worthington Chauncey Ford, Vol. XI (1785–1790) (New York and London: G.P. Putnam’s Sons, 1890), p. 249, available at files.libertyfund.org/files/2415/Washington_1450-11_Bk.pdf.
 63. Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, vol. 3 (Virginia) (1827), p. 102, available at files.libertyfund.org/files/1907/1314.03_Bk.pdf.
 64. Federalist No. 85 in *The Federalist*, *supra* note 47.
 65. See, e.g., *Journals of the Continental Congress, Proceedings*, vol. VI (June 1780) (application from New Hampshire), p. 189; *id.* at 331 (October 1780) (application from New York), available at <https://play.google.com/store/books/details?id=QmgFAAAAQAAJ&rdid=-book-QmgFAAAAQAAJ&rdot=1>.
 66. *Ibid.*
 67. Robert Natelson, “Amending the Constitution by Convention: A Complete View of the Founders’ Plan,” *Goldwater Institute Policy Report No. 241*, September 16, 2010, pp. 15–18.
 68. *The Writings of James Madison*, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed, Vol. 6, edited by Gaillard Hunt (New York: G.P. Putnam’s Sons, 1900), pp. 403–4, available at files.libertyfund.org/files/1941/1356.06_Bk.pdf.
 69. U.S. Const., art. I, sec. 7 (cl. 2).
 70. *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982); Special Constitutional Convention Study Committee, American Bar Association, *Amendment of the Constitution by the Convention Method under Article V 25* (1974).
 71. U.S. Const., art. I, sec. 5 (cl. 2).
 72. *Ins v. Chadha*, 462 U.S. 919, 951 (1983); *Myers v. United States*, 272 U.S. 52, 123 (1926).
 73. See, e.g., *New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval “transforms an interstate compact within [the Compact Clause] into a law of the United States”); *Bryant v. Yellen*, 447 U.S. 352, 369 (1980); *McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186 (D.C. Cir. 1987).
 74. See, e.g., *Poole v. Fleeger’s Lessee*, 36 U.S. 185, 1837 Westlaw 3559, *24 (1837) (Baldwin, J., concurring) (“The effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated ... or as if there had been no restraining provision in the constitution. Its validity does not depend on any recognition or admission in or by the constitution, that states may make such compacts with the consent of congress; the power existed in the states, in the plenitude of their sovereignty, by original inherent right; they imposed a single restraint upon it, but did not make any surrender of their right, or consent to impair it to any greater extent. Like all other powers not granted to the United States, or prohibited to the states, by the constitution, it is reserved to them, subject only to such restraints as it imposes, leaving its exercise free and unlimited in all other respects, without any auxiliary by any implied recognition or admission of the existence of the general power, consequent upon the particular limitation”).
 75. Lew Uhler, “Discipline of the Federal FISC Article V,” *Human Events*, April 29, 2014, www.humanevents.com/2014/04/29/discipline-of-the-federal-fisc-article-v/.
 76. 25 CR 211 (HCR51 (MS 1979)).
 77. See, e.g., HJR548 (TN 2014); SJR5 (OH 2013); 125 CR 3007 (R5 (NC 1979)); 125 CR 212 (SJR (NM 1979)); 126 CR 1104 (SJR8 (NV 1980)); SR371 (GA 2014); 125 CR 9188 (SJR1 (IN 1979)); 125 CR 2110 (SCR1661 (KS 1979)); SJR4 (MD 1977); SJRV (MI 2013).
 78. See, e.g., 129 CR 20352 (SCR3 (MO 1983)); 125 CR 15227 (SJR1 (IA 1979)).
 79. See, e.g., 125 CR 212 (LR106 (NB 1979)); 125 CR 2113 (R236 (PA 1979)); 125 CR 5223 (HCR31 (TX 1979)).
 80. Michael B. Rappaport, “The Constitutionality of a Limited Convention: An Originalist Analysis,” *Constitutional Commentary*, Vol. 81 (2012), p. 53; Mike Stern, “Reopening the Constitutional

- Road to Reform: Toward a Safeguarded Article V Convention," *Tennessee Law Review* 765 (Spring 2011), p. 78.
81. A similar conclusion has been reached by numerous experts. See, e.g., Michael Rappaport, *ibid.*; Mike Stern, *ibid.*; "Note, The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process," *Harvard Journal of Law and Public Policy* 30 (2007), pp. 1005, 1022.
 82. Federalist No. 85 in *The Federalist*, *supra* note 47.
 83. The foregoing analysis is not cast into doubt by any modern case striking down state laws or ballot initiatives seeking to compel the proposal of constitutional amendments or Article V applications by congressional candidates or legislative representatives. See, e.g., *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Barker v. Hazeltine*, 3 F.Supp.2d 1088 (D.S.D. 1998); *League of Women Voters of Me. v. Gwadosky*, 966 F. Supp. 52 (D.Me. 1997); *Bramberg v. Jones*, 20 Cal.4th 1045, 86 Cal.Rptr.2d 319, 978 P.2d 1240 (1999); *Morrissey v. State*, 951 P.2d 911 (Colo. 1998); *Simpson v. Cenarrusa*, 130 Idaho 609, 944 P.2d 1372 (1997); *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996). The Compact does not compel anyone or anything to propose any amendment, nor does it place any power conferred by Article V to a designated body in the hands of anyone or anything that is not designated to exercise such power.
 84. *The Records of the Federal Convention of 1787*, Vol. 2, edited by Max Farrand (New Haven: Yale University Press, 1911), pp. 629–30, available at files.libertyfund.org/files/1786/0544-02_Bk.pdf.
 85. *Ibid.*
 86. The Compact's limitations on delegate authority and instructions are enforced by automatic forfeiture of the appointment of all delegates for that member state if any delegate violates such limitations and instructions (see *supra* note 9, Article VI, section 10). Second, the legislature of the respective member state also could immediately recall and replace the runaway delegate (sections 3 and 4). Third, if such behavior were disorderly, in addition to all other standard means of maintaining order and enforcing the rules furnished under Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure, the chair of the Convention could suspend proceedings and the Commission could relocate the Convention as needed to resume proceedings with a quorum of states participating (*supra* note 9, Article VII, Sections 2, 7 and 8). Fourth, a declaratory judgment ruling all actions of the runaway delegate "void ab initio" and an injunction or temporary restraining order forcing the delegate to cease participation and to return to his or her state capitol would be another option because attorneys general of each member state are required to seek injunctions to enforce the provisions of the Compact (compare *supra* note 9, Article X, section 3, with Articles VI, sections 6, 7, 10). These delegate-specific direct enforcement mechanisms are in addition to the following backstop "kill-switches" (which every member state attorney general also must enforce): (1) the prohibition on member states participating in the convention unless the Compact rules are adopted as the first order of business (*supra* note 9, Article VIII, section 1(b)); (2) the prohibition on transmission of any amendment proposal from the convention other than the contemplated amendment (Article VII, section 9); (3) the nullification of any convention proposal other than the contemplated amendment (compare Article VIII, section 2(a), with Articles VI, sections 6, 7, 10, and Article VII, section 2); and (4) the disapproval of ratification of any amendment by all member states other than the contemplated amendment (Article VIII, section 3).
 87. See, *inter alia*, Robert Natelson, *supra* note 67.
 88. See, e.g., Federalist No. 40, in *The Federalist*, *supra* note 53.
 89. The truth is that the delegates to the Philadelphia Convention stayed well within the scope of their authority. Translated with the usage of the times, the legal instruments organizing the Philadelphia Convention essentially declared, "The convention is being organized for the 'sole' purpose of considering a total rewrite of the Articles of Confederation with such alterations and new provisions as might establish a firm national government and make it adequate to governance." It does not take a legal genius to fit the proposal of the Constitution within the scope of such authority. The breadth of the foregoing authority is evident from the fact that the congressional resolution for the Philadelphia Convention contemplated a broad purpose for the meeting – to establish "in these states a firm national government ... [and] render the federal Constitution ade-

quate to the exigencies of Government and the preservation of the Union" (Resolution of Feb. 21, 1787, 32 J. Continental Cong. 1774–1789 (edited by Roscoe R. Hill, reprint ed. 1968), p. 74. It also contemplated "revising" the Articles with "alterations and provisions." *Id.* Equally broad language was reflected in the state-issued credentials of nearly all delegates to the convention (with New Jersey's delegates being an arguable exception). (Records of the Federal Convention of 1787, edited by M. Farrand, 1911, pp. 706–36. Contemporaneous legal usage indicates the word "revision" had a broader meaning than "amendment" and indicated the possibility of a total or substantial rewrite of an original document. See, e.g., *Cases of Judges of Court of Appeals, 1788 Va. LEXIS 3, *27 (1788)* (using "revisal" to describe total rewrite of state laws); *Respublica v. Dallas, 1801 Pa. LEXIS 56, **18 (Pa. 1801)* (referring to a committee creating a new state constitution as charged with "revising" the old constitution); *Waters v. Stewart, 1 Cai. Cas. 47, 65-72 (N.Y. 1805)* (using "revision" in the context of describing a total rewrite of state statutes); *Commonwealth v. Daniel Messenger, 4 Mass. 462, 467, 469-70 (1808)* (describing statutes as a "revision" of prior provincial laws and a "revised" statute as replacing a "former statute"); *Lessee of Ludlow's Heirs v. Culbertson Park, 1829 Ohio LEXIS 36, **24-26 (Ohio 1829)* (using "revision" to describe a total rewrite and consolidation into one act all prior statutes); see generally *Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009)* (holding that "[w]hile both constitutional amendments and revisions require a majority of voters approval, a revision – which substantially alters the entire Constitution, the basic framework of the governmental structure or the powers held by one or more governmental branches – requires prior approval of two-thirds of each house of the California State Legislature") (citing *Calif. Const. art. X (1849) ("Mode of Amending and Revising the Constitution")*; *Browne, Rep. of the Debates in Convention of Cal. on Formation of State Const. 354-61 (1850)*; *Livermore v. Waite, 102 Cal. 113 (1894)*; *Dodd, The Revision and Amendment of State Constitutions (1910), 118–20*; *Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding (4th ed. 1887), §§ 530–2, 550–2* (citing the Constitutions of Maine (1820), New Jersey (1844), New York (1846), and Michigan (1850)); *William B. Fisch, "Constitutional Refer-*

endum in the United States of America," American Journal of Comparative Law 54 (2006), pp. 485, 493 (noting "the preferred vehicle for major revisions of existing state constitutions and creation of new ones has been the popularly elected convention, which has often been called by a state legislature without explicit authority in the existing governing document"

90. Thomas H. Neale, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, R42589, 18 (C.R.S., April 11, 2014), www.fas.org/sgp/crs/misc/R42589.pdf.
91. *Ibid.*
92. *Ibid.* at 36 ("Between 1973 and 1992, 22 bills were introduced in the House and 19 in the Senate that sought to establish a procedural framework that would apply to an Article V Convention. Proponents argued that constitutional convention procedures legislation would eliminate many of the uncertainties inherent in first-time consideration of such an event and would also facilitate contingency planning, thus enabling Congress to respond in an orderly fashion to a call for an Article V Convention. The Senate, in fact, passed constitutional convention procedures bills, the "Federal Constitutional Convention Procedures Act," on two separate occasions: as S. 215 in 1971 in the 92nd Congress, and as S. 1272 in 1983, in the 98th Congress").
93. Congressional implied consent could be construed as transforming the Compact's terms and conditions relating to the Article V convention it organizes into the functional equivalent of federal law for procedural purposes under current precedent if Congress's call duty were wrongly regarded as entailing such power. See, e.g., *New Jersey, 523 U.S. at 811*; *Bryant, 447 U.S. at 369*; *McKenna, 829 F.2d 186*.



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A version of this Policy Brief was originally published by the Heartland Institute.
The Author has authorized this publication.